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articles

The Temporary Refuge Initiative: A Close Look at Australia's
Attempt to Reshape International Refugee Law
– *Savitri Taylor and Jodie Boyd* 251

Recognising the Sentience of Animals in Law: A Justification
and Framework for Australian States and Territories
– *Jane Kotzmann* 281

Bargaining in a Vacuum? An Examination of the Proposed Class
Exemption for Collective Bargaining for Small Businesses
– *Tess Hardy and Shae McCrystal* 311

before the high court

Police Doorknocking in Comparative and Constitutional
Perspective: *O'Neill v Roy*
– *Julian R Murphy* 343

case note

Burns v Corbett: Federal Jurisdiction, State Tribunals and
Chapter III Courts
– *Callum Christodoulou* 353

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The Temporary Refuge Initiative: A Close Look at Australia's Attempt to Reshape International Refugee Law

Savitri Taylor* and Jodie Boyd†

Abstract

There is currently a widespread practice of states providing protection to asylum seekers on a temporary, rather than a permanent, basis. Although the practice has a long history, the international law governing it is unclear. Drawing on archival material, including Australian Government files that have not previously been studied, this article takes a close look at the first attempt to institutionalise the practice in international law: Australia's temporary refuge initiative that began in 1979.

I Introduction

Over the last fifty years, the international refugee protection framework, established by the 1951 *Convention relating to the Status of Refugees* ('*Refugee Convention*')¹ and its 1967 *Protocol relating to the Status of Refugees* ('*Refugee Protocol*'),² has faced severe challenges. Frequent mass exoduses of asylum seekers fleeing from large-scale conflicts or other unsustainable conditions in their home countries have prompted a significant number of receiving states to narrow their interpretation of their international protection obligations and to implement increasingly restrictive asylum policies. The binding provision of non-refoulement within the *Refugee Convention* prohibits states from returning refugees to danger.³ However, as numerous commentators have noted, the continuing reality of situations of mass exodus has driven a fundamental shift within the international refugee protection

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¹ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force for Australia and generally on 22 April 1954) ('*Refugee Convention*').

² *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force generally on 4 October 1967 and for Australia on 13 December 1973) ('*Refugee Protocol*').

³ Discussed below in Part IIIA of this article.

framework; namely, the provision by states of protection to refugees on a temporary, rather than a permanent, basis. As Bradley points out,

[m]any countries, in particular in the Global North, that previously extended citizenship to recognized refugees now offer only temporary protection, even when the possibility of voluntary repatriation in conditions of safety and dignity is nowhere on the horizon.⁴

Despite a long history, the practice of temporary refuge or protection is acknowledged as having no clear standing in international law. Writing in 2017, Ineli-Ciger suggested that while the ‘principle of non-refoulement is generally accepted as the core principle that temporary protection is built upon ... this is not the whole picture’.⁵ She notes the observation made at the ‘UN High Commissioner for Refugees (UNHCR) Roundtable assembled in 2012 [that the] legal foundation of temporary protection even today remains largely undefined or unsettled’.⁶ Ineli-Ciger notes further that ‘[s]ince an authoritative international instrument governing many aspects of temporary protection does not exist, states enjoy broad discretion with regard to shaping different aspects of their temporary protection policies.’⁷ In other words, the lack of a firm legal mechanism or framework within international refugee law around the provision of temporary protection has enabled conditions to develop wherein refugees can be subject to so-called protection that offers no minimum standards of treatment and no commitment to, or timely provision of, a permanent or durable solution.

In 2014, the UNHCR issued *Guidelines on Temporary Protection and Stay Arrangements*⁸ as something of a belated rearguard action against temporary protection conditions that have emerged and that, as Fitzpatrick’s earlier body of work demonstrated, are in no way a recent phenomenon.⁹ Indeed, as early as 1986, Fitzpatrick posited the emergence of temporary refuge as a customary norm within international refugee law and noted a contemporary concern (that remains today), which inhibited the adoption of a binding legal mechanism; namely, that codification of the concept of temporary refuge could operate ‘to deprive eligible refugees of access to durable solutions’.¹⁰

⁴ Megan Bradley, *Resolving Refugee Situations: Seeking Solutions Worthy of the Name* (World Refugee Council Research Paper No 9, March 2019) 4–5 <<https://www.worldrefugeecouncil.org/publications/resolving-refugee-situations-seeking-solutions-worthy-name>>.

⁵ Meltem Ineli-Ciger, *Temporary Protection in Law and Practice* (Brill Nijhoff, 2017) 48, 48.

⁶ *Ibid.*

⁷ *Ibid.* 42–3.

⁸ United Nations (‘UN’) High Commissioner for Refugees (‘UNHCR’), *Guidelines on Temporary Protection or Stay Arrangements* (February 2014) paras 3, 11 <<https://www.refworld.org/docid/52fba2404.html>>. Discussed below in Part V of this article.

⁹ Deborah Perluss and Joan F Hartman, ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26(3) *Virginia Journal of International Law* 551; Joan Fitzpatrick, ‘Flight from Asylum: Trends toward Temporary “Refuge” and Local Responses to Forced Migrations’ (1994) 35(1) *Virginia Journal of International Law* 13 (‘Flight from Asylum’); Joan Fitzpatrick, ‘The End of Protection: Legal Standards for Cessation of Refugee Status and Withdrawal of Temporary Protection’ (1998) 13(3) *Georgetown Immigration Law Journal* 343; Joan Fitzpatrick, ‘Temporary Protection of Refugees: Elements of a Formalized Regime’ (2000) 94(2) *American Journal of International Law* 279; Joan Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency* (University of Pennsylvania Press, 1994).

¹⁰ Description of the 1986 journal article in Fitzpatrick, ‘Flight from Asylum’ (n 9) 16 n 15. For the original 1986 article, see Perluss and Hartman (n 9).

This article gives attention to the first effort to codify or institutionalise temporary refuge within the international refugee law system: Australia's sustained, although ultimately resisted, temporary refuge initiative at the United Nations ('UN'). That initiative began in 1979, almost 45 years prior to the UNHCR's publication of its non-binding *Guidelines on Temporary Protection or Stay Arrangements* in 2014. This article draws on the documentary archive produced by the Australian Government entities most closely involved with the initiative; namely, the Federal Cabinet, the Department of Foreign Affairs and the Department of Immigration. Within the relatively recent debate about the 'turn to history',¹¹ the use of historical archival material to excavate the foundations of international law has been proposed as a means by which the field's dominant normative and progressivist narratives may be, if not disrupted, then at least admitted as more complex and historically contingent than they have sometimes been allowed.¹² As Arvidsson and McKenna noted recently, reaching beyond 'the doctrinally sanctioned sources of international law' does more than extend the range of sources available to international legal scholars.¹³ By going 'beyond the customs, doctrines, treaties, and so forth that have traditionally formed the boundaries of international law',¹⁴ and in looking further to both the historical sources that underpin the creation of doctrinal sources, and the methodological approaches attendant to their analysis, the 'critical potentialities' of international law are also extended.¹⁵

Drawing on the Australian Government archive relating to its temporary refuge initiative is productive, not only in offering broader historical context or background to temporary protection practices in international refugee law, but also in enabling access to the conflict, contestation, dead-ends and discontinuities that are as integral to understanding the development of the international system of refugee protection as the final expression in the doctrinal materials of international refugee law. Accessing the archive, even accepting that it is selective, partial and incomplete,¹⁶ encourages an acknowledgement of the 'embeddedness of law in

¹¹ Orford has noted:

Of course, international law has always had a deep engagement with the past. Past texts and concepts are constantly retrieved and taken up as a resource in international legal argumentation and scholarship. Thus the 'turn to history' trope marks a turn to history as method, rather than a turn to history in terms of engaging with the past rather than the present.

See Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers* (Cambridge University Press, 2017) 297, 297.

¹² Key recent works include Matilda Arvidsson and Miriam Bak McKenna, 'The Turn to History in International Law and the Sources Doctrine: Critical Approaches and Methodological Imaginaries' (2020) 33(1) *Leiden Journal of International Law* 37; Rossana Deplano, *Pluralising International Legal Scholarship: The Promise and Perils of Non-Doctrinal Research Methods* (Edward Elgar, 2019); Valentina Vadi, 'International Law and Its Histories: Methodological Risks and Opportunities' (2017) 58(2) *Harvard International Law Journal* 311; Orford (n 11); Martti Koskenniemi, 'Expanding Histories of International Law' (2016) 56(1) *American Journal of Legal History* 104; Anne Orford, 'On International Legal Method' (2013) 1(1) *London Review of International Law* 166; Martii Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (2013) 27(2) *Temple International & Comparative Law Journal* 215.

¹³ Arvidsson and McKenna (n 12) 39.

¹⁴ Ibid 38. See also 37, 39

¹⁵ Ibid 39.

¹⁶ Australian Government records are archived according to the *Archives Act 1983* (Cth) and specific records authority rules applicable to each government department. Together, these govern which records can be destroyed, periods of retention and conditions of accessibility. Consequently, only a

broader social and political practices' and fosters an ability 'to register fully the conflicts and contestations that have naturally accompanied historical development in international law'.¹⁷ Historians, of course, have utilised archival sources to examine the international system of refugee protection and states' relationships with it. Their goal, often, is to understand developments in domestic refugee politics and policies, as well as the evolution of the international protection regime and its relationship to the domestic, bilateral or transnational contexts of states' interventions and responses.¹⁸

Contrary to the frequently stated assumption that 'historians are interested in the past for its own sake and want to put it in context, [and] lawyers tend to be "interested in the past for the light it throws on the present"',¹⁹ this article utilises an historical analytic in its examination of government records relating to the temporary refuge initiative in order to indicate two points about the present condition of temporary protection in international refugee law.²⁰ First, the context of Australia's championing of the institutionalisation of the concept of temporary refuge (namely, fears relating to mass influx of Indo-Chinese 'boat people') is indicative of the integral part that domestic histories can play in the development of international law. Importantly, that context is also indicative of the ways in which the circumstances of historical contingency can have a long-lasting effect on the adoption (or not) of binding or normative mechanisms within international law. Second, in its analysis of the strategy, politics and development of Australia's negotiating postures, this article proposes an understanding of the Australian initiative at the UN as one that, while unsuccessful, worked significantly to expose the key divisions and anxieties relating to the institutionalisation of temporary refuge that remain today. Indeed, it is concluded that in the recent practice of states, the worst fears of those opposing the institutionalisation of temporary refuge (also known as temporary protection) have been realised.

This article is structured as follows. Part II of the article explains the geopolitical context of the initiative: the Indo-Chinese refugee exodus that began in 1975. Part III follows the evolution of relevant key concepts in international refugee

fractional number of the total records created by government departments are retained for permanent archive. If archived, these records are subject to further restrictions: access can be refused, for example, if the material was created within 20 or 30 years of a request and, if in the 'open access period' (ss 3(1), 3(7)), releasing that information would damage Australia's security, defence or international relations (s 33(1)(a)), or reveal confidential information provided to the Australian Government by a foreign government or an international organisation (s 33(1)(b)).

¹⁷ Arvidsson and McKenna (n 12) 41.

¹⁸ Notable recent work by Australian historians includes: Claire Higgins, *Asylum by Boat: Origins of Australia's Refugee Policy* (NewSouth Publishing, 2017); Klaus Neumann, *Across the Seas: Australia's Response to Refugees: A History* (Black Inc, Schwartz Publishing, 2015) ('*Across the Seas*'); Nathalie Huynh Chau Nguyen, 'Memory in the Aftermath of War: Australian Responses to the Vietnamese Refugee Crisis of 1975' (2015) 30(2) *Canadian Journal of Law & Society/Revue Canadienne Droit et Societe* 183; Klaus Neumann, 'Oblivious to the Obvious? Australian Asylum-Seeker Policies and the Use of the Past' in Klaus Neumann and Gwenda Tavan (eds), *Does History Matter?* (ANU Press, 2009) 47 <<https://www.jstor.org/stable/j.ctt24h2v9.10>>.

¹⁹ An assumption discussed by Vadi (n 12) 312–13.

²⁰ '[W]hat seems needed is a better understanding of how we have come to where we are now — a fuller and a more realistic account of the history of international law': Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View' (n 12) 216.

law up to 1979, paying particular attention to the Australian position. Part IV considers in detail the rationale for and development of the temporary refuge concept by Australia and its efforts to promote the concept at the international level. Australia ceased active promotion of temporary refuge as a legal concept after 1984. However, the concept has had an afterlife that is examined in Part V of the article. The conclusion of the article draws out the lessons to be learned about the influence of domestic and international politics on the development of international law.

II The Indo-Chinese Refugee Exodus and Australia's Political Response

War and regime change in three Indo-Chinese countries precipitated extraordinarily large numbers of people fleeing their homes. In April 1975, the Khmer Rouge took the Cambodian capital, Phnom Penh. This was followed in the same month by the fall of Saigon in Vietnam to the forces of the Communist North Vietnamese and Viet Cong. In December 1975, Soviet- and Vietnamese-backed Pathet Lao forces overthrew the Royalist Government in Laos.²¹ While a great number of refugees fled to neighbouring countries, many sought asylum further afield — in particular, Vietnamese refugees fleeing by sea ('boat people').²²

As the refugee exodus from Indo-China escalated and neighbouring South East Asian countries began to turn people away, there was growing disquiet in the broader Australian community about the number of Vietnamese refugees reaching Australia.²³ In an effort to dissuade Indo-Chinese refugees from attempting the sea voyage to Australia, and in an effort to demonstrate that it was taking steps to control and regularise the intake of Indo-Chinese refugees, the incumbent Liberal–National Party Government committed to increasing the prospects of resettlement in Australia for refugees arriving through authorised channels. While the increased prospect of resettlement seems to have dissuaded some Indo-Chinese refugees from attempting the hazardous sea voyage to Australia, unauthorised boat arrivals in Australia continued nevertheless.²⁴

As Goodwin-Gill has noted, a key anxiety driving the Australian Government's early responses to increasing numbers of refugee boat arrivals was that 'Australia's geopolitical situation was thought to expose it to large-scale arrivals, with little prospect of international support'.²⁵ An essential element in its

²¹ David Feith, *Stalemate, Refugees in Asia* (Asian Bureau Australia, 1988) 12.

²² Robinson estimated that from 1975 to mid-1979, 'more than 663,000 Vietnamese were evacuated or fled, 160,000 Laotian refugees crossed into Thailand and around 525,000 Cambodian and ethnic Vietnamese fled the reign of the Khmer Rouge and its aftermath — a total of almost 1.4 million': Claire Higgins, 'Status Determination of Indochinese Boat Arrivals: A "Balancing Act" in Australia' (2017) 30(1) *Journal of Refugee Studies* 89, 91, citing W Courtland Robinson, *Terms of Refuge: The Indochinese Exodus & the International Response* (Zed Books, 1998) 50.

²³ Neumann, *Across the Seas* (n 18) 267, 274. For a discussion of popular hostility towards the prospect of Asian immigration to Australia, see Higgins (n 22) 94; see also Gwenda Tavan, *The Long, Slow Death of White Australia* (Scribe, 2005).

²⁴ Neumann, *Across the Seas* (n 18) 274–5.

²⁵ Guy S Goodwin-Gill, 'Non-Refoulement, Temporary Refuge, and the "New" Asylum Seekers' in David James Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff, 2014) 433, 433.

commitment to increasing refugee resettlement numbers rested then, not only on its own policy responses, but also on the ways in which the South East Asian states of first arrival managed the influx of refugees into their own territories. On the Australian Government's re-election in December 1977, the Foreign Affairs and Defence Committee of the Federal Cabinet agreed that for the financial year 1977–78 Australia should accept 6,000 Indo-Chinese refugees for resettlement from South East Asia, representing an increase of 2,000 more than originally planned. A crucial component in this decision was the agreement by the Cabinet Committee that the 'the co-operation of Malaysia, Thailand, Indonesia and Singapore be sought as part of an international effort to handling the Indo-Chinese resettlement'²⁶ and that talks should be held with the United States ('US') at a 'high policy level' about how to deal with the situation.²⁷ Cabinet recognised that Australia's capacity to manage the influx of refugees depended, to a very significant degree, on obtaining the cooperation of its neighbours who were on the frontline of mass refugee flows.

The Immigration Minister, Ian MacKellar, expressed a growing concern in late 1978 that the attitudes of member states of the Association of Southeast Asian Nations ('ASEAN')²⁸ had begun to harden against accepting the intake of further Indo-Chinese refugees.²⁹ Outflows of Indo-Chinese refugees had been exacerbated by the Vietnamese invasion of Cambodia in late 1978, which successfully overthrew the Chinese-backed Khmer Rouge regime. In retaliation, China engaged in a three-week incursion into Vietnam which, in turn, intensified Vietnamese suspicions of ethnic Chinese who were pushed out of the country in even greater numbers.³⁰ MacKellar worried that the hardening attitudes of the ASEAN nations would result in a massive increase in boat arrivals in Australia.³¹ He also noted that a meeting of 21 countries convened by the Office of the UNHCR in Kuala Lumpur in September 1978 had not achieved 'any significant new offers of help'.³²

Over the first six months of 1979, some ASEAN nations began to turn away all refugees or threatened to do so as the burdens placed on them became ever heavier.³³ With a focus on easing those burdens, a Meeting on Refugees and Displaced Persons in South East Asia was convened by the UN Secretary General in Geneva (Switzerland) in late July 1979. At this meeting, Australia pledged more money in support of countries of first asylum and the UNHCR and also pledged to

²⁶ Cabinet Minute, Foreign Affairs and Defence Committee, *Submission No 2014: Indo-Chinese Refugees — Ongoing Programme — Decision No 4884 (FAD)*, 16 March 1978 (National Archives of Australia ('NAA'): A12909) 1.

²⁷ *Ibid* 2.

²⁸ ASEAN was established in 1967 with a membership consisting of Indonesia, Malaysia, the Philippines, Singapore and Thailand. The expansion of the membership to the current ten commenced when Brunei joined in 1984. See ASEAN, *About ASEAN* (Web Page) <<https://asean.org/asean/about-asean/>>.

²⁹ MJR MacKellar, Minister for Immigration, *Submission No 27771 — Review of the Indo-Chinese Refugee Program*, 17 November 1978 (NAA: A12909, 2771).

³⁰ Nancy Viviani, *Australian Government Policy on the Entry of Vietnamese Refugees 1975 to 1982: Record and Responsibility* (Research Paper No 7, Griffith University Centre for the Study of Australian-Asian Relations, August 1982) 2.

³¹ MacKellar (n 29).

³² *Ibid*.

³³ Viviani (n 30) 15, 23.

increase its refugee intake from 10,500 per year to 14,000 per year.³⁴ At the same meeting or in the lead up to it, other countries also pledged a large number of resettlement places and/or large amounts of funding to the UNHCR.³⁵ Further, Vietnam had also been persuaded to participate in the meeting. As well as cooperating with the UNHCR on an orderly departure program agreed upon in May 1979, Vietnam announced prior to the July 1979 meeting that it had taken measures to prevent unauthorised departures.³⁶ The effectiveness of these ad hoc measures began to be revealed from mid-1979. Boat departures from Vietnam, and hence the number of irregular arrivals in regional countries, including Australia, started trending downwards. Regional countries remained apprehensive, however, that they remained exposed to further large-scale arrivals. Australia's temporary refuge initiative was generated in this context and, as Goodwin-Gill has noted, 'was intended in part but seriously, to forge an institutional link between admission and burden-sharing within the existing refugee protection regime'.³⁷

III The Contemporaneous State of Play in International Refugee Law

The mass exodus of Indo-Chinese people seeking refuge revealed that the system of international refugee protection at the time provided insufficient guidance on how receiving states could deal with such events. The key questions raised about the applicable international law can be summarised as follows:

- (1) Did the principle of non-refoulement apply in mass influx situations?
- (2) In what circumstances, if any, were states under an obligation to admit asylum seekers to their territory?
- (3) If a state admitted asylum seekers, what further obligations did it have towards them?
- (4) If a state admitted asylum seekers, did other states have an obligation to share the burden?

Section A of this Part explains the contemporaneous state of play in relation to questions (1) and (2) and Section B in relation to questions (3) and (4).

A *Non-Refoulement and Provisional Stay*

Article 33 of the *Refugee Convention* provides:

1. No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a

³⁴ MJR MacKellar, *Submission No 3349: Statement at Geneva Conference on Indo-Chinese Refugees — Attachment A*, 12 July 1979 (NAA: A12909, 3349).

³⁵ Viviani (n 30) 25.

³⁶ *Ibid* 26.

³⁷ Goodwin-Gill (n 25) 433.

final judgment of a particularly serious crime, constitutes a danger to the community of that country.

There was initial uncertainty among states as to whether the non-refoulement article (art 33(1)) covered rejection at the frontier, but by the time of the Indo-Chinese exodus this uncertainty had been resolved in favour of the refugee.³⁸ By contrast, an uncertainty that persisted was whether art 33(1) was applicable in situations where the receiving country faced a mass influx of refugees. As Zieck has shown, the drafting history of the *Refugee Convention* can support an argument of its non-applicability to situations of mass influx. Zieck stated that ‘the outcome [in the *Refugee Convention*] is a clear text that does *not* include an exception for mass influxes, but it did not have to, since the drafters arguably considered it to be already covered by the inclusion of the French verb “*refouler*”’.³⁹ She noted

it has been suggested that the French verb ‘*refouler*’ was added to article 33(1) to ensure that the duty of non-return would not have a wider meaning than the French expression ‘which was agreed not to apply in the event that national security or public order was genuinely threatened by a mass influx’.⁴⁰

A desire for clarity in regard to a mass influx exception to non-refoulement manifested itself in a succession of negotiations and some instruments. For instance, art 3(1) in the 1967 *Declaration on Territorial Asylum*⁴¹ confirms the principle of non-refoulement by providing that

No person [defined in art 1(1)] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

The Declaration further states, however, that exception may be made to the principle ‘for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons’.⁴² All the Declaration requires of a State invoking the exception is that it ‘*consider* the possibility of granting to the persons concerned, *under such conditions as it may deem appropriate*, an opportunity, whether by way of provisional asylum or otherwise, of going to another State’.⁴³

A further effort to clarify states’ obligations during instances of mass influx was attempted in 1972. The UNHCR presented a Draft Convention on Territorial Asylum (known as the ‘Carnegie Draft’) to the UN General Assembly.⁴⁴ Article 2 of the Carnegie Draft was similar to art 3(1) of the *Declaration on Territorial Asylum*

³⁸ Savitri Taylor and Klaus Neumann, ‘Australia and the Abortive Convention on Territorial Asylum: A Case Study of a Cul de Sac in International Refugee and Human Rights Law’ (2020) 32(1) *International Journal of Refugee Law* 86, 1023.

³⁹ Marjoleine Zieck, ‘Refugees and the Right to Freedom of Movement: From Flight to Return’ (2018) 39(1) *Michigan Journal of International Law* 19, 61 (emphasis in original; citations omitted).

⁴⁰ *Ibid* 60, quoting James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005) 357.

⁴¹ *Declaration on Territorial Asylum*, GA Res 2312 (XXII), UN Doc A/RES/2312 (XXII) (14 December 1967).

⁴² *Ibid* art 3(2).

⁴³ *Ibid* art 3(3) (emphasis added).

⁴⁴ This draft is reproduced in Atle Grahl-Madsen, *Territorial Asylum* (Almqvist & Wiksell International, 1980) 174–6. It is called the Carnegie Draft because the process through which it was produced was initiated by the UNHCR in collaboration with the Carnegie Endowment for International Peace: see Taylor and Neumann (n 38) 89–90.

in that it prohibited rejection at the border or expulsion or compulsory return. Article 2 of the Carnegie Draft went even further than the Declaration by containing no equivalent to the art 3(2) exception in instances of mass influx. Moreover, art 4 of the Carnegie Draft provided:

A person requesting the benefits of this Convention at the frontier or in the territory of a Contracting State shall be admitted to or permitted to remain in the territory of that State pending a determination of his request, which shall be considered by a specially competent authority and shall, if necessary, be reviewed by higher authority.

This provision of the Carnegie Draft marked new territory in international refugee law by laying the groundwork for states to be legally obliged to admit asylum seekers into their territory, albeit on a temporary basis, effectively proposing to intrude on state sovereignty.

During late April and early May 1975, a Group of Experts composed of representatives from 27 countries, including Australia, met in Geneva to discuss and revise the Carnegie Draft. At the Group of Experts' meeting, there was serious disagreement about the appropriate scope of the non-refoulement provision (art 3) in the proposed Convention.⁴⁵ The text of art 3 finally adopted by the Group of Experts⁴⁶ regressed from the Carnegie Draft and set out an exception to non-refoulement that was similar to that contained in art 33(2) of the *Refugee Convention*. On the other hand, the Group of Experts did adopt an art 4 that was similar to art 4 of the Carnegie Draft, stipulating an obligation on states to admit asylum seekers pending a determination of their refugee status by a competent authority.

The final step towards finalising a formal treaty on territorial asylum was the Conference of Plenipotentiaries on Territorial Asylum convened by the UN during January and February 1977 in Geneva. While the Committee of the Whole managed to reach agreement on the text of five provisions in the time allotted, none of them was considered by the plenary of the conference.⁴⁷ Article 3 on non-refoulement was one of the articles agreed upon by the Committee of the Whole. It regressed from the Group of Experts' draft by adding a mass influx exception to the non-refoulement obligation.

Significantly, the Australian Delegation to the 1977 Conference of Plenipotentiaries on Territorial Asylum was instructed to seek deletion of art 4 of the Group of Experts' draft.⁴⁸ The Delegation was also instructed that, if it could not secure deletion of art 4, it was to seek an amendment of the article to ensure that states were 'not legally obliged' to admit asylum seekers even on a provisional basis.⁴⁹ As it turned out, Australia's concerns were moot given that the 1977 Conference did not have time to consider art 4 and the conditions of uncertainty regarding states' obligations to admit asylum seekers to their territory remained.

⁴⁵ Taylor and Neumann (n 38) 100.

⁴⁶ This text is reproduced in Grahl-Madsen (n 44) 194–7.

⁴⁷ *Cable from Australian Mission to the UN in Geneva to the Department of Foreign Affairs*, 29 January 1977 (NAA: A1838, 938/43 Part 7). The text agreed by the Committee of the Whole is reproduced in Grahl-Madsen (n 44) 208–11.

⁴⁸ *Conference of Plenipotentiaries on Territorial Asylum*, Geneva, 10 January–4 February 1977, [Brief for the Australian Delegation] n.d. (NAA: A1838, 938/43 Part 7).

⁴⁹ *Ibid.*

B *Asylum and International Solidarity*

A lack of clarity in international refugee law also existed with regard to states' obligations towards asylum seekers admitted to their territories and, importantly, the obligations of other states to share the burden of states receiving a large-scale influx of asylum seekers. Recital 4 of the preamble of the *Refugee Convention* draws an explicit relationship between the provision by states of asylum and the need for international cooperation where a country has been unduly burdened by the grant of asylum. In addition to the preamble text, the *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* makes the non-binding recommendation that '[g]overnments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement'.⁵⁰

Further work to clarify states' obligations towards asylum seekers and each other was undertaken in the 1967 *Declaration on Territorial Asylum* and in the 1972 Carnegie Draft Convention on territorial asylum. Article 1(1) of the *Declaration on Territorial Asylum* asserts the right of states to grant asylum, while implicitly rejecting any right of individuals to receive asylum. However, art 2(1) of the Declaration states that the situation of asylum seekers is 'of concern to the international community' and art 2(2) contains a call for other states to 'consider, in a spirit of international solidarity, appropriate measures to lighten the burden' on a State that is experiencing 'difficulty in granting or continuing to grant asylum'.

More ambitiously, art 1(1) of the 1972 Carnegie Draft Convention provided:

A Contracting State, acting in an international and humanitarian spirit, shall use its best endeavours to grant asylum in its territory, which for the purpose of the present Article includes permission to remain in that territory, to [definition of beneficiary group].

By obliging Contracting States to use their 'best endeavours to grant asylum', the Carnegie Draft went beyond the 1967 Declaration, which frames the granting of asylum as a right, but not an obligation, of states. Further, art 5 of the Carnegie Draft provided:

Where, in a case of a sudden or mass influx, or for other compelling reasons, a State experiences difficulties in granting or continuing to grant the benefits of this Convention, other Contracting States, in a spirit of international solidarity, shall take appropriate measures individually, jointly, or through the United Nations or other international bodies, to share equitably the burden of that State.

Again, the Carnegie Draft's formulation 'shall take' is stronger than the 1967 Declaration's 'shall consider', and the words 'share equitably' left less to a State's discretion than the Declaration's exhortation to 'lighten' the burden of overburdened states.

⁵⁰ *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons* (25 July 1951) recommendation D <<http://www.unhcr.org/en-au/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html>>.

Indeed, the Secretary of the Australian Government Department of Foreign Affairs, in a letter to the Secretary of the Department of Immigration, made particular note that the main difference between art 2(2) of the *Declaration on Territorial Asylum* and art 5 of the Carnegie Draft was that the latter imposed an obligation to ‘share equitably’ the burden of any mass influx seeking asylum.⁵¹ The Foreign Affairs Secretary affirmed that

[n]o Australian government is likely to accede to an arrangement whereby it did not retain complete control over the number and type of persons entering the country. The article is clearly unacceptable in its present form and desirably should be drafted to conform more closely with Article 2 of the Declaration on Territorial Asylum.⁵²

He added that Australia could, however, ‘undertake to give sympathetic consideration to the problems of refugees in any mass influx situation’.⁵³ In other words, Australia did not want to be obliged to take an equitable share of the refugee burden. However, it was willing to promise that it would consider doing something to help in particular mass influx situations.

The Group of Experts’ version of art 1 provided: ‘Each Contracting State, acting in the exercise of its sovereign rights, shall use its best endeavours in a humanitarian spirit to grant asylum in its territory to any person eligible for the benefits of this Convention’.⁵⁴ Unlike the Carnegie Draft Convention, the Group of Experts’ version did not contain any indication of what was meant by ‘asylum’. Further, at the Group of Experts’ meeting, there was a divergence between experts from first or ‘frontline’ asylum states, and those from other states, in their approach to art 5.⁵⁵ Experts from first asylum states wanted to strengthen the obligation of other states to assist them in situations of mass influx.⁵⁶ However, experts from those other states, including Australia, wanted to amend art 5 to give them greater discretion in the provision of assistance to first asylum states.⁵⁷ Article 5 of the text finally adopted by the Group of Experts provided:

Whenever a Contracting State experiences difficulties in the case of a sudden or mass influx, or for other compelling reasons, in granting, or continuing to grant, the benefits of this Convention, each Contracting State shall, at the request of that State, through the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, or by any other means considered suitable, *take such measures as it deems appropriate*, in conjunction with other States or individually, to share equitably the burden of that State.⁵⁸

⁵¹ Letter from RE Armstrong (Secretary of the Department of Immigration) to the Secretary of Department of Foreign Affairs, 2 November 1973 (NAA: A432, 1973/5344 Part 1).

⁵² Ibid.

⁵³ Ibid.

⁵⁴ The beneficiary definition was set out in a separate article: art 2.

⁵⁵ *Cable from US Mission in Geneva to the Secretary, US Department of State*, 1 May 1975 <https://wikileaks.org/plusd/cables/1975GENEVA03078_b.html>.

⁵⁶ *Cable from US Mission in Geneva to the Secretary, US Department of State*, 5 May 1975 <https://wikileaks.org/plusd/cables/1975GENEVA03184_b.html>.

⁵⁷ Ibid; *Cable from US Mission in Geneva to the Secretary, US Department of State*, 1 May 1975 (n 55).

⁵⁸ UN General Assembly, *Office of the United Nations High Commissioner for Refugees: Elaboration of a Draft Convention on Territorial Asylum Report of the Secretary-General*, A/10177 (29 August 1975) <<https://www.refworld.org/docid/3ae68befc.html>> (emphasis added).

Unsurprisingly, the experts from first asylum states were dissatisfied with this text.⁵⁹ Australia's expert and, eventually, most significant shaper of Australia's position, the foreign affairs official Gervase Coles, thought the use of the phrase 'as it deems appropriate' was an acceptable compromise and voted in favour of the text. However, the Department of Immigration was unhappy with the retention of 'equitably' and wanted Australia to seek its deletion from future drafts.⁶⁰ By this time, the Indo-Chinese exodus had commenced. Yet, despite Coles pointing out 'the possibility that Australia could become increasingly a country of "first" asylum' and would then stand to benefit from art 5,⁶¹ the Department of Immigration's unhappiness persisted.⁶² Regardless, the Australian Delegation to the 1977 Conference of Plenipotentiaries on Territorial Asylum was briefed that art 5 of the Group of Experts' draft was acceptable to Australia.⁶³

In the eyes of the UNHCR, art 5 was more than just acceptable. In a lecture delivered in August 1976, the High Commissioner for Refugees, Prince Sadruddin Aga Khan, noted that '[t]he idea of international solidarity in this field is not new, as it has been the basis for all international efforts to assist refugee [sic]'.⁶⁴ He suggested, however, that the idea needed to be adopted anew and 'adapted to the needs of our time'.⁶⁵ Most significantly, he indicated that international solidarity, rethought for the needs of the time in the form of art 5, 'would furnish UNHCR with a legal and contractual foundation on which it would in future be able to base measures that today depend only on persuasion and the invoking of obvious humanitarian concern'.⁶⁶

As noted by the High Commissioner, the principle of solidarity had played a role in the development of refugee law from the time of the League of Nations. However, the concept and language of solidarity came to have even greater power in the context of ongoing decolonisation.⁶⁷ The growth in membership of the UN from 60 at the end of 1950 to 147 at the end of 1976 was largely accounted for by newly independent developing countries. The principle of international solidarity was very much part of a 'new morality' of international law promoted by these countries.⁶⁸ However, the failure of the 1977 Conference of Plenipotentiaries meant the loss of an opportunity to entrench the principle in international refugee law.

⁵⁹ [GJL Coles], 'Draft Convention on Territorial Asylum' (n.d. [1976]), Attachment to Letter from GJL Coles to DF De Stoop, 18 June 1976 (NAA: A1838, 938/43 Part 4).

⁶⁰ Letter from WE Bowler (for the Secretary of the Department of Immigration) to the Secretary of Department of Foreign Affairs, 15 July 1975 (NAA: A1838, 938/43 Part 2).

⁶¹ 'Draft Convention on Territorial Asylum' (n 59).

⁶² Memorandum from LA Taylor to the Assistant Secretary, Program Control and Development Branch, Department of Immigration, 5 July 1976 (NAA: A446, 1975/76062), in which the point made by Coles is acknowledged.

⁶³ *Conference of Plenipotentiaries on Territorial Asylum* [Brief for the Australian Delegation] (n 48).

⁶⁴ Prince Sadruddin Aga Khan, 'Legal Problems relating to Refugees and Displaced Persons' (Lecture, Hague Academy of International Law, 6 August 1976) [75] <<https://www.unhcr.org/en-uk/admin/hcspeeches/3ae68fc04/lectures-prince-sadruddin-aga-khan-united-nations-high-commissioner-refugees.html>>.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford University Press, 2009) 138–40.

⁶⁸ *Ibid.*

Indeed, art 5 of the Group of Experts' draft was one of the articles that the 1977 Conference did not have time to even consider.

IV The Temporary Refuge Initiative

A *The Domestic Impetus*

At the time of the Indo-Chinese refugee exodus, Australia was a party to the *Refugee Convention* and *Refugee Protocol*. However, most of the countries to which the Cambodian, Laotian and Vietnamese refugees fled were not.⁶⁹ A case could be made that the prohibition on refoulement had, by that time, become a principle of customary international law binding even on states not parties to those treaties.⁷⁰ However, it was a principle that the receiving countries of South East Asia, which viewed the Indo-Chinese arrivals as a security problem and an economic burden, were clearly prepared to violate, unless they had assurance that resettlement (or repatriation) would happen quickly and that external funding for care and maintenance would be forthcoming in the meantime.⁷¹

From the Australian perspective, the greater the number of refugees turned away from South East Asian countries, the greater the number that could be expected to make their way irregularly to Australia instead. Even if refugees were not turned away by South East Asian countries, inhumane conditions in those countries or despair at being denied a durable solution to their plight were factors likely to prompt irregular onward movement to Australia. It was in Australia's interests, therefore, to argue that the principle of non-refoulement, encompassing non-rejection at the border, applied in situations of mass influx, while also promoting the clear understanding that admission did not require the grant of permanent asylum. Further, it was in Australia's interests to ensure minimum standards of humane treatment of those admitted and the timely provision of durable solutions. The only realistic way of achieving the latter goals was to promote also the principle of equitable burden-sharing.

In August 1979, the Immigration Minister delivered an address in Brisbane to the United Nations Association of Australia in which he called for the development of 'a new system of international instruments' and mechanisms that would be capable

⁶⁹ The Philippines acceded to the *Refugee Convention* and *Refugee Protocol* on 22 July 1981, Japan acceded on 3 October 1981 and 1 January 1982 respectively, and China (excluding Hong Kong Special Administrative Region ('SAR')) acceded on 24 September 1982. However, Cambodia only acceded to the treaties on 15 October 1992, while Hong Kong SAR, Indonesia, Laos, Malaysia, Myanmar, Singapore, Thailand and Vietnam remain non-parties up to the present.

⁷⁰ It was described as a 'recognized principle' in *EXCOM Conclusion 15 (XXX) of 1979* (see below n 94 and accompanying text), a 'generally recognized principle' in *EXCOM Conclusion 17 (XXXI) of 1980* (UNHCR EXCOM, *Conclusion 17 (XXXI) of 1980 on Problems of Extradition Affecting Refugees*, in *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 35th sess, Agenda Item 4, Supp No 12, UN Doc A/34/12/Add.1 (3 November 1980) [48] and as a 'humanitarian legal principle' in *EXCOM Conclusion 19 (XXXI) of 1980* (UNHCR EXCOM, *Conclusion 19 (XXXI) of 1980 on Temporary Refuge* contained in *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 35th sess, Agenda Item 4, Supp No 12A, UN Doc A/35/12/Add.1 (3 November 1980) [48]).

⁷¹ Gilbert Jaeger, 'Refugee Asylum: Policy and Legislative Developments' (1981) 15(1/2) *International Migration Review* 52, 57–8.

of managing mass influx refugee situations with the certainty of international support and guaranteed standards of treatment for refugees.⁷² Drawing a link between non-refoulement and an explicit obligation by other countries to share the burdens of the non-rejection of mass influx populations, he proposed the need for

a graduated set of obligations beginning with the basic survival level of enabling refugees to remain within a country's territory, if necessary in designated and confined areas and at no expense to the Government of the country concerned. The obligations should extend through the present types of protection and non-refoulement in the International Convention and Protocol Relating to the Status of Refugees to the more stringent commitments to resettle refugees and to afford rights to them in the country of resettlement.⁷³

In what was perhaps the first salvo of Australia's temporary refuge initiative, the Immigration Minister asserted 'We need separate instruments to deal with these different aspects covering survival, sanctuary, protection, resettlement and civil rights for refugees'.⁷⁴

The Immigration Minister's address prompted Coles to write an influential memorandum to his superiors in the Department of Foreign Affairs.⁷⁵ In a move demonstrating the intersection of domestic politics with the evolution of international law, Coles sought to draw attention to 'a number of important and sensitive international political and legal questions' that the Immigration Minister's proposal raised.⁷⁶ Coles advocated that the Department of Foreign Affairs ought to become 'closely involved' in the proposal, since it

is related not so much to Australian immigration policy as to an international refugee policy which is, of course, a major international issue at the moment affecting our relations not only with our neighbours to the north but also with countries in other regions ...⁷⁷

Given the potential ramifications beyond Australia's borders, Coles argued that these matters were outside the remit of the Immigration Minister's portfolio. He argued that 'a whole range of sensitive judgements would have to be made before we could safely conclude that this would be a good international initiative'.⁷⁸ He flagged, in particular, his 'grave reservations ... about the wisdom of drawing up a "poor man's" regime for the international protection of refugees' worrying that such a system 'may seriously undermine the status of the 1951 Convention and Protocol', which, he said, was already felt by many to offer 'only a minimum protection'.⁷⁹ Any new system of instruments dealing with mass influx and minimum standards of treatment, in Coles' view, 'should be looking for more rather than less' than what was offered by the existing instruments.⁸⁰

⁷² MJR MacKellar, [Untitled] (Address, United Nations Association, 11 August 1979, NAA: A1838, 938/43 Part 9).

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ Memorandum from GJL Coles to RJ Smith, Clarrie Harders, AF Dingle and G Casson, 14 August 1979 (NAA: A1838, 938/43 Part 9).

⁷⁶ *Ibid.* para 13.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* para 14.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

Coles also drew attention to the geopolitical/neo-colonial sensitivities that could be provoked by the Immigration Minister's proposal. He noted that

It is also very doubtful, in my opinion, that States who won't accept the 1951 Convention and Protocol will accept another instrument or instruments. Their main preoccupation at the moment seems to be to preserve their sovereignty intact. They are particularly suspicious of Western 'humanitarian' initiatives in this area, particularly where the Western countries themselves are not directly involved.⁸¹

Coles' superiors were aware that there was a view gaining strength within the Department of Immigration that it should be responsible for international refugee policy as well as the resettlement of refugees in Australia.⁸² In a further instance of the long-range impact on international refugee law of domestic bureaucratic 'turf wars', they decided that the best way of asserting the Department of Foreign Affairs' claim to primary responsibility for international refugee policy was to initiate interdepartmental discussions on the subject under the Department's chairmanship.⁸³ A series of meetings followed, chaired by the Department of Foreign Affairs' Legal Adviser, Sir Clarrie Harders,⁸⁴ during which officials of his Department, the Department of Immigration and the Attorney-General's Department examined the political and legal, international and domestic dimensions of the problem of large-scale influx.⁸⁵ The main concern that the officials identified was that observance of the principle of non-refoulement, which they accepted as extending to non-rejection at the frontier, was increasingly becoming associated with the grant of durable asylum.⁸⁶ The officials agreed that, particularly in large-scale influx situations, it was unrealistic to expect states to grant durable asylum to all refugees they admitted into their territory.⁸⁷ Any such obligation was clearly unacceptable to the South East Asian states dealing with the Indo-Chinese influx and, because of Australia's exposure to that influx, was unacceptable to Australia also.⁸⁸ Summing up the interdepartmental meetings Coles noted that:

The unanimous view ... was that on balance it was in Australia's interests to secure the admission of the 'boat' people into the countries of first call on conditions which eased the situation of the admitting State and emphasised the obligation of the international community to assist the countries of first refuge in obtaining satisfactory solutions. It was also the view of these meetings that it was fundamentally in Australia's national interests as a potential country of first refuge to make clear that admission in such situations must be without prejudice to the question whether the admitting State provided thereby a durable or a temporary solution.⁸⁹

⁸¹ Ibid.

⁸² Memorandum from WH Bray to Acting Secretary, Department of Foreign Affairs, 27 August 1979 (NAA: A1838, 938/43 Part 9) para 2.

⁸³ Ibid.

⁸⁴ Sir Clarrie had joined the Department of Foreign Affairs in early July 1979 shortly after retiring as Secretary of the Attorney-General's Department: 'Harders Post', *The Canberra Times* (Canberra, 5 July 1979) 3.

⁸⁵ Memorandum from GJL Coles to J Hoyle, 10 August 1981 (NAA: A1838, 1490/6/46/1 Part 2), reprising the history of the temporary refugee initiative.

⁸⁶ Ibid para 5.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid para 6.

It was decided, therefore, that at the next session of the UNHCR's Executive Committee ('EXCOM') Australia should take the initiative to propose 'a set of realistic and helpful principles to guide the conduct of States in large-scale influx situations'.⁹⁰

B *EXCOM Conclusion 15 (XXX) of 1979*

At the meeting of the EXCOM Sub-Committee of the Whole on International Protection of Refugees ('Sub-Committee of the Whole') in 1979, the Australian Delegation tabled a paper dealing with the problems of the large-scale influx of refugees.⁹¹ The paper referred to recent instances of 'refoulement', including rejection at the frontier, and suggested that they had been prompted by fears held by receiving countries that they would be left to bear the burden of the large-scale influxes on their own. In that context, Australia argued that 'temporary refuge' should be developed as a mechanism to link admission of refugees with international solidarity.⁹² According to contemporary commentators, the Australian initiative was met with a 'decidedly mixed response'.⁹³ Nevertheless, EXCOM adopted *Conclusion 15 (XXX) of 1979*, which stated:

(a) States should use their best endeavours to grant asylum to bona fide asylum-seekers;

(b) Action whereby a refugee is obliged to return or is sent to a country where he has reason to fear persecution constitutes a grave violation of the recognized principle of non-refoulement;

...

(f) In cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge. States which because of their geographical situation, or otherwise, are faced with a large-scale influx should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing. Such States should consult with the Office of the United Nations High Commissioner for Refugees as soon as possible to ensure that the persons involved are fully protected, are given emergency assistance, and that durable solutions are sought.⁹⁴

The benefit to asylum seekers of forging an instrumental link between non-rejection at the border and a concept of refuge uncoupled from an obligation to provide a permanent or durable solution was almost immediate. Thailand, as the only South East Asian member of EXCOM at the time, announced two days after the adoption of the EXCOM Conclusion that it would henceforth grant 'temporary

⁹⁰ Ibid para 7.

⁹¹ Referred to in 'Australia's Views on the International Protection of Refugees: Temporary Refuge and International Solidarity: (Attachment to Letter from Australian Mission to the UN in Geneva to I Jackson)' 12 September 1980, UNHCR Archives, Geneva, 671.1.AUL [Fonds 11, series 2, box 1306] ('Australia's Views on the International Protection of Refugees').

⁹² As summarised in *ibid*.

⁹³ David A Martin, 'Large-Scale Migrations of Asylum Seekers' (1982) 76(3) *American Journal of International Law* 598, 605.

⁹⁴ UNHCR EXCOM, *Conclusion 15 (XXX) of 1979 on Refugees without an Asylum Country*, contained in *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 34th sess, Agenda Item 4, Supp No 12, UN Doc A/34/12/Add.1 (6 November 1979) [72].

refuge' to boat people and to all Kampucheans in Thailand.⁹⁵ Thailand's response demonstrated the pragmatic benefit of the temporary refuge concept to the safety of asylum seekers, but also offered a clear indication of how the Australian initiative might be received by other frontline South East Asian nations.

C *An Exploratory Step*

Department of Foreign Affairs officials in consultation with Department of Immigration officials decided that the next step should be to explore the acceptability to the international community of the concept of temporary refuge.⁹⁶ The Foreign Affairs Minister, Andrew Peacock, gave his approval for this step in August 1980⁹⁷ followed shortly after by Immigration Minister Ian McPhee's approval.⁹⁸ Consequently, in the lead up to the EXCOM meeting in October 1980, the Australian Mission to the UN in Geneva made available to the UNHCR a 1980 memorandum entitled 'Australia's Views on the International Protection of Refugees: Temporary Refuge and International Solidarity'.⁹⁹ The covering letter emphasised that the views in the memorandum were being advanced in 'an exploratory way' and did not 'necessarily represent the final position of the Australian Government'.¹⁰⁰

Despite his initial reservations (see above Part IVA), Coles became the primary shaper of Australia's temporary refuge initiative and a strong advocate for it.¹⁰¹ Indeed, it is likely that he was the principal author of Australia's 1980 memorandum. The memorandum noted that existing international instruments already included the concept of temporary refuge in 'embryonic form', for example, art 3(3) of the 1967 *Declaration on Territorial Asylum*.¹⁰² It argued that in recent international instruments relating to territorial asylum, a distinction had been drawn between the grant of 'asylum' (which it defined as 'the provision of durable plenary protection to a person who is a refugee lawfully in the country of asylum within the meaning of the [*Refugee Convention*']') and temporary admission (which it labelled 'temporary refuge').¹⁰³ According to the memorandum, the grant of asylum remained the 'optimum response to a request for protection', but temporary refuge could be granted where 'national security or other overwhelming need to safeguard the population, as in the case of large-scale influx, prevents the grant of asylum'.¹⁰⁴ The memorandum warned that:

⁹⁵ Memorandum from Coles to Hoyle (n 85).

⁹⁶ *Ibid.*

⁹⁷ Memorandum from Stephen Brady, Refugees and Asylum Section, Department of Foreign Affairs, to Unknown, 12 January 1983 (NAA: A9737, 1991/81180 Part 1).

⁹⁸ Memorandum from Coles to Hoyle (n 85).

⁹⁹ 'Australia's Views on the International Protection of Refugees' (n 91).

¹⁰⁰ Letter from Australian Mission to the UN in Geneva to I Jackson, 12 September 1980 (UNHCR Archives, Geneva, 671.1.AUL [Fonds 11, series 2, box 1306]).

¹⁰¹ Mary Crock and Kate Bones, 'Australian Exceptionalism: Temporary Protection and the Rights of Refugees' (2015) 16(2) *Melbourne Journal of International Law* 522, 525.

¹⁰² 'Australia's Views on the International Protection of Refugees' (n 91).

¹⁰³ *Ibid.* The memorandum noted that temporary admission had been given many different labels, including 'first asylum', 'provisional asylum', 'temporary asylum' and 'temporary residence', but argued that the label 'temporary refuge' was to be preferred as conveying the element of protection while avoiding confusion with 'asylum'.

¹⁰⁴ *Ibid.*

The unqualified acceptance of the principle of non-rejection at the frontier, which could be seen as derogating from the right to refuse asylum, will only be possible in our view if it is linked with temporary refuge, a concept developed as a category of protection different from asylum.¹⁰⁵

Temporary refuge was, then, a mechanism that avoided *refoulement*, while also serving as a signal from the receiving country to the rest of the international community that international solidarity was required.¹⁰⁶

The 1980 memorandum then addressed the status of refugees accorded temporary refuge, placing emphasis on the requirement that any refugee granted temporary refuge ‘should not be penalised on account of the entry or presence in the country’.¹⁰⁷ While the memorandum accepted that some restrictions might be imposed on a refugee’s freedom of movement within the receiving country, it also gave significant weight to the requirement that refugees given temporary refuge be ‘accorded humane treatment and the essential conditions for an existence worthy of a human being’.¹⁰⁸ Coles’ authorship is suggested by the similarity of the basic minimum standards specified in the memorandum with those contained in a paper titled ‘The International Protection of Refugees and the Concept of Temporary Refuge’, which Coles had presented in his own name at the Round Table on Humanitarian Assistance to Indo-China Refugees and Displaced Persons held in May 1980 at the International Institute of Humanitarian Law in San Remo, Italy.¹⁰⁹ In this paper, Coles wrote that the temporary refugee

should not be treated as a criminal or someone undeserving of human respect and sympathy... [T]here should be no discrimination on grounds of race, religion, political opinion, nationality, or country of origin. He should receive all the help and understanding that his tragic situation demands. His spiritual, moral and material needs should be recognized and met as far as possible. Basic sanitary and health facilities should be provided. Wherever possible, families should be kept together. Facilities for recreation should be provided. He should be allowed to send and receive mail and to receive at least limited amounts of material assistance from friends or relatives.¹¹⁰

The 1980 memorandum ended with similar language to the San Remo paper, raising ‘the question whether an international instrument should not be prepared to deal with the status of refugees who are in the country of refuge on a basis other than lawfully within the meaning of the 1951 Convention and Protocol’.¹¹¹ The memorandum elaborated that such an instrument could provide not only ‘humanitarian standards for [refugee] protection’, but also, and significantly, it could provide a mechanism to facilitate international solidarity, which would provide for ‘immediate assistance to a state burdened beyond the capacity of its resources, and

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ GJL Coles, ‘The International Protection of Refugees and the Concept of Temporary Refuge’ in *Round Table on Humanitarian Assistance to Indo-China Refugees and Displaced Persons, San Remo, 28–30 May 1980* (UN Doc HCR/120/16/82, 1982) 103 (‘San Remo paper’).

¹¹⁰ Ibid 103. The only standard specified in the San Remo paper that was not also specified in the Australian memorandum was the provision of recreation facilities.

¹¹¹ ‘Australia’s Views on the International Protection of Refugees’ (n 91).

on durable solutions, including voluntary repatriation'. Further, the proposed instrument would provide that 'on the matter of admission ... a person seeking asylum and who meets the criteria for an asylee shall receive at least temporary refuge'.¹¹²

The response to the Australian initiative continued to be 'mixed' at the 1980 session of EXCOM.¹¹³ While Thailand 'warmly endorsed' it,¹¹⁴ a number of Western European countries were resistant.¹¹⁵ Presciently, they expressed the fear that acceptance of the concept of temporary refuge 'might lead to a weakening of recognized principles relating to asylum and non-refoulement and might sanction a practice by Governments generally to grant temporary refuge rather than durable asylum to refugees'.¹¹⁶ In Coles' view, however, the 'underlying political concern of these countries was to confine the international obligations in the South East Asian situation to the countries of the immediate region', which, as he noted, included Australia.¹¹⁷

D *The 1981 Group of Experts' Meeting*

EXCOM dealt with its internal disagreement by asking the High Commissioner for Refugees, Poul Hartling, to convene 'a representative group of experts to examine temporary refuge in all its aspects within the framework of the problems raised by large-scale influx'.¹¹⁸ Once again, Coles played a major role in shaping the concept of temporary refuge when he was seconded from the Department of Foreign Affairs to the UNHCR for a few months¹¹⁹ to do preparatory work for the Group of Experts' meeting. He was subsequently nominated as the Australian representative on the Group of Experts¹²⁰ and authored a paper titled 'Temporary Refuge and the Large-Scale Influx of Refugees' for consideration by the 14-member group.¹²¹

Coles' paper claimed that the responses to the influx of Hungarian refugees into Austria in 1956, the influx of refugees from East Pakistan into India in 1971 and the influx of Indo-Chinese refugees into South East Asian countries in the period

¹¹² Ibid.

¹¹³ Martin (n 93) 605.

¹¹⁴ JL Menadue, 'Discussion' in Charles A Price (ed), *Refugees, the Challenge of the Future: Proceedings, Academy of the Social Sciences in Australia Fourth Academy Symposium, 3-4 November 1980* (Academy of the Social Sciences in Australia, 1981) 22, 23.

¹¹⁵ Memorandum from Coles to Hoyle (n 85).

¹¹⁶ UNHCR, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21-24 April 1981)*, EC/SCP/16/Add.1 (17 July 1981) <<http://www.unhcr.org/en-au/excom/scip/3ae68cd04/report-meeting-expert-group-temporary-refuge-situations-large-scale-influx.html>> ('*Addendum to the Report of the 1981 Group of Experts' Meeting*').

¹¹⁷ Memorandum from Coles to Hoyle (n 85).

¹¹⁸ UNHCR EXCOM, *Conclusion 19 (XXXI) of 1980* (n 70).

¹¹⁹ The secondment appears to have continued until 28 February 1981, which was a little longer than originally intended: *Cable from Australian Mission to the UN in Geneva to Department of Foreign Affairs*, 5 February 1981 (NAA: A1838, 1490/6/46/1 Part 2). Coles was again seconded to the UNHCR from late 1981 to sometime in 1985.

¹²⁰ Submission from RJ Smith to Minister for Foreign Affairs, 23 December 1980 (NAA: A1838, 1490/6/46/1 Part 2).

¹²¹ GJL Coles, 'Temporary Refuge and the Large-Scale Influx of Refugees' in UNHCR, *Addendum to the Report of the 1981 Group of Experts' Meeting* (n 116).

1975 to 1980 were illustrative of the fact that Australia was simply proposing formalisation of principles that were already being applied in practice.¹²² The paper repeated the key points made in Australia's 1980 memorandum, but extended the list of basic minimum standards of temporary refuge.¹²³ This longer list of standards was very similar to a list previously included in the Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia.¹²⁴ Coles had been a member and the rapporteur of the Working Group, which met in San Remo in January 1981 under the joint auspices of the International Institute of Humanitarian Law and the UNHCR.¹²⁵

Coles' paper for the 1981 Group of Experts' meeting also went further than Australia's 1980 memorandum in its comments on finding durable solutions. After noting that documents such as the Carnegie Draft Convention placed emphasis on the grant of permanent asylum by the State initially approached, Coles questioned whether such an emphasis was appropriate in situations of mass influx. At the same time, he questioned whether admission on a temporary basis should be seen 'exclusively in relation to the opportunity accorded to obtain admission into another country' as was the case in existing international instruments.¹²⁶ According to Coles, '[i]n view of the variety and complexity of the circumstances which can surround large-scale influx situations, there should be no general a priori assumption about the best solution in every situation', with the only applicable general principle being that 'the most satisfactory durable solution should be found as soon as possible' whether that be voluntary repatriation, local integration, resettlement or some combination thereof.¹²⁷

At its meeting in April 1981, the Group of Experts adopted a report setting out its conclusions.¹²⁸ These conclusions emphasised the scrupulous observance of non-refoulement including non-rejection at the border and the accompanying need for admission on at least a temporary basis. They also set out a list of basic minimum standards of treatment of those temporarily admitted that was clearly patterned on the list set out in Coles' paper for the meeting. Finally, they called for the strengthening and/or creation of mechanisms to enable burden-sharing between states in relation to the provision of immediate assistance and appropriate durable solutions as well as prevention or removal of the causes of mass influx situations. While Australia in its 1980 memorandum and Coles in his paper for the 1981 Group

¹²² Ibid.

¹²³ Ibid.

¹²⁴ [GJL Coles], *Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia* (Report, March 1981). The Working Group had been established to follow up on the recommendations and conclusions of the Manila Round Table on Current Problems in the International Protection of Refugees and Displaced Persons in Asia, which had met in April 1980. Coles had participated in the April 1980 Round Table and presented a paper: see Gervase Coles, 'Problems of Large-Scale Influx' (Paper, Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons, 14–18 April 1980).

¹²⁵ The other six members of the working group were international refugee law experts from India, Japan, Pakistan, the Philippines, Thailand and Vietnam.

¹²⁶ Coles (n 121).

¹²⁷ Ibid.

¹²⁸ UNHCR, *Report of the Meeting of the Expert Group on Temporary Refuge in Situations of Large-Scale Influx (Geneva 21–24 April 1981)*, UN Doc EC/SCP/16 (3 June 1981) <<http://www.refworld.org/docid/3ae68cc08.html>> ('*Report of the 1981 Group of Experts' Meeting*').

of Experts' meeting had advocated strongly for the adoption and consistent use of the term 'temporary refuge' as a means of clearly distinguishing the concept from that of 'asylum' in the sense of durable solution, the Group of Experts went to great lengths to avoid using the term 'temporary refuge' in their conclusions. According to Martin, a US academic who participated in the meeting, this was precisely because they were 'even more resistant than [EXCOM's] members toward giving any blessing to what might be seen as a firm new legal concept or status clearly separate from full refugee status'.¹²⁹

In retrospect, Coles was scathing about the Group of Experts' meeting observing that many of the participants were not experts in the field of international refugee law or protection policy.¹³⁰ Rather, Coles argued that 'the selection of experts ... was not dictated by a desire to have an open discussion but as a result of pressure by certain legal circles within UNHCR to down-play the temporary solution'.¹³¹ Supporting his claim that the outcome of the Group of Experts' meeting was predetermined, Coles pointed out that 'the report of the April meeting was drafted before the meeting actually took place by lawyers in the UNHCR who wished to reinforce the link [between admission and durable outcomes]'.¹³² Coles was correct about there being opposition to the concept of temporary refuge within the UNHCR. While some such as Goodwin-Gill, then a UNHCR legal adviser based in Australia, were in favour of the concept,¹³³ others within the UNHCR feared that international protection law might be weakened by it.¹³⁴

Western European countries, which thought at the time that mass movements had no relevance to the European context, also remained resistant to the concept. On the other hand, in the course of arguing for the Australian initiative to be continued, Coles noted that the Australian Embassy in Manila had reported that the Philippines recent accession to the *Refugee Convention* 'was secured on the assurances that admission would not necessarily have as a legal consequence an obligation to provide a durable solution'.¹³⁵ He also noted that the Japanese Embassy had confirmed that the Japanese Diet was considering ratification of the *Refugee Convention* on the understanding that it would only have to provide temporary refuge to any boat people it admitted.¹³⁶

Coles' superiors in the Department of Foreign Affairs were convinced by his defence of the temporary refuge initiative. In September 1981, the Department made a submission to its Minister, Tony Street, recommending that the initiative be

¹²⁹ Martin (n 93) 605.

¹³⁰ Memorandum from Coles to Hoyle (n 85).

¹³¹ Ibid para 25.

¹³² Ibid.

¹³³ GS Goodwin-Gill, 'Non-Refoulement and the Concept of Temporary Refuge in Situations involving Large Numbers of Asylum Seekers: Some Comments on Recent Developments' (1981) in *Guy S Goodwin-Gill Papers*, Bodleian Social Science Library, Oxford (GG): ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2].

¹³⁴ Letter from Michel Moussalli, Director of International Protection, UNHCR to GS Goodwin-Gill, 26 August 1981, in *Guy S Goodwin-Gill Papers*, Bodleian Social Science Library, Oxford (GG): ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2.]

¹³⁵ Memorandum from Coles to Hoyle (n 85) para 33.

¹³⁶ Ibid para 34.

continued and noting that the Department of Immigration agreed.¹³⁷ This recommendation was accepted.¹³⁸

E *EXCOM Conclusion 22 (XXXII) of 1981*

In its statement at the October 1981 meeting of the Sub-Committee of the Whole, the Australian Delegation to EXCOM drew attention to the report of the Round Table on Problems arising from the Large Numbers of Asylum Seekers.¹³⁹ The Round Table was convened in June 1981 in San Remo by the International Institute of Humanitarian Law and the UNHCR. Coles had been among the 29 foreign affairs officials, academics and non-government organisation representatives who participated in the June 1981 Round Table¹⁴⁰ and had written a 48-page background paper for it in his private capacity.¹⁴¹ As recommended by Coles,¹⁴² the Australian Delegation to EXCOM described the Round Table report as a ‘valuable contribution’ and urged that it be considered alongside the *Report of the 1981 Group of Experts’ Meeting*.¹⁴³ According to the Australian Delegation, both reports explicitly or implicitly accepted that: (i) a state that admitted refugees did not thereby incur an unqualified obligation to provide them with a durable solution; (ii) in certain cases the admitting state could provide protection on a temporary basis only, pending a durable solution being found; and (iii) the principle of solidarity had a role to play in achieving durable solutions in such cases.¹⁴⁴

In the light of this observation, the Australian Delegation expressed dissatisfaction with the choice made by the Group of Experts to use the term ‘asylum on a temporary basis’ in its *Report of the 1981 Group of Experts’ Meeting* and reiterated its preference for the term ‘temporary refuge’, which had been used in *EXCOM Conclusion 15 (XXX) of 1979* and in the *June 1981 Round Table Report*.¹⁴⁵ The Australian Delegation’s statement also took direct aim at an observation of ‘some experts’ recorded in the *Report of the 1981 Group of Experts’ Meeting* that, in the past, states in Europe and Africa ‘had granted asylum in their territories in

¹³⁷ Submission from JH Brooks to Minister for Foreign Affairs, 7 September 1981 (NAA: A1838, 1490/6/46/1 Part 2) 2.

¹³⁸ Memorandum from Brady to Unknown (n 97).

¹³⁹ Australian Delegation to UNHCR EXCOM, ‘Statement by Australian Delegation’ (Statement, Meeting of the Sub-Committee of the Whole, 8–12 October 1981) GG: ring binder ‘3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General’ [box 1, file 2]. The *June 1981 Round Table Report* is reproduced in International Institute of Humanitarian Law and UNHCR, *Contributions to International Refugee Law: Joint Activities of the International Institute of Humanitarian Law and the United Nations High Commission for Refugees 1973–2000* (2001) 13 <<http://iihl.org/wp-content/uploads/2019/05/Refugee-a-continuing-challenge.pdf>>.

¹⁴⁰ A list of participants is annexed to the *Report on the Round Table on the Problems arising from Large Numbers of Asylum Seekers* (Report, June 1981) GG: ring binder ‘3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General’ [box 1, file 2].

¹⁴¹ The paper states ‘[t]he views contained in this paper are those of the author and are not necessarily those of any other body’. GJL Coles, *Problems arising from Large Numbers of Asylum-Seekers: A Study of Protection Aspects* (International Institute of Humanitarian Law, 1981) [introductory note].

¹⁴² *Cable from Coles to Department of Foreign Affairs*, 16 September 1981 (NAA: A432, E1977/6390 Part 9).

¹⁴³ Australian Delegation to UNHCR EXCOM (n 139).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

cases of large-scale influx, without making use of any other concepts'.¹⁴⁶ The Delegation noted that Australia was 'a major country of resettlement where one of these regions is concerned'.¹⁴⁷ Given this position, and Australia's experience over the last thirty years' as a country that 'has been approached regularly by certain countries ... to accept refugees who are being held in refugee camps for resettlement on the basis that no durable or permanent solution could be provided for them in their country of origin', the Delegation commented that 'the practice of temporary refuge is found on a significant and growing scale in most regions of the world'.¹⁴⁸ Turning to international solidarity, the Australian Delegation expressed the view that the language used by the *Report of the 1981 Group of Experts' Meeting* was 'insufficiently strong'.¹⁴⁹ It preferred instead the *June 1981 Round Table Report*, which it said stated that

the country of refuge should be regarded as acting on behalf of the international community and was entitled to receive (where necessary) directly or through appropriate organisations active cooperation from other states in the provision of assistance and in the obtaining of durable solutions, whether voluntary repatriation, settlement in the country of refuge or resettlement elsewhere.¹⁵⁰

Ultimately, the Sub-Committee of the Whole adopted a very slightly modified form of the Group of Experts' conclusions as its own conclusions.¹⁵¹ EXCOM in turn adopted the Sub-Committee of the Whole's conclusions as its own.¹⁵² Despite Australia's exhortations, *EXCOM Conclusion 22 (XXXII)* did not use the term 'temporary refuge' or adopt the strong wording of the *June 1981 Round Table Report* in relation to international cooperation. On the other hand, it did avoid the use of terms such as 'asylum on a temporary basis' and did add a couple of sentences about the desirability of international cooperation.¹⁵³ Moreover, Coles regarded the inclusion in the EXCOM Conclusion of the basic minimum standards of treatment of persons granted temporary refuge as 'a watershed in the development of international legal thinking in regard to the refugee problem'.¹⁵⁴ As the originator of the minimum standards, Coles was not, of course, an impartial observer, but contemporaries agreed that these standards represented an important advance.¹⁵⁵

¹⁴⁶ UNHCR, *Report of the 1981 Group of Experts' Meeting* (n 128) [8]. Unsurprisingly, these experts were from Europe and Africa: Martin (n 93) 605–6.

¹⁴⁷ Australian Delegation to UNHCR EXCOM (n 139).

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.* 20.

¹⁵¹ UNHCR EXCOM, *Report on the Meeting of the Sub-Committee of the Whole on International Protection (6th Meeting)*, UN Doc A/AC.96/599 (12 October 1981).

¹⁵² UNHCR EXCOM, *Conclusion 22 (XXXII) of 1981 on Protection of Asylum-Seekers in Situations of Large-Scale Influx* (21 October 1981) <<https://www.unhcr.org/en-au/excom/exconcl/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html>>.

¹⁵³ Martin (n 93) 607.

¹⁵⁴ GJL Coles, 'Some Reflections on the Protection of Refugees from Armed Conflict Situations' (1984) 7 *In Defense of the Alien* 78, 99.

¹⁵⁵ Martin (n 93) 606; Roda Mushkat, 'Human Rights under Temporary Refuge' (1984) 62(3) *Revue de Droit International de Sciences Diplomatiques et Politiques* 169, 175. Similarly, in correspondence with Guy S Goodwin-Gill, Michel Moussalli said 'Thanks to this Australian initiative we now have what I consider one of the best conclusions ever achieved by our Sub-Committee on Protection': Letter from Michel Moussalli to Guy S Goodwin-Gill, 22 December 1981, GG: ring binder '3 Non-refoulement, Asylum and Protection: 30 Non-refoulement: General' [box 1, file 2].

F *The Resisters Prevail*

In September 1982, almost 12 months after the adoption of *EXCOM Conclusion 22 (XXXII)*, the Department of Foreign Affairs sent a cable to the Australian missions to the UN in Geneva and New York, seeking their comments on a provisional plan for achieving acceptance of temporary refuge as an ‘operative concept in public international law’.¹⁵⁶ The best case scenario envisaged by the Department was a UN General Assembly resolution on the initiative in 1983 and the possible move ‘towards a declaration and perhaps, later a convention’.¹⁵⁷ The Australian Mission to the UN in New York responded to the cable suggesting that the Department was being too ambitious in its plans.¹⁵⁸ The Mission also expressed the view that any work on a declaration or convention on temporary refuge could more effectively proceed through EXCOM machinery rather than the Third Committee of the UN General Assembly and should only be brought to the UN General Assembly if and when finalised in Geneva.¹⁵⁹

For reasons not illuminated by the extant archival record, Australia did not get temporary refuge listed as an item on the agenda of EXCOM sub-committee or plenary meetings in 1982.¹⁶⁰ However, during general debate at the plenary meeting, the Australian representative suggested that the EXCOM Secretariat should conduct further study with a view to elaborating on *EXCOM Conclusion 22 (XXXII)* and developing the practical arrangements to which it referred, and should report back to the 34th session of EXCOM.¹⁶¹ Australia also raised the issue of temporary refuge during the discussion on the UNHCR in the Third Committee of the UN General Assembly at its 37th session in 1982.¹⁶²

Australia did not manage to get the term ‘temporary refuge’ into the language of UN General Assembly *Resolution 37/195* on the *Report of the United Nations High Commissioner for Refugees*,¹⁶³ which it regarded as a serious setback.¹⁶⁴ However, Australia was reasonably satisfied that the issue was kept alive by the Resolution,¹⁶⁵ which: requested the High Commissioner to continue ‘examining the problems associated with providing refuge on a temporary basis to asylum seekers in situations of large-scale influx with a view to finding durable solutions’ (para 4); noted the major contribution of countries ‘giving asylum to, or otherwise accepting on a temporary basis, and assisting large numbers of refugees and displaced persons’

¹⁵⁶ *Cable from Department of Foreign Affairs to Australian Missions to the UN in Geneva and New York*, 3 September 1982 (NAA: A432, E1977/6390 Part 11).

¹⁵⁷ *Ibid.*

¹⁵⁸ *Cable from Australian Mission to the UN in New York to Department of Foreign Affairs*, 3 September 1982 (NAA: A432, E1977/6390 Part 11).

¹⁵⁹ *Ibid.*

¹⁶⁰ Letter from J Jusczyk to Keith Baker, 20 April 1983 (NAA: A9737, 1991/81180 Part 1).

¹⁶¹ UNHCR EXCOM, *Summary Record of the 343rd meeting*, 33rd session, UN doc A/AC.96/SR.343 (14 October 1982).

¹⁶² UNHCR EXCOM, *Summary Record of 43rd meeting*, UN GAOR, 3rd Comm, 37th session, UN Doc A/C.3/37/SR.43 (16 November 1982) paras 9–14.

¹⁶³ *Report of the United Nations High Commissioner for Refugees*, GA Res 37/195, UN GAOR, 35th sess, 111th plen mtg, Agenda Item 90A, UN Doc A/RES/37/195 (18 December 1982) (*‘Resolution 37/195’*).

¹⁶⁴ ‘West Brief’, August 1983 (NAA: A9737, 1991/81180 Part 1).

¹⁶⁵ *Ibid.*

(para 5); and stressed ‘the importance of maintaining relief efforts and the resettlement momentum for boat and land cases in South-East Asia, where large numbers of refugees and displaced persons have been admitted on a temporary basis’ (para 8).¹⁶⁶ Australia’s efforts bore some fruit when, by 1983, some opponents of the temporary refuge concept had come around to support the Australian perspective.¹⁶⁷ Despite these small advances, some within the UNHCR, such as Ivor Jackson, the Deputy Director of the UNHCR’s Protection Division, and many European countries, such as Belgium, the Netherlands, Norway and Sweden, still regarded the concept as one that undermined the existing obligations of states.¹⁶⁸ At the same time, ASEAN countries were wary of the concept to the extent that it imposed minimum standards of protection on them.¹⁶⁹

At the 34th session of EXCOM in October 1983, Australia’s representatives persisted in advancing the concept of temporary refuge, referring to the need for ‘further examination of the concept’ in light of the ‘all too evident gaps in the legal regime for international protection’.¹⁷⁰ Shortly after, the Australian Mission to the UN in New York reported back to the Department of Foreign Affairs that a number of delegations at the 38th Session of the UN General Assembly were resistant to Australia’s efforts to include a specific reference to the concept of temporary refuge in the resolution on the report of the UNHCR.¹⁷¹ The Department responded that it attached ‘considerable importance’ to the incorporation of such a reference.¹⁷² In the end, and a far cry from the Department’s goal of having the concept of temporary refuge accepted as an operative legal concept in international law, the UN General Assembly Resolution instead expressed ‘its deep appreciation for the valuable material and humanitarian response of receiving countries, in particular of many developing countries that give asylum to or accept on a temporary basis large numbers of refugees’.¹⁷³

Australia made one final effort to promote the institutionalisation of temporary refuge in international law in 1984. In its statement on the agenda item on international protection at the 35th session of EXCOM, Australia again drew attention to the pragmatic reality that many states were already providing temporary protection to refugees in mass-influx situations, without the benefit of clear

¹⁶⁶ *Resolution 37/195*, UN Doc A/RES/37/195 (n 163) paras 4–5, 8.

¹⁶⁷ For example, Paul Weis, the influential Chairperson of the Ad Hoc Committee on the Legal Aspects of Territorial Asylum and Refugees of the Council of Europe, who had previously been opposed to consideration of mass flows and temporary refuge, had pleasantly surprised Australia’s High Commissioner in Malta by stating that a European convention on asylum would need to cover ‘temporary stay pending resolution of the asylum seeker’s situation’: *Cable from G Cotsell to Department of Foreign Affairs*, 26 April 1983 (NAA: A9737, 1991/81180 Part 1).

¹⁶⁸ *Ibid*; ‘West Brief’ (n 164).

¹⁶⁹ ‘West Brief’ (n 164).

¹⁷⁰ UNHCR EXCOM, *Summary Record of the 354th meeting*, 34th session, UN doc A/AC.96/SR.354 (12 October 1983) para 47. See also UNHCR EXCOM, *Summary Record of the 359th meeting*, 34th session, UN doc A/AC.96/SR.359 (17 October 1983) para 75.

¹⁷¹ *Cable from Australian Mission to the UN in New York to Department of Foreign Affairs*, 17 November 1983 (NAA: A9737, 1991/81180 Part 1).

¹⁷² *Cable from Department of Foreign Affairs to Australian Mission to the UN in New York*, 18 November 1983 (NAA: A9737, 1991/81180 Part 1).

¹⁷³ *Report of the United Nations High Commissioner for Refugees*, GA Res 38/121, UN GAOR, 38th sess, 100th plen mtg, UN Doc A/RES/38/121 (16 December 1983) para 6.

standards of treatment or the material support that formalised international solidarity could provide. Appealing to his fellow delegates, the Australian representative at EXCOM asked them to abandon their view of ‘temporary refuge as a development only to be resisted’ and to instead recognise the ‘advantage in accepting it as a reality in certain situations and in building upon such acceptance to establish the basic rights asylum seekers should enjoy’.¹⁷⁴ The Australian representative also took the opportunity to remind the Committee that ‘Australia has been promoting further examination of the practice of granting temporary refuge in this sense’.¹⁷⁵ In rebuttal, Michel Moussalli, the UNHCR’s Director of International Protection, responded pointedly that

[i]t had been suggested that it would be preferable to acknowledge, rather than resist, temporary refuge. Temporary refuge was a sad fact ... but it would perhaps be a mistake to institutionalize it and allow it to develop into a concept that would weaken asylum ...¹⁷⁶

Ironically, Coles’ original concerns expressed in 1979 that MacKellar’s proposal would work only to undermine the 1951 Convention and result in a “‘poor man’s” regime for the international protection of refugees’ ultimately won the day.¹⁷⁷

V The Afterlife of Temporary Refuge

From the mid to late 1980s, the concept of temporary refuge became a matter only for academic debate. Perluss and Hartman, for instance, relied on state practice and alleged *opinio juris*, such as the EXCOM Conclusions discussed above, to argue that a customary norm of temporary refuge had emerged.¹⁷⁸ In response, Hailbronner accused them of ‘wishful legal thinking’.¹⁷⁹ However, the breakup of the Socialist Federal Republic of Yugoslavia in the 1990s caused the UNHCR and European states to revisit the concept.¹⁸⁰ The conflicts prompted by Croatia’s and Slovenia’s unilateral declarations of independence in June 1991 displaced approximately 1.8 million people.¹⁸¹ The resulting mass-influx refugee crisis in Europe led to a significant shift in the widespread practice of European countries of granting permanent asylum to recognised refugees. In place of this practice, European

¹⁷⁴ UNHCR EXCOM, *Report of the 35th session of the Executive Committee of the High Commissioner’s Programme* contained in *Addendum to the Report of the United Nations High Commissioner for Refugees*, UN GAOR, 39th sess, Agenda Item 6, Supp No 12A, UN Doc A/39/12/Add.1 (5 November 1984) para 78.

¹⁷⁵ Statement by the Australian representative, Charles Mott, to UNHCR EXCOM re agenda item #6, International Protection, 12 October 1984 (NAA: A1838, 1689/2/3/3 Part 4).

¹⁷⁶ UNHCR EXCOM, *Summary Record of the 374th meeting*, 35th session, UN doc A/AC.96/SR.374 (23 October 1984) para 83.

¹⁷⁷ Memorandum from Coles to Smith et al (n 75).

¹⁷⁸ Perluss and Hartman (n 9).

¹⁷⁹ Kay Hailbronner, ‘Nonrefoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?’ in David A Martin (ed), *The New Asylum Seekers: Refugee Law in the 1980s* (Springer, 1988) 123.

¹⁸⁰ The Socialist Federal Republic of Yugoslavia was made up of Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia (including the province of Kosovo) and Slovenia.

¹⁸¹ Maria O’Sullivan, *Refugee Law and Durability of Protection: Temporary Residence and Cessation of Status* (Routledge, 2019) 21.

countries moved instead toward the granting of so-called ‘temporary protection’ to displaced populations.¹⁸²

The UNHCR’s 1994 *Note on International Protection* described ‘temporary protection’ as a variation on the practice of granting ‘temporary refuge’ used to deal with situations of large-scale influx in ‘other parts of the world’.¹⁸³ The Note also acknowledged that the UNHCR had ‘first formally recommended’ such a practice in the context of the Yugoslav refugee crisis.¹⁸⁴ Unlike the countries of South East Asia during the period of the Indo-Chinese refugee crisis, most European countries in the 1990s were parties to the *Refugee Convention* and *Refugee Protocol*. The Note advanced three justifications for the UNHCR’s stance. First, the procedures in place in European countries for individualised determination of refugee status were unable to cope with a mass influx situation.¹⁸⁵ Second, those fleeing the Yugoslav conflict were in need of international protection even if they were not ‘refugees’ within the meaning of the *Refugee Convention* and *Refugee Protocol*.¹⁸⁶ Finally, provision of the full panoply of *Refugee Convention* rights was not necessary, given that the expectation was that refugees would be able to repatriate safely within a fairly short period.¹⁸⁷ In relation to the final justification, the UNHCR pointed out that, in fact, ‘[t]he benefits provided under the various articles of the Convention have different levels of applicability depending on the nature of the refugee’s sojourn or residence in the country’.¹⁸⁸ This allowed scope for ‘reorienting programmes for refugees admitted on a temporary basis towards their eventual return when conditions permit, rather than towards full integration in the asylum country’.¹⁸⁹

According to the UNHCR, the basic elements of temporary protection included:

- admission to safety in the country of refuge;
- respect for basic human rights, with treatment in accordance with internationally recognized humanitarian standards such as those outlined in Conclusion 22 (XXXII) of the Executive Committee;^[190]
- protection against refoulement;
- repatriation when conditions in the country of origin allow.¹⁹¹

These were the same elements that Australia had specified in relation to temporary refuge except that Australia left open the possibility of durable solutions other than repatriation depending on the situation. Moreover, as Australia had emphasised in relation to temporary refuge, the UNHCR emphasised that ‘[t]emporary protection should be one component in a comprehensive approach’ which included burden-

¹⁸² Ibid 21–2.

¹⁸³ UNHCR, *Note on International Protection*, UN Doc A/AC.96/830 (7 September 1994) <<https://www.refworld.org/docid/3f0a935f2.html>> para 46.

¹⁸⁴ Ibid para 41.

¹⁸⁵ Ibid para 46.

¹⁸⁶ Ibid para 47.

¹⁸⁷ Ibid para 49.

¹⁸⁸ Ibid para 29.

¹⁸⁹ Ibid.

¹⁹⁰ However, the UNHCR added that, in the context of the Yugoslav refugee crisis, ‘[t]here was general agreement on the need for progressive improvements in standards beyond the minimum in Conclusion 22 (XXXII) when the period of temporary protection is prolonged’: *ibid* para 49.

¹⁹¹ Ibid para 48.

sharing and international solidarity with directly affected countries and the addressing of root causes.¹⁹²

While the Department of Foreign Affairs in 1982 thought that securing a convention on temporary refuge was a possible best case scenario, the UNHCR in 1994 conceded that states were disinclined ‘to incur further legal obligations in this domain’.¹⁹³ Instead, it suggested that a declaration of guiding principles on temporary protection was ‘not only desirable but perhaps even a feasible option’.¹⁹⁴ It was overly optimistic. Over the period 1996–98, the UNHCR held informal consultations on the provision of international protection to all who need it. Temporary protection and burden-sharing were discussed in the course of these consultations.¹⁹⁵ Over the period 2000–02, the UNHCR held its Global Consultations on International Protection. Temporary protection was discussed in the Third Track of the Global Consultations in the context of discussing the protection of refugees in situations of mass influx.¹⁹⁶ However, neither set of consultations resulted in a consensus view about temporary protection.¹⁹⁷ Ten years later, the UNHCR tried again, holding Roundtables on Temporary Protection in 2012 and 2013 with the aim of identifying ‘the scope and minimum standards of temporary protection/stay’.¹⁹⁸ The UNHCR then drew on these Roundtable discussions as well as an Expert Meeting on International Cooperation to Share Burdens and Responsibilities held in 2011 and lessons learned from past arrangements to compile its 2014 *Guidelines on Temporary Protection or Stay Arrangements*.¹⁹⁹ The Guidelines are intended to ‘guide and assist Governments in the development of Temporary Protection or Stay Arrangements’.²⁰⁰ According to the Guidelines, a Temporary Protection or Stay Arrangement is ‘an appropriate multilateral response to humanitarian crises, including large-scale influxes, and complex or mixed population movements’.²⁰¹ Purporting to build on *EXCOM Conclusion 22 (XXXII) of 1981* ‘in line with subsequent developments in international human rights law’, the Guidelines specify minimum standards of treatment in the context of a temporary protection or stay arrangement.²⁰² However, the Guidelines emphasise that ‘[i]n cases of extended stay, or where transition to

¹⁹² Ibid para 51.

¹⁹³ Ibid para 53.

¹⁹⁴ Ibid para 54.

¹⁹⁵ UNHCR, *Progress Report on Informal Consultations on the Provision of International Protection to All Who Need It*, UN Doc EC/48/SC/CRP.32 (25 May 1998) <<https://www.unhcr.org/excom/standcom/3ae68cff4/progress-report-informal-consultations-provision-international-protection.html>> paras 1–2.

¹⁹⁶ UNHCR, *Global Consultations on International Protection/Third Track: Protection of Refugees in Mass Influx Situations: Overall Protection Framework*, UN Doc EC/GC/01/4 (19 February 2001) <<https://www.refworld.org/docid/3bfa83504.html>>. The Third Track of the Global Consultations consisted of discussions between the UNHCR and the UNHCR EXCOM about protection issues beyond the *Refugee Convention*: Tom Clark and James C Simeon, ‘UNHCR International Protection Policies 2000–2013: From Cross-Road to Gaps and Responses’ (2014) 33(3) *Refugee Survey Quarterly* 1, 5–6.

¹⁹⁷ Alice Edwards, ‘Temporary Protection, Derogation and the 1951 *Refugee Convention*’ (2012) 13(2) *Melbourne Journal of International Law* 595.

¹⁹⁸ UNHCR (n 8) para 2.

¹⁹⁹ Ibid.

²⁰⁰ Ibid para 1.

²⁰¹ Ibid annex.

²⁰² Ibid para 16.

solutions is delayed, the standards of treatment would need to be gradually improved.’²⁰³ Moreover, they emphasise that a Temporary Protection or Stay Arrangement is ‘complementary to and building on the international refugee protection regime’ and should not be used ‘to undermine existing international obligations’.²⁰⁴

While the Guidelines document is to be commended, it is a far cry from a treaty binding on states or even a declaration politically endorsed by states. In fact, the actual practice of states has realised the worst fears of those opposing the institutionalisation of temporary refuge. States now resort to the grant of temporary refuge not only to deal with the kind of mass influx situation that prompted Australia to promote the concept, but as everyday practice divorced from efforts to find durable solutions for affected individuals.²⁰⁵ Indeed, Australia is one of the countries that has experimented with temporary protection domestically, implementing a ‘temporary protection’ regime in which no durable solution is available to unauthorised arrivals besides repatriation.²⁰⁶ Under this regime, unauthorised arrivals who are found to be in need of Australia’s protection are only eligible for the grant of a three-year Temporary Protection Visa or five-year Safe Haven Enterprise Visa.²⁰⁷ The vast majority of Temporary Protection Visa and Safe Haven Enterprise Visa holders will need to reapply for protection every three/five years and to repatriate if and when found not to be in need of protection.²⁰⁸ Similarly, Europe’s response to the refugee crisis in the 1990s ‘set the scene for the contemporary use of time-limited residence permits in the EU’.²⁰⁹

VI Conclusion

Australia’s promotion of the concept of temporary refuge was a turnaround from the position it had taken on the provisional stay article in the Group of Experts’ 1975 draft convention on territorial asylum and is an example of circumstances altering cases. At the time of the 1977 Conference of Plenipotentiaries on Territorial Asylum, the Australian Government Department of Immigration had not yet formed the view that irregular mass movement of asylum seekers to Australian shores was a real prospect. After it had formed this view, however, the calculation of Australian self-interest changed. Provision of temporary refuge by its neighbours to the north could be expected to insulate Australia from onward movement of asylum seekers and this became a more important consideration than preserving its own discretion to refuse admission.

²⁰³ Ibid para 17.

²⁰⁴ Ibid annex.

²⁰⁵ O’Sullivan (n 181) 24.

²⁰⁶ For a detailed discussion of the evolution of temporary protection schemes in Australia starting with the introduction of Refugee Temporary Entry Permits in December 1989, see Crock and Bones (n 101).

²⁰⁷ Other protection visa applicants are eligible for the grant of a permanent protection visa.

²⁰⁸ The Safe Haven Enterprise Visa seems to offer pathways to permanent residence, but very few, if any, Safe Haven Enterprise Visa holders are likely to meet all the requirements for permanent residence.

²⁰⁹ O’Sullivan (n 181) 24.

Australia's championing of the principle of equitable burden-sharing is another example of circumstances altering cases. At the time of the 1977 Conference of Plenipotentiaries on Territorial Asylum, Australia thought it far more likely that it would be called upon to assist other countries than that it would be needing assistance from other countries. Its perceived self-interest was therefore against a strong solidarity obligation. A few years later it was not so sanguine and its position changed accordingly.

European countries too changed their principles to match their circumstances. At the time Australia was promoting the concept of temporary refuge, European countries were confident that they would never be at the receiving end of a mass influx situation. While this remained the case, they resisted the institutionalisation of a concept that they perceived as having the potential to undermine the principle of non-refoulement and/or to place pressure on them to share the burden of mass influx faced by countries in other regions. However, in the 1990s, when the same European countries were faced with a mass influx of their own, they embraced the concept of temporary refuge, albeit under another name.

In retrospect, it is a pity that Australia's push to secure a declaration or treaty on temporary refuge did not succeed, because success might actually have set the limits that the UNHCR is now attempting to set. While Australia failed to achieve its goal of institutionalising temporary refuge in international law, it did nevertheless lay some of the groundwork that informs and shapes present-day initiatives in response to large-scale mass-influxes of refugees. In particular, an enduring legacy of the Australian initiative was the articulation of minimum standards of treatment that became established in *EXCOM Conclusion 22 (XXXII) of 1981* and that, in turn, set the foundation for subsequent developments in international protection law.

Recognising the Sentience of Animals in Law: A Justification and Framework for Australian States and Territories


Jane Kotzmann*

Abstract

Scientific research is clear that most animals are sentient. This means that they have the capacity to subjectively perceive or feel things such as happiness and suffering. At present in Australia, animal sentience is, to some degree, implicitly recognised in animal welfare legislation that is in operation in all state and territory jurisdictions. This legislation criminalises human cruelty towards some animals because of the capacity such action has to cause animal pain and suffering. There is growing public concern in Australia, however, that such legislation does not adequately protect animals from pain and suffering. The Australian Capital Territory ('ACT') has recently responded to this concern by passing amendments to the *Animal Welfare Act 1992* (ACT), which makes it the first Australian jurisdiction to explicitly recognise animal sentience. The ACT amendments follow international precedent. This article analyses this novel development in the law's recognition of animal sentience. It considers the extent to which the ACT legislation is likely to enhance the protection of animals and whether it should be a paradigm, in this respect, for other Australian jurisdictions. It argues that the ACT amendments, while largely symbolic, are a welcome development, and other Australian jurisdictions should follow suit. Nevertheless, further legislative change to increase protections for animals is also required.

I Introduction

If you watch a Labrador retriever bound towards you, tail wagging and tongue hanging out, it appears that he or she is experiencing happiness. In contrast, observing a Whippet or Weimaraner pull his or her ears back, pace around, whine and paw suggests that the dog is feeling insecure and anxious. While such inferences may be anthropomorphic, research in relation to animal capabilities is clear that most animals are sentient.¹ In this respect, sentience refers to the capacity to have

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¹ Note this paper uses the term 'animal' to refer to all animals, excluding human beings. While human beings are themselves animals, this popular use of the term animal is helpful for the purposes of clear

feelings.² Sentience requires a certain level of consciousness and intellectual capacity, and may include positive feelings such as happiness and pleasure, as well as negative states such as pain and suffering.³ In particular, it is clear that most animals have the capacity to feel both physical and psychological pain that is similar to that experienced by humans.⁴

At present in Australia, states and territories are largely responsible for regulating animal welfare.⁵ Legislation in each of these jurisdictions implicitly recognises, to some degree, that some animals are sentient by criminalising human cruelty towards them and providing examples of such conduct, all of which would cause such animals to suffer. For example, the *Prevention of Cruelty to Animals Act 1979* (NSW) states that an act of cruelty towards an animal includes acts or omissions that ‘unreasonably, unnecessarily or unjustifiably’ cause the animal to experience pain.⁶ Such acts include beating, kicking, killing and wounding an animal.⁷

In recent times, however, there has been growing public concern that, in light of the evidence that most animals are sentient, current laws do not adequately ensure animal wellbeing.⁸ Partly in response to such concerns, the Australian Capital Territory (‘ACT’) amended the *Animal Welfare Act 1992* (ACT) (‘AWA’) by the

communication: see Peter Singer, *Animal Liberation* (Random House, 2015) xx. In relation to sentience, see Gary E Varner, *Personhood, Ethics, and Animal Cognition: Situating Animals in Hare’s Two Level Utilitarianism* (Oxford University Press, 2012) ch 5 especially at 106; David J Mellor, ‘Welfare-Aligned Sentience: Enhanced Capacities to Experience, Interact, Anticipate, Choose and Survive’ (2019) 9(7) *Animals* 440; Philip Low, ‘The Cambridge Declaration on Consciousness’ (Conference Paper, Francis Crick Memorial Conference on Consciousness in Human and Non-Human Animals, 7 July 2012); Helen Lambert, Gemma Carder and Neil D’Cruze, ‘Given the Cold Shoulder: A Review of the Scientific Literature for Evidence of Reptile Sentience’ (2019) 9(10) *Animals* 821; Helen S Proctor, Gemma Carder and Amelia R Cornish, ‘Searching for Animal Sentience: A Systematic Review of the Scientific Literature’ (2013) 3(3) *Animals* 882; Helen Proctor, ‘Animal Sentience: Where Are We and Where Are We Heading?’ (2012) 2(4) *Animals* 628. See also the discussion at IIA below.

² Academic Press, *Encyclopedia of Animal Behavior* (online at 5 October 2020) vol 1, 2 Animal Welfare and Conservation, ‘Sentience’ [131].

³ *Ibid.*

⁴ See Hope Ferdowsian and Debra Merskin, ‘Parallels in Sources of Trauma, Pain, Distress, and Suffering in Humans and Nonhuman Animals’ (2012) 13(4) *Journal of Trauma and Dissociation* 448, 461; David DeGrazia and Andrew Rowan, ‘Pain, Suffering, and Anxiety in Animals and Humans’ (1991) 12(3) *Theoretical Medicine* 193, 208; Frank McMillan, ‘Psychological Trauma in Animals: PTSD and Beyond’ (Conference Paper, International Association of Animal Behavior Consultants Conference, 2 April 2011).

⁵ The *Australian Constitution* lacks an express power enabling the Commonwealth Parliament to legislate with regard to animal welfare. Several indirect powers, however, empower the Commonwealth Parliament to pass legislation that relates to animals. For example, s 51(i) of the *Australian Constitution*, relating to trade and commerce, underpins Commonwealth legislation in relation to the live export of animals. See Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworths, 2nd ed, 2018) 75–82.

⁶ *Prevention of Cruelty to Animals Act 1979* (NSW) s 4(2) (‘NSW Act’).

⁷ *Ibid* s 4(2)(a).

⁸ See, eg, Futureye, ‘Commodity or Sentient Being? Australia’s Shifting Mindset on Farm Animal Welfare’ (Research Report, 2018) 10; Transport Canberra and City Services, *Animal Welfare Legislation Amendment Bill 2019* (Consultation Report, May 2019) 8. Note that the term ‘wellbeing’ rather than ‘welfare’ is used here to distinguish the discussion from the animal welfare versus animal rights debate: see Jane Kotzmann and Nick Pendergrast, ‘Animal Rights: Time to Start Unpacking What Rights and for Whom’ (2019) 46(1) *Mitchell Hamline Law Review* 158.

Animal Welfare Legislation Amendment Act 2019 (ACT) ('ACT amendments').⁹ The ACT amendments make the ACT the first Australian jurisdiction to *explicitly* recognise animals' sentience in the law — as part of the objects of its animal protection legislation.¹⁰ The ACT amendments are also atypical in Australian animal welfare legislation in that they recognise the 'intrinsic value' of animals and that animals 'deserve to be treated with compassion and have a quality of life that reflects their intrinsic value'.¹¹

The ACT amendments seem to constitute an important step in enhancing the legal protection of animals. Specifically, the amendments signify an attempt to soften the traditional legal approach to animals that constructs and treats them as property.¹² This approach to animals permits humans to own animals and generally to treat them in any manner that suits their own interests, subject to the limited conditions placed on them by animal welfare legislation.¹³ This approach is found in the common law and statute. By way of example, s 4 of the *Competition and Consumer Act 2010* (Cth) defines 'goods' to include animals — along with ships, aircraft and other vehicles.

Recognition of animal sentience and animals' intrinsic value in the ACT amendments has the potential to improve protection for some animals in that territory. This is primarily because courts are required to take into account the statutory purposes of the AWA, including the recognition of animals' sentience, when interpreting the provisions of the AWA.¹⁴ This may be important in determining whether particular conduct that causes pain to an animal is 'unjustifiable, unnecessary or unreasonable' and thus constitutes cruelty.¹⁵ Case law from foreign jurisdictions, including that considering relevant provisions in the laws of New Zealand¹⁶ and Quebec,¹⁷ provides some indication of the influence that legal recognition of animal sentience might have in statutory interpretation.¹⁸ Moreover, the symbolic nature of such provisions should not be undervalued. In a context where animals are legally categorised as property, recognising that they are sentient, while not impacting their legal status, may be interpreted as a symbolic rejection of that categorisation.

This article analyses the symbolic importance of the ACT amendments, as well as whether they translate into a meaningful increase in protection for animals. In this respect, the article contributes to the literature on animal law and welfare in that it critiques a novel development in the law's recognition of animal sentience,

⁹ Note that as all provisions of the *Animal Welfare Legislation Amendment Act 2019* (ACT) have commenced (at different times: s 2), that Act has been automatically repealed in accordance with the *Legislation Act 2001* (ACT) s 89(1).

¹⁰ *Animal Welfare Act 1992* (ACT) s 4A(1)(a) ('AWA').

¹¹ *Ibid* s 4A(1)(b).

¹² Bruce (n 5) 76–7.

¹³ *Ibid* 77.

¹⁴ *Acts Interpretation Act 1901* (Cth) s 15AA ('*Acts Interpretation Act*').

¹⁵ AWA (n 10) s 6A.

¹⁶ *Animal Welfare Act 1999* (NZ) long title ('AWANZ').

¹⁷ *Animal Welfare and Safety Act*, CQLR 2016, c B-3.1, preamble ('AWSA (*Quebec*)').

¹⁸ See Part IV of this article below.

which to date is ‘nebulous’ and lacks ‘scholarly conceptualization’.¹⁹ The article argues that the ACT amendments constitute a positive step in animal protection and that other Australian jurisdictions should consider incorporating similar provisions into their own animal protection legislation. Nevertheless, increased legal protection is required.

In light of animal sentience and public concern for animals, this article argues that the ACT amendments fall short in terms of providing meaningful protection for animals from cruelty inflicted by humans. This is because the AWA (and equivalent state and territory legislation) excludes conduct that is in accordance with an approved code of practice or mandatory code of practice relating to animal welfare from the scope of its anti-cruelty obligations,²⁰ significantly limiting the contexts in which many animals are protected by the law. Moreover, it is usually human needs and wants that determine whether conduct that causes pain to animals is ‘unjustifiable, unnecessary or unreasonable’.²¹ In this respect, what legislation proscribes in one circumstance may be permissible in another if the relevant animal is used to produce goods like milk or leather.²²

Part II of this article examines the contextual background to the ACT amendments. Part III considers the ACT amendments’ parliamentary history and substantive content. Part IV provides an analysis of the significance of these legislative amendments, with respect to their symbolic importance and ability to provide meaningful increases in protection for animals. In Part V, the article makes recommendations for the reform of animal protection laws both in the ACT and in other Australian jurisdictions. The recommendations made in the article are summarised in the concluding remarks in Part VI.

II Background to the ACT Amendments

A *The Animal Advocacy Movement*

Animal advocacy has flourished over the last 50 years, particularly following the publication of Peter Singer’s text, *Animal Liberation*, in 1975.²³ At the same time, pronounced differences in ideology between people within the animal advocacy movement have become apparent. The main division is between those advocating animal rights and those advocating improvements to animal welfare. In this respect, animal rights advocates challenge the legitimacy of human use of animals, and seek fundamental rights for animals.²⁴ For example, Francione argues that animals need only one right, ‘the right not to be treated as the property of humans’,²⁵ and that

¹⁹ Charlotte Blattner, ‘The Recognition of Animal Sentience by the Law’ (2019) 9(2) *Journal of Animal Ethics* 121, 122.

²⁰ AWA (n 10) s 20.

²¹ *Ibid* s 6A; Bruce (n 5) 208.

²² Bruce (n 5) 208.

²³ Kotzmann and Pendergrast (n 8) 158.

²⁴ *Ibid* 159.

²⁵ Gary L Francione, ‘One Right for All’, *New Scientist* (Web Page, 5 October 2005) <<https://www.newscientist.com/article/mg18825205-100-one-right-for-all/>>.

‘vegan education’ is the best way to work towards this goal.²⁶ In contrast, welfare advocates argue that when ‘humans use animals for their own ends’, animals are entitled to minimum living conditions.²⁷ For example, welfare advocates might support banning sow stalls, but not challenge the right of humans to raise and kill pigs for human consumption. Animal welfare ideology thus represents an attempt to strike a balance between human interests in using animals and animal interests in living happily and healthily. In contrast, animal rights ideology asserts that animal interests in a good life should outweigh any human interests in using animals. The colossal failure of animal welfare laws to protect animals from human harm together with the inherent strength of rights protections compared with welfare protections support a conclusion that legal rights are more likely to protect animals from human harm.²⁸ Accordingly, this article adopts the animal rights framework as the normative yardstick against which to assess changes to animal law.

It may be asked where the legal recognition of animal sentience sits within the context of this ideological spectrum. In this respect, it is clear that legally recognising animal sentience will not prevent humans continuing to use animals in various ways and will not change the legal status of animals as property.²⁹ Nevertheless, legally recognising animal sentience may achieve other objectives. In particular, recognising that animals are capable of experiencing feelings may lead to a reduction in animal suffering caused by humans and a strengthening of legal protection for animals. It might also better reflect community sentiment in relation to how humans should treat animals and provide a scientific foundation to animal welfare laws. Further, legal changes have the potential to improve public awareness and thus generate further change. This article evaluates the likely actual impact of the recognition of animal sentience in the ACT amendments.³⁰

B *Animal Sentience in Science*

One of the notable aspects of the ACT amendments is that they make the ACT the first Australian state or territory to explicitly recognise animal sentience in the law. Scientists generally use sentience as a concept that refers to the capacity to have feelings.³¹ In this respect, feelings may include sensations like pain, as well as emotional responses like fear, suffering, happiness and joy.³² A sentient being may also have more complex features including having some ability ‘to evaluate the actions of others in relation to itself and third parties, to remember some of its own

²⁶ Gary L Francione, ‘The Abolition of Animal Exploitation’ in Gary L Francione and Robert Garner, *The Animal Rights Debate: Abolition or Regulation?* (Columbia University Press, 2010) 64–5, 71; Kotzmann and Pendergrast (n 8) 171.

²⁷ Kotzmann and Pendergrast (n 8) 166.

²⁸ *Ibid* 182.

²⁹ See Part IV(F)(1) of this article below.

³⁰ See Parts IV–V of this article below.

³¹ Donald M Broom, ‘Considering Animals’ Feelings’ (2016) 5(1) *Animal Sentience* 1, 2.

³² Donald M Broom, *Sentience and Animal Welfare* (Cabi, 2014) 20; David Degrazia, ‘The Ethics of Animal Research: What Are the Prospects for Agreement?’ (1999) 8(1) *Cambridge Quarterly of Healthcare Ethics* 23, 26.

actions and their consequences, to assess risks and benefits, to have some feelings, and to have some degree of awareness'.³³

While there has been a recent global trend towards the express legal recognition of animal sentience,³⁴ there has been scientific consensus for some time that many animals are sentient.³⁵ In particular, there is general agreement that vertebrate animals are sentient.³⁶ Scientific research indicates that parrots, dogs, pigs, cattle, other farm animals, companion animals, laboratory animals, wild mammals and birds are sentient.³⁷ Further, studies in relation to amphibians, reptiles, fish, cephalopods and crustaceans indicate that they are sentient.³⁸ There is even the suggestion that snails may be sentient.³⁹

C Public Concern for the Wellbeing of Animals

Growing public concern in relation to the wellbeing of animals prompted, at least in part, the ACT amendments.⁴⁰ This concern stems from increasing awareness of the extent of animal sentience, as well as increased media attention directed towards animal welfare, which has exposed the environments and practices to which sentient animals are often subject.⁴¹ In this respect, critics argue that animals require greater protections than welfare laws generally provide.⁴² For example, laws often permit animals used for food to be: subject to painful procedures that may be undertaken

³³ Academic Press (n 2).

³⁴ See, eg, *Animals Act 2011* (Netherlands) art 1.3; *Code Civil* [Civil Code] (France) art 515–14; *Animal Welfare Act 2008* (Tanzania) s 4(b)(i); *AWSA (Quebec)* (n 17) preamble; *Civil Code 2016* (Colombia) art 655; *AWANZ* (n 16) long title; *Treaty on the Functioning of the European Union*, opened for signature 13 December 2007, [2012] OJ C 326/01 (entered into force 1 December 2009) art 13 ('*TFEU*'); Donald M Broom, 'Animal Welfare and Legislation' in Frans J M Smulders and Bo Algers (eds), *Welfare of Production Animals: Assessment and Management of Risks* (Wageningen Academic Publishers, 2009) 339, 339.

³⁵ Broom, *Sentience and Animal Welfare* (n 32) 127; Proctor, Carder and Cornish (n 1) 882; Proctor (n 1) 628; Marc Bekoff, 'Animal Emotions: Exploring Passionate Natures' (2000) 50(10) *BioScience* 861.

³⁶ Robert C Jones, 'Science, Sentience, and Animal Welfare' (2013) 28(1) *Biology & Philosophy* 1, 6.

³⁷ Broom, 'Considering Animals' Feelings' (n 31) 8.

³⁸ *Ibid*; Jones (n 36) 6–8.

³⁹ Broom, 'Considering Animals' Feelings' (n 31) 8.

⁴⁰ See 'Consultation on the Exposure Draft of the Animal Welfare Legislation Amendment Bill 2019', *ACT Legislation Register* (online) <https://www.legislation.act.gov.au/DownloadFile/ca/db_59376/current/PDF/db_59376.PDF> 3; Futureye (n 8) 4; Responsible Investment Association Australasia, *From Values to Riches: Charting Consumer Attitudes and Demand for Responsible Investing in Australia* (Report, November 2017) 9. See also Department of Economic Development, Jobs, Transport and Resources (Vic), *Animal Welfare Action Plan: Improving the Welfare of Animals in Victoria* (Report, 2018) 12, which showed that 75% of respondents were of the view that animals should be better protected by the law: cited in Sentencing Advisory Council (Vic), *Animal Cruelty Offences in Victoria* (Report, February 2019) 1.

⁴¹ Futureye (n 8) 4; Donald M Broom, 'Animal Welfare in the European Union' (Research Paper, European Parliament Policy Department for Citizens' Rights and Constitutional Affairs, January 2017) 9.

⁴² See, eg, Siobhan O'Sullivan and Dinesh Wadiwel, 'We Have Animal Welfare Laws but They Don't Stop the Suffering', *The Conversation* (online, 21 August 2014) <<https://theconversation.com/we-have-animal-welfare-laws-but-they-dont-stop-the-suffering-30703>>.

without anaesthetic⁴³ (including debeaking,⁴⁴ dehorning,⁴⁵ tail docking,⁴⁶ castration⁴⁷ and hot branding);⁴⁸ kept in restrictive conditions (such as battery cages⁴⁹ and sow stalls⁵⁰); deprived of natural light;⁵¹ and killed using painful or violent methods. Animals used for other purposes including entertainment,⁵² experimentation,⁵³ companionship,⁵⁴ and animals that live in the wild,⁵⁵ are also subject to practices that have been criticised on the basis of their perceived cruelty.

Some countries have amended existing legislation or passed new legislation, including prohibitions on some of these practices, in order to address an increased concern for animal welfare and to better protect animals. It is notable that several countries and regions have recently passed laws that explicitly recognise that animals are sentient beings. These countries and regions include the European Union ('EU') in 2008,⁵⁶ France in 2014,⁵⁷ Quebec in 2015,⁵⁸ New Zealand in 2015,⁵⁹ and Colombia in 2016.⁶⁰

Government consultation in relation to the ACT amendments showed that most people consulted supported the proposed Animal Welfare Legislation Amendment Bill

⁴³ Note that this is the case under both the Model Codes of Practice (see below nn 44–6, 48) and the Australian Animal Welfare Standards and Guidelines. At present, the Model Codes of Practice for the Welfare of Animals are being updated and replaced by the Australian Animal Welfare Standards and Guidelines: 'Australian Animal Welfare Standards and Guidelines', *Department of Agriculture, Water and the Environment* (Cth) (Web Page, 4 February 2020) <<https://www.agriculture.gov.au/animal/welfare/standards-guidelines>>.

⁴⁴ See Primary Industries Standing Committee, *Model Code of Practice for the Welfare of Animals: Domestic Poultry* (CSIRO Publishing, 4th ed, 2002) 17 cl 12.5 ('*Poultry MCOP*').

⁴⁵ See Primary Industries Standing Committee, Parliament of Australia, *Model Code of Practice for the Welfare of Animals: Cattle* (CSIRO Publishing, 2nd ed, 2004) 19 cl 5.8 ('*Cattle MCOP*').

⁴⁶ See Primary Industries Standing Committee, Parliament of Australia, *Model Code of Practice for the Welfare of Animals: Pigs* (CSIRO Publishing, 3rd ed, 2008) 14 cl 5.6.10 ('*Pigs MCOP*').

⁴⁷ *Cattle MCOP* (n 45) 17 cl 5.4.

⁴⁸ See Animal Health Australia, *Australian Animal Welfare Standards and Guidelines for Cattle* (1st ed, 2014) 19–20.

⁴⁹ See *Poultry MCOP* (n 44) 25–6 (appendix).

⁵⁰ See *Pigs MCOP* (n 46) 23.

⁵¹ *Poultry MCOP* (n 44) 17 cl 12.5.

⁵² Bruce (n 5) ch 7; Jackson Walkden-Brown, 'Animals and Entertainment' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 129, 129; Dominique Thiriet, 'Out of Eden: Wild Animals and the Law' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 226, 235–8.

⁵³ Kathrin Herrmann and Kimberley Jayne, *Animal Experimentation: Working Towards a Paradigm Change* (Brill, 2019); Elisa Galgut, 'Raising the Bar in the Justification of Animal Research' (2015) 5(1) *Journal of Animal Ethics* 5.

⁵⁴ Tony Bogdanoski, 'A Companion Animal's Worth: The Only "Family Member" Still Regarded as Legal Property' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 84, 84; Steven White, 'Companion Animals: Members of the Family or Legally Discarded Objects?' (2009) 32(3) *University of New South Wales (UNSW) Law Journal* 852.

⁵⁵ Thiriet (n 52) 226; Keely Boom and Dror Ben-Ami, 'Shooting Our Wildlife: An Analysis of the Law and Its Animal Welfare Outcomes for Kangaroos & Wallabies' (2011) 5 *Australian Animal Protection Law Journal* 44.

⁵⁶ *TFEU* (n 34) art 13.

⁵⁷ *Code Rural et de la Peche Maritime* [Rural and Maritime Fisheries Code] (France) art L214–1.

⁵⁸ Bill 54, *An Act to Improve the Legal Situation of Animals*, 1st session, 41st Leg, Quebec, 2015, s 1.

⁵⁹ *AWANZ* (n 16).

⁶⁰ *Ley No 1774 de 2016* (Colombia) art 665.

2019 (ACT) ('Amendment Bill').⁶¹ The consultation took place from December 2018 to February 2019 and involved 120 individuals and 21 businesses and organisations. Feedback generally showed a 'very high degree of support' for recognising that animals are sentient and accordingly merit a quality of life and universal support for amendments to the law in order to better protect animals.⁶²

D *Animal Welfare Laws in Australia*

The legal status of animals facilitates the manner in which humans have treated them. Animals have historically been categorised as property in the same manner that furniture or vehicles are characterised as property.⁶³ Since they are legal property, owners of animals can buy and sell them, force them to work and generally treat them as they see fit (subject to welfare laws, discussed below).⁶⁴ However, given that animals are sentient in a way that other forms of personal property are not, the categorisation of animals as property has been cause for concern and society has become increasingly uneasy with this aspect of law.⁶⁵ Indeed, it is notable that animals are the only sentient beings that continue to be categorised as property in law.⁶⁶

All Australian states and territories have enacted laws that seek to protect some animals from exploitation,⁶⁷ in accordance with the prevailing ethic that animals are sentient beings deserving of protection.⁶⁸ Generally, animal welfare legislation operates to criminalise human conduct towards animals that would cause an animal unnecessary pain or suffering, and to impose positive duties of care on the owners or persons who are in charge of animals. Such legal protections limit the ways in which humans can use and derive benefit from animals, but do not grant animals themselves legal rights.

⁶¹ Transport Canberra and City Services (n 8).

⁶² Ibid 3. See also Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 16 May 2019, 1809 (Chris Steel, Minister for City Services) ('May 2019 Speech').

⁶³ Geeta Shyam, 'Is the Classification of Animals as Property Consistent with Modern Community Attitudes?' (2018) 41(4) *University of New South Wales (UNSW) Law Journal* 1418, 1418; Steven White, 'Exploring Different Philosophical Approaches to Animal Protection in Law' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 31, 31; James Gacek and Richard Jochelson, '"Animal Justice" and Sexual (Ab)use: Consideration of Legal Recognition of Sentience for Animals in Canada' (2017) 40(3) *Manitoba Law Journal* 337, 339; Richard L Cupp Jr, 'Animals as More than "Mere Things," But Still Property: A Call for Continuing Evolution of the Animal Welfare Paradigm' (2016) 84(4) *University of Cincinnati Law Review* 1023, 1026, 1028.

⁶⁴ Bruce (n 5) 76–7; Gacek and Jochelson (n 63) 339.

⁶⁵ Broom, 'Animal Welfare in the European Union' (n 41) 35; Cupp (n 63) 1027; Shyam (n 63) 1418.

⁶⁶ Gacek and Jochelson (n 63) 339. Note that the law has treated slaves, women and children as property in the past.

⁶⁷ See AWA (n 10); NSW Act (n 6); *Animal Welfare Act 1999* (NT); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Welfare Act 2002* (WA). In relation to Codes of Practice, see Arnja Dale and Steven White, 'Codifying Animal Welfare Standards – Foundations for Better Animal Protection or Merely a Façade?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 151, 151–6.

⁶⁸ Steven White, 'Standards and Standard-Setting in Companion Animal Protection' (2016) 38(4) *Sydney Law Review* 463, 463.

E *The Animal Welfare Act 1992 (ACT) Framework*

The *AWA* is similar to animal protection legislation in operation in other Australian states and territories. The *AWA* applies to a broad range of animals, comprising various vertebrate species, including amphibians, birds, fish, mammals (other than human beings), as well as reptiles, cephalopods and crustaceans intended for human consumption.⁶⁹

Part 2 of the *AWA* criminalises a range of human conduct in relation to animals. Such conduct includes: failure by a person in charge of an animal to fulfil a duty of care to the animal, such as failing to provide appropriate food and water;⁷⁰ cruelty or aggravated cruelty to animals;⁷¹ failure by a person who injures an animal to take reasonable steps to assist with the animal's injury;⁷² administering electric shock to an animal in an unauthorised manner;⁷³ transporting or containing an animal in a way that causes the animal unnecessary injury, pain or suffering;⁷⁴ carrying a dog unrestrained in a moving vehicle on a road or road-related area;⁷⁵ and carrying out a medical or surgical procedure on an animal where the person undertaking the procedure is not a veterinary practitioner or where the procedure is not for an authorised purpose.⁷⁶

A key distinction between the *AWA* and legislation in other Australian jurisdictions is the prohibitions on particular conduct towards animals in ss 9, 9A, 9B and 9C. In this respect, s 9 creates offences for confining an animal where that confinement causes or is likely to cause injury, pain or death to the animal;⁷⁷ an owner confining an animal where the animal is not able to move in a way that is appropriate;⁷⁸ and a person in charge of an animal confining the animal in or on a vehicle where such confinement causes or is likely to cause the animal injury, pain, stress or death.⁷⁹ Section 9A criminalises the keeping of laying fowls for commercial egg production in battery cages, as they fail to meet the conditions in the *Eggs (Labelling and Sale) Regulation 2019* (ACT).⁸⁰ Similarly, s 9B criminalises the keeping of pigs in sow stalls. Finally, s 9C criminalises the removal or trimming of a fowl's beak.

Pursuant to s 20 of the *AWA*, however, the anti-cruelty provisions described above do not apply if the conduct the subject of the alleged offence was in accordance with an approved code of practice or a mandatory code of practice. There are some exceptions to this provision, including the prohibitions in ss 9A, 9B and 9C, which

⁶⁹ Note only 'live' animals are included within the definition: *AWA* (n 10) Dictionary (definition of 'animal').

⁷⁰ *Ibid* s 6B.

⁷¹ *Ibid* ss 7, 7A.

⁷² *Ibid* s 10.

⁷³ *Ibid* s 13.

⁷⁴ *Ibid* s 15.

⁷⁵ *Ibid* s 15A.

⁷⁶ *Ibid* ss 19, 19A.

⁷⁷ *Ibid* s 9(1)(b).

⁷⁸ *Ibid* s 9(2)(b).

⁷⁹ *Ibid* ss 9(4)(a)–(b).

⁸⁰ *Ibid* s 9A(1)–(3).

impose strict liability. Nevertheless, these exemptions operate to remove animals that are the subject of codes of practice — generally farmed animals — from the reach of most anti-cruelty provisions.

The ACT Minister for City Services, Chris Steel, introduced the Amendment Bill into the Legislative Assembly of the ACT Parliament on 16 May 2019.⁸¹ The Bill was developed in line with the Labor Government's *Animal Welfare and Management Strategy 2017–22*, which acknowledges that animals are 'sentient beings' and seeks to ensure a consistent approach to promoting improved animal welfare outcomes.⁸² The amendments contained in the Amendment Bill continued the ACT's approach of enacting progressive animal welfare reforms.⁸³

III The ACT Amendments

A Parliamentary History

Reference to the Hansard record of parliamentary discussion regarding the Amendment Bill shows that the ACT Parliament considers the recognition of animal sentience in legislation to be a very significant change.⁸⁴ Chris Steel, the Minister for City Services, Australian Labor Party, stated that the '[B]ill reflects [animals'] ... intrinsic value'.⁸⁵ Caroline Le Couteur, for the Greens, referred to the change as 'a great step forward'.⁸⁶ In particular, her statement revealed that the Greens see the amendments as a change in the way that humans see animals, a better relationship between humans and other species on the earth, a critical step towards that improved relationship and a recognition that humans have 'rights and responsibilities' with regards to animals.⁸⁷ The statement from Nicole Lawder, for the Liberal Party, indicated that the Liberals see the change as a shift away from the categorisation of animals as property:

I must confess that, in some ways, this was something I had to grapple with, because the law and our community have historically treated animals as property, and sentience and reason were reserved for humans. This [B]ill challenges the norm, and it is natural that we should question and be cautious about such a big step in our legislative framework.⁸⁸

It is also evident that the ACT Parliament sees the legal recognition of sentience as both reflective of community opinion and in step with global legislative changes. In parliamentary debate, Labor emphasised the extensive community consultation process and the high level of community support for the legal

⁸¹ Steel, May 2019 Speech (n 62) 1806.

⁸² Naomi Maxwell, *Animal Welfare and Management Strategy 2017–2022* (Transport Canberra and City Services Directorate, ACT Government, 2016) 5.

⁸³ For example, banning battery cages and sow stalls.

⁸⁴ Part IIIB discusses other noteworthy changes contained in the *Animal Welfare Legislation Amendment Act 2019* (ACT) (n 9).

⁸⁵ Steel, May 2019 Speech (n 62) 1806.

⁸⁶ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3945 (Caroline Le Couteur).

⁸⁷ *Ibid* 3945–6.

⁸⁸ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3948–9 (Nicole Lawder).

recognition of animal sentience.⁸⁹ Tara Cheyne, for Labor, indicated that the change would be reflective of community values, and that ‘leading jurisdictions around the world are moving towards recognising the sentience of animals in their legislation’.⁹⁰ Chris Steel also noted the international trend towards legal recognition of animal sentience.⁹¹

Of particular interest is that at least some members of the ACT Parliament see recognition of animal sentience as providing a tangible and not just symbolic change. For example, Tara Cheyne (Labor) asserted that the change would enable the AWA ‘to provide for the physical *and mental* wellbeing of animals’.⁹² Nicole Lawder (Liberal) intimated that the change means that the legislation ‘considers the mental as well as the physical wellbeing of animals’.⁹³ Similarly, Chris Steel (Labor) indicated that recognising the sentience of animals would enable the legislation to ‘account for the proven fact that animals are not objects but instead beings capable of feeling emotion and pain’.⁹⁴

Section 4A(1)(c) of the Amendment Bill, which stated that ‘people have a duty to care for the physical and mental welfare of animals’, created discord in the ACT Parliament. Nicole Lawder (Liberal) moved to amend the clause on the basis that the phrase ‘duty of care’ has significant meaning in the law and thus ‘[s]ection 4A(1)(c) in its current unqualified form could potentially be interpreted as prohibitive against many acceptable, responsible, humane and common environmental, commercial and recreational activities’.⁹⁵ Accordingly, she proposed amendments that expressly recognised practices in particular contexts as not being limited by s 4A(1)(a).⁹⁶ The proposed amendments were not successful.⁹⁷ Chris Steel (Labor) indicated that the amendments would make s 4 more ambiguous and ‘could be seen to limit ... sentience’.⁹⁸ Caroline Le Couteur (Greens) did not support the amendments on the basis that the Greens would like to see change to some practices in these areas.⁹⁹ Thus, it seems clear that the ACT Parliament’s intention is that the recognition of sentience in s 4A(1)(a) applies to all animals.¹⁰⁰ This conclusion is supported by the Revised Explanatory Statement for the Bill, which states that

⁸⁹ Steel, May 2019 Speech (n 62) 1809. See also Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3955 (Chris Steel, Minister for City Services) (‘September 2019 Speech’).

⁹⁰ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3950 (Tara Cheyne).

⁹¹ Steel, September 2019 Speech (n 89) 3952.

⁹² Cheyne (n 90) 3951 (emphasis added).

⁹³ Lawder (n 88) 3948.

⁹⁴ Steel, September 2019 Speech (n 89) 3952.

⁹⁵ Lawder (n 88) 3957.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* 3958.

⁹⁸ Steel, September 2019 Speech (n 89) 3957.

⁹⁹ Le Couteur (n 86) 3957.

¹⁰⁰ Note that the Liberal Party also proposed amendments in relation to the Amendment Bill s 18. These amendments were similarly rejected on the basis that they might make the provision more ambiguous and might restrict the application of the AWA: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 September 2019, 3959–61 (Chris Steel, Nicole Lawder and Caroline Le Couteur).

s 4A aims to mirror community values in relation to animal welfare ‘and the proper treatment of *all* animals’.¹⁰¹

B *Substance of the ACT Amendments*

The ACT amendments aimed to recognise animals as sentient beings, and bolster animal welfare protections.¹⁰² The amendments comprised significant changes to the AWA’s objects, which are set out in s 4A (as amended) as follows:

- (1) The main objects of this Act are to recognise that—
 - (a) animals are sentient beings that are able to subjectively feel and perceive the world around them; and
 - (b) animals have intrinsic value and deserve to be treated with compassion and have a quality of life that reflects their intrinsic value; and
 - (c) people have a duty to care for the physical and mental welfare of animals.
- (2) This is to be achieved particularly by—
 - (a) promoting and protecting the welfare of animals; and
 - (b) providing for the proper and humane care, management and treatment of animals; and
 - (c) deterring and preventing animal cruelty and the abuse and neglect of animals; and
 - (d) enforcing laws about the matters mentioned in paragraphs (a), (b) and (c).

Thus, as noted, the amendments are particularly significant in that they make the ACT the first Australian jurisdiction to explicitly recognise animal sentience in the law.¹⁰³ According to the Responsible Minister, Chris Steel, this means that:

[W]e as a community accept that animals are sentient beings with intrinsic value that can feel pain and emotions and are deserving of an acceptable quality of life. This is based on science and recognises that modern animal welfare is about considering how an animal is coping mentally and physically with the conditions in which it lives.¹⁰⁴

The amendments to the objects also operate to expressly acknowledge that people have a duty of care to look after both the physical and mental welfare of animals. While the legislation, prior to the ACT amendments, already set out a duty to care for animals,¹⁰⁵ the ACT amendments to the objects strengthen and widen the scope of this duty.

¹⁰¹ Revised Explanatory Statement, Animal Welfare Legislation Amendment Bill 2019 (ACT) 12 (emphasis added).

¹⁰² Steel, May 2019 Speech (n 62) 1806.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ AWA (n 10) s 6B.

Many of the other ACT amendments are also noteworthy. The amendments aim to make the ACT ‘a national leader in animal welfare’.¹⁰⁶ In this respect, a number of amendments operate to broaden and strengthen existing protections. For example, the amending legislation broadened the AWA s 6A definition of what constitutes cruelty by changing the definition from causing pain that is ‘unjustifiable, unnecessary or unreasonable’ to ‘doing, *or not doing*’ something that ‘causes, *or is likely to cause, injury, pain, stress* or death ... that is unjustifiable, unnecessary or unreasonable’.¹⁰⁷ Thus, the definition of cruelty now encompasses the failure of a person to prevent unnecessary pain or the likelihood of unnecessary pain. Similarly, the duty of care of a person in charge of an animal set out in s 6B has been expanded and strengthened. A range of additional strict liability offences relating to failure to provide an animal with water or shelter, failure to provide animal with a hygienic environment, failing to properly groom and maintain an animal, failing to exercise a dog, and abandoning an animal supplement this duty of care.¹⁰⁸ The amendments also increase the penalties for a range of offences under the AWA.¹⁰⁹

The ACT amendments also aim to achieve more effective law enforcement. For example, under s 6, the amendments broaden the power of the Animal Welfare Authority to delegate its functions. Part 7 of the AWA establishes an ‘escalating enforcement framework’¹¹⁰ to try to prevent further animal cruelty events occurring. As part of this escalating framework, the Animal Welfare Authority has the power to make interim prohibition orders to prevent individuals from being in charge of an animal for a period.¹¹¹ Further, the Animal Welfare Authority has been granted the power to seize, retain, sell, rehome or destroy (where necessary) seized animals.¹¹²

IV The Significance of the ACT Amendments

A Introduction

This section discusses the potential impact of the legal recognition of animal sentience in the ACT. In doing so, it draws on the experience of the EU, New Zealand and Quebec, which also recognise sentience in their animal welfare legislation. A small sample of cases provides the foundation for this discussion. This is because the legislative amendments in New Zealand and Quebec are very recent and, accordingly, there has been little relevant case law in those jurisdictions. The EU provisions have been in place for a longer period, however, and, as discussed below, the EU has a quite distinct legal framework and the provisions are somewhat different in nature to the ACT legislative recognition of animal sentience.

¹⁰⁶ Chris Steel (Minister for City Services, ACT Government), ‘Bill Passed to Strengthen Animal Welfare Standards’ (Media Release, 26 September 2019) <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/chris-steel-mla-media-releases/2019/bill-passed-to-strengthen-animal-welfare-standards>.

¹⁰⁷ AWA (n 10) s 6A (emphasis added).

¹⁰⁸ Ibid ss 6C–6G. ‘Strict liability’ means that there are no fault elements for any of the physical elements of the offence: *Criminal Code 2002* (ACT) s 23(1)(a).

¹⁰⁹ AWA (n 10) ss 7 (‘cruelty to animals’), 7A(1)–(2) (‘aggravated cruelty to animals’).

¹¹⁰ Steel (n 107).

¹¹¹ Ibid s 86E.

¹¹² Ibid ss 81A, 83A, 86C–86D.

The EU has legally recognised animal sentience for some time. In 1997, a protocol to the *Treaty of Amsterdam* ('Treaty of Amsterdam') referred to animals as 'sentient beings'.¹¹³ In 2006, the *Lisbon Treaty* amended the *Treaty on the Functioning of the European Union* ('TFEU') and included an explicit recognition of animal sentience in the form of art 13.¹¹⁴ The recognition of sentience in both the *Treaty of Amsterdam* and the *TFEU* relates to '[a]ll animals used by people'.¹¹⁵

The *TFEU* does not define the term 'sentient' and it is unclear why it was explicitly included.¹¹⁶ While the EU's brochure on its Animal Welfare Strategy 2012–15 states that recognising animals as sentient beings means that 'they are capable of feeling pleasure and pain',¹¹⁷ at the time of drafting, there was little discussion as to the reasons for including TFEU art 13.¹¹⁸ Contextually, however, the inclusion of a recognition of animal sentience fits in with the historical background of a growing concern for animal welfare and thus appears to constitute recognition of the importance of animal interests.¹¹⁹ From 1974, the EU began introducing directives in relation to animal welfare.¹²⁰ Political developments have also demonstrated an increasing concern for animal welfare.¹²¹

In 2015, New Zealand amended the *Animal Welfare Act 1999* (NZ) ('AWANZ') to recognise animal sentience.¹²² The AWANZ is the primary legislation relating to the welfare of animals in New Zealand, and sets out how people should and should not interact with animals and the obligations people have towards animals.¹²³ The AWANZ covers a wide range of animals, including mammals, birds, reptiles, amphibians, fish, octopus, squid, crab, lobster, and crayfish, but excludes humans.¹²⁴ The long title of the AWANZ was amended to state that the AWANZ is intended 'to reform the law relating to the welfare of animals and the prevention of their ill-treatment; and ... to recognise that animals are sentient'.¹²⁵ While the term

¹¹³ *Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts*, opened for signature 2 October 1997, [1997] OJ C 340/1 (entered into force 1 May 1999) ('*Treaty of Amsterdam*') *Protocol on Protection and Welfare of Animals*.

¹¹⁴ *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, opened for signature 13 December 2007, [2007] OJ C 306/1 (entered into force 1 December 2009) art 13; 'Animal Welfare', *European Commission* (Web Page) <https://ec.europa.eu/food/animals/welfare_en>.

¹¹⁵ Broom, 'Animal Welfare in the European Union' (n 41) 47.

¹¹⁶ Katy Sowery, 'Sentient Beings and Tradable Products: The Curious Constitutional Status of Animals under Union Law' (2018) 55(1) *Common Market Law Review* 55, 67.

¹¹⁷ European Commission, *EU Animal Welfare Strategy: 2012–2015*, 1 <https://ec.europa.eu/food/sites/food/files/animals/docs/aw_brochure_strategy_en.pdf>.

¹¹⁸ Sowery (n 116) 67.

¹¹⁹ See Steven White, 'Into the Void: International Law and the Protection of Animal Welfare' (2013) 4(4) *Global Policy* 391, 392.

¹²⁰ *Council Directive 74/577/EEC of 18 November 1974 on Stunning of Animals before Slaughter* [1974] OJ L 316/10 cited in Sowery (n 116) 62.

¹²¹ Sowery (n 116) 64.

¹²² *Animal Welfare Amendment Act (No 2) 2015* (NZ) s 4.

¹²³ AWANZ (n 16) long title; Ministry for Primary Industries (NZ), 'Animal Welfare', *Agriculture & Investment Services* (Web Page, 3 August 2020) <<https://www.mpi.govt.nz/law-and-policy/legal-overviews/animal-welfare/>>.

¹²⁴ AWANZ (n 16) s 2(1).

¹²⁵ *Ibid* long title (emphasis added). See also Marcelo B Rodriguez Ferrere, 'Codes vs Regulations: How Best to Enforce Animal Welfare in New Zealand?' (2018) 43(4) *Alternative Law Journal* 250, 252.

‘sentience’ is not defined in the *AWANZ*, it was referred to as meaning ‘that animals can have feelings, perceptions, and experiences that matter to them’ in the Minister for Primary Industry’s second reading speech.¹²⁶

Public consultation prompted the recognition of sentience in New Zealand law.¹²⁷ The amendment Bill, as originally introduced, did not explicitly reference animal sentience. During the passage of the Bill, it was referred to the Primary Production Committee, which consulted with the public and subsequently recommended that animal sentience be expressly recognised.¹²⁸ During consultation, the National Animal Welfare Advisory Committee, animal advocacy groups — including the World Society for the Protection of Animals, Royal New Zealand Society for the Prevention of Cruelty to Animals and New Zealand Companion Animal Council — and a large number of private individuals and bodies made submissions recommending the inclusion of a concept of sentience in the amendment Bill.¹²⁹ There were several reasons put forward for adding sentience to the Bill, including that recognising animal sentience is central to understanding how humans should treat animals, putting animal sentience beyond doubt, and maintaining New Zealand’s reputation as an international leader in animal welfare.¹³⁰ Most submissions, however, ‘acknowledge[d] that the change proposed would be largely symbolic’.¹³¹ Nevertheless, the Minister for Primary Industries noted that recognising sentience in the preamble to the *AWANZ* might play an important role in influencing the future operation of the *AWANZ*, because of the relevance of sentience in interpreting provisions in the Act.¹³²

The legal recognition of animal sentience in the *AWANZ* has both similarities to, and differences from, the recognition in *TFEU* art 13. The *AWANZ* includes reference to sentience as an aspect of the purpose of the Act, which may influence interpretation of the Act’s provisions where a purposive approach to interpretation is applied.¹³³ In this respect, New Zealand courts have used long titles when applying a purposive approach.¹³⁴ Similarly, *TFEU* art 13 obliges Member States to pay regard to ‘the welfare requirements of animals’ in certain circumstances, *because* animals are sentient. Thus, the reference to sentience provides the purpose for the substantive obligation and may influence the interpretation of the substantive obligation.

¹²⁶ (26 November 2014) 702 NZPD 898–9 (Animal Welfare Amendment Bill — Second Reading, Nathan Guy). See also Ministry for Primary Industries (NZ), *Animal Welfare Amendment Bill: Issues Paper Developed by the Ministry for Primary Industries* (Issues Paper, 5 December 2013) 8 <https://www.parliament.nz/en/pb/sc/submissions-and-advice/document/50SCPP_ADV_00DBHOH_BILL12118_1_A371224/ministry-for-primary-industries-issues-paper>; Marcelo B Rodriguez Ferrere, Mike King and Levi Mros Larsen, ‘Animal Welfare in New Zealand: Oversight, Compliance and Enforcement’ (Project Report, New Zealand Law Foundation, 2019) 29.

¹²⁷ Guy (n 126) 898–9.

¹²⁸ *Ibid* 898.

¹²⁹ Ministry for Primary Industries (NZ) (n 126) 6.

¹³⁰ *Ibid*.

¹³¹ *Ibid* 8.

¹³² *Ibid* 9.

¹³³ See *Interpretation Act 1999* (NZ) s 5(1).

¹³⁴ JF Burrows, *Statute Law in New Zealand* (LexisNexis Butterworths, 3rd ed, 2003) 166.

Quebec is the third jurisdiction considered here that has legally recognised animal sentience. On 4 December 2015, the General Assembly of Quebec passed Bill 54, *An Act to Improve the Legal Situation of Animals*.¹³⁵ This Act amended the *Civil Code of Quebec*¹³⁶ to formally recognise animals as sentient beings.¹³⁷ Accordingly, s 898.1 of the *Civil Code of Quebec* now stipulates that '[a]nimals are not things. They are sentient beings and have biological needs'. *An Act to Improve the Legal Situation of Animals* also operated to enact the *Animal Welfare and Safety Act* ('AWSA (Quebec)').¹³⁸ Like the *Civil Code of Quebec*, the AWSA (Quebec) recognises that 'animals are sentient beings that have biological needs'.¹³⁹ While the *Civil Code of Quebec* and the AWSA (Quebec) recognise animal sentience, they do not grant rights to animals;¹⁴⁰ indeed, s 898.1 of the *Civil Code of Quebec* explicitly indicates that laws concerning property continue to apply to animals. Further, while the AWSA (Quebec) imposes obligations of care and prohibitions against causing distress to animals, these protections do not extend to animals involved in agricultural activities, teaching activities, or scientific research undertaken in accordance with generally recognised rules.¹⁴¹

While there are differences between the jurisdictions considered here, the relevant provisions bear striking resemblance to each other. In each jurisdiction, concern for animal welfare and a perceived need to improve legal protections for animals provided the context for legal recognition of animal sentience. In this respect, the sentience provisions were the product of domestic pressures, but also pressures that transcend individual jurisdictions. At the same time, it is not clear that explicit recognition of sentience in any of the jurisdictions has yet had any significant consequence for animals.

B Tangible Consequences of Recognising Sentience

The ACT amendments expressly recognise animal sentience, but do not clearly link this acknowledgment with any substantive obligation on humans to protect animals. It could be argued that the wording of s 4A links recognition of sentience to substantive obligations, for example, via the words '[t]his is to be achieved ... by ... promoting and protecting the welfare of animals'.¹⁴² This is, however, a tangential link. In this respect, it is similar to the amendments made to the AWANZ; the long title recognises animal sentience, but there is no link between the acknowledgement of sentience and a substantive obligation on humans in relation to their care for animals. Likewise, the legislative amendments passed in Quebec to recognise animal sentience have no link to a duty on humans to care for animals.¹⁴³

¹³⁵ Bill 54, *An Act to Improve the Legal Situation of Animals* (n 58).

¹³⁶ *Civil Code of Quebec*, CQLR c CCQ-1991 ('*Civil Code of Quebec*').

¹³⁷ Bill 54, *An Act to Improve the Legal Situation of Animals* (n 58) explanatory note.

¹³⁸ AWSA (Quebec) (n 17).

¹³⁹ *Ibid* preamble.

¹⁴⁰ Amanda Elizabeth Boniface, 'Animals: "Objects" or "Sentient Beings"?: A Comparative Perspective of the South African Law' (2016) 2(3) *Journal of Advances in Humanities and Social Sciences* 143, 151.

¹⁴¹ AWSA (Quebec) (n 17) s 7.

¹⁴² AWA (n 10) s 4A(2)(a).

¹⁴³ See, eg, *Esposito v 9177-3184 Quebec Inc* [2017] QCCQ 9937. In that case, the Court of Quebec identified that the AWSA (Quebec) would be useful to determine what a pet care business's duties

These provisions contrast with *TFEU* art 13, whose recognition of animal sentience provides the basis for the substantive obligation on the EU and its Member States to ‘pay full regard’ to animal welfare matters when formulating and implementing particular EU policies. In this respect, *TFEU* art 13 operates to create a linkage between sentience and animal welfare.¹⁴⁴ In other words, *TFEU* art 13 asserts that it is *because* animals are sentient that humans must consider animal welfare. This linkage is important because the way in which sentience is conceived, particularly in the absence of an explicit definition, affects how animal welfare is approached in EU law.¹⁴⁵ To be clear, the reference to sentience in *TFEU* art 13 alone does not create any legal obligation. It is instead included as justification for the legal obligation to ‘pay full regard to the welfare requirements of animals’.¹⁴⁶

Masterrind GmbH v Hauptzollamt Hamburg-Jonas,¹⁴⁷ decided in 2016, illustrates the operation of *TFEU* art 13. In that case, the Court stated that the aim of the relevant regulation was ‘to avoid transporting animals in a way likely to cause them injury or undue suffering’, and commented that ‘[t]his is in line with Article 13 *TFEU*, according to which animals are sentient beings’.¹⁴⁸ As a result, the Court held that *TFEU* art 13 required the EU and its Member States to pay full regard to animal welfare requirements in formulating and implementing agriculture policy.¹⁴⁹ Further, *European Coalition to End Animal Experiments v European Chemicals Agency (ECHA)*¹⁵⁰ illustrates the nature of the legal obligation to ‘pay full regard’.¹⁵¹ The Court identified that the Board of the European Chemicals Agency was obliged, when making decisions, such as the contested decision to require a second species prenatal developmental toxicity study, to pay full regard to animal welfare requirements.¹⁵²

The link between *TFEU* art 13 and a substantive obligation to pay full regard to animal welfare requirements is commendable. However, the EU, to a greater extent than the ACT, New Zealand or Quebec, is limited in the matters on which it can legislate. In particular, animal welfare is not included as an area of competence

were towards a pet dog. The Court cited the recognition of animal sentience in the *Civil Code of Quebec*, before proceeding to state that the *AWSA (Quebec)* defines the obligations of care and prohibits certain acts by an owner or custodian of an animal: at 22. While the Court did not expressly make the point, it may be inferred that the legal recognition of animal sentience in the *Civil Code of Quebec* in itself does not impose a legal obligation, but that the relevant provisions of the *AWSA (Quebec)* should be consulted in this respect.

¹⁴⁴ Bart Driessen, ‘Fundamental Animal Rights in European Law’ (2017) 23(3) *European Public Law* 547, 568.

¹⁴⁵ Sowery (n 116) 59.

¹⁴⁶ *TFEU* (n 34) art 13; UK Centre for Animal Law, ‘Brexit, Article 13, and the Debate on Recognising “Animal Sentience” in Law’ (Research Paper, 28 November 2017) 2.

¹⁴⁷ *Masterrind GmbH v Hauptzollamt Hamburg-Jonas* (Court of Justice of the European Union, C-469/14, ECLI:EU:C:2016:47, 28 July 2016) (*‘Masterrind’*).

¹⁴⁸ *Ibid* [29]. See also *Pfotenhilfe-Ungarn eV v Ministerium für Energiewende, Landwirtschaft, Umwelt und ländliche Räume des Landes Schleswig-Holstein* (Court of Justice of the European Union, C-301/14, ECLI:EU:C:2015:589, 10 September 2015) [5].

¹⁴⁹ *Masterrind* (n 147) [29].

¹⁵⁰ *European Coalition to End Animal Experiments v European Chemicals Agency (ECHA)* (General Court of the European Union, T-673/13, ECLI:EU:T:2015:167, 13 March 2015) (*‘European Coalition’*).

¹⁵¹ *TFEU* (n 34) art 13.

¹⁵² *European Coalition* (n 150) [61].

to legislate and adopt legally binding acts of the EU in arts 2–6 of the *TFEU*. Thus, while the protection of animal welfare is a ‘legitimate objective in the public interest’,¹⁵³ the EU has no competence to adopt animal welfare standards in the absence of a relevant policy area, such as agriculture and fisheries.¹⁵⁴ Thus, it would not be possible for the EU to adopt an animal welfare law, like that adopted in the other jurisdictions considered here, which criminalises human conduct towards animals or imposes broad duties on humans to care for animals.

C *Impact on Statutory Interpretation*

While the ACT sentience recognition is unlikely to have a significant impact in the substantive sense outlined above, it may have more influence through the processes of statutory interpretation. When courts interpret statutory provisions in order to give them meaning, and where there is more than one interpretation of a particular provision open to them, they are required to consider the purposes of the relevant legislation and give the provision the interpretation most in line with the legislative purposes.¹⁵⁵ This is the purposive approach to statutory interpretation, and is common in many jurisdictions.

In the context of the *AWA*, there are numerous provisions that courts may need to interpret. Perhaps one of the provisions most amenable to varying interpretations is the definition of cruelty set out in s 6A, which informs the prohibitions on cruelty and aggravated cruelty to animals set out in ss 7 and 7A. Here, conduct (or a failure to act) in relation to an animal is defined as cruelty only if it is ‘unjustifiable, unnecessary or unreasonable in the circumstances’.¹⁵⁶ The legislation does not define these terms, however, and they could be subject to numerous meanings.¹⁵⁷ For example, does the conduct need to be unjustifiable from the perspective of a human or from the perspective of an animal? Is conduct necessary if it allows farmers to adopt more efficient farming practices even though the animal would be better off under other practices?¹⁵⁸ In answering questions like these, courts will refer to the objects of the *AWA*, which now include a purpose to recognise that animals are sentient. It may be that reference to the objects will enable courts to take a more animal-centred approach to statutory interpretation. In particular, prosecutors and courts may give greater value to the estimation of each individual animal for the purposes of sentencing in criminal cases. In this respect, it is interesting to note that some United States’ courts are recognising animals as

¹⁵³ *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW v Vlaams Gewest* (Opinion of Advocate General Wahl, Court of Justice of the European Union, C-426/16, ECLI:EU:C:2017:926, 30 November 2017) [110] (*‘Liga’*).

¹⁵⁴ See *TFEU* (n 34) art 4(2)(d); Sowers (n 116) 57. Although the significance of EU legislation in areas of competence such as agriculture and fisheries should not be discounted; in this respect, the EU has some of the highest standards in the world for farmed animals.

¹⁵⁵ *Acts Interpretation Act* (n 14) s 15AA.

¹⁵⁶ *AWA* (n 10) s 6A.

¹⁵⁷ See Elizabeth Ellis, ‘Making Sausages & Law: The Failure of Animal Welfare Laws to Protect Both Animals and Fundamental Tenets of Australia’s Legal System’ (2010) 4 *Australian Animal Protection Law Journal* 6, 8.

¹⁵⁸ Note that farming practices are likely conducted pursuant to codes of practice, which are exempted from the cruelty prohibitions: *AWA* (n 10) s 20.

crime victims for sentencing purposes, meaning that each animal that is subjected to abuse counts as a separate ‘victim’ of the crime.¹⁵⁹

Even so, relying on courts to interpret legislation in a way that is more favourable to animals is a slow way to improve protections for animals. Courts must wait for cases to come before them in which the parties ask them to consider issues of interpretation before they are able to undertake the statutory interpretation exercise. In Australia, magistrates’ courts decide most animal cruelty cases,¹⁶⁰ and reasons for these decisions are not readily available; these factors make the potential for change via this pathway even slower. The paucity of case law from other jurisdictions in relation to legal recognition of animal sentience may be due, in part, to these issues.

Nevertheless, there is some evidence from other jurisdictions that animal sentience recognition can have influence through the processes of statutory interpretation. For example, the reference to animal sentience in *TFEU* art 13 may have assisted the interpretation of EU legislation in the case of *Zuchtvieh-Export GmbH v Stadt Kempten*.¹⁶¹ *Zuchtvieh* was concerned with whether animal welfare requirements relating to the transport of animals also apply to those parts of an international journey that take place outside of the EU. The European Court of Justice held that the relevant regulation should be interpreted generously, such that the EU animal welfare rules must be complied with even if the journey continues outside of the EU, so long as it commenced within the EU.¹⁶² *TFEU* art 13 grounds this interpretation. Moreover, EU case law establishes that ‘the protection of animal welfare is a legitimate objective in the public interest’.¹⁶³ The European Court of Justice relies on *TFEU* art 13 as the foundation of this principle.¹⁶⁴ Nevertheless, while *TFEU* art 13 has been influential in these instances, it is unclear the extent to which the express recognition of animal sentience, as opposed to the remainder of *TFEU* art 13, has contributed to this influence.

In the New Zealand context, several cases have referenced the recognition of animal sentience in the long title of the *AWANZ*.¹⁶⁵ *Erickson v Ministry for*

¹⁵⁹ See *State v Nix*, 334 P 3d 437, 448 (Or, 2014) vacated by *State v Nix*, 345 P 3d 416 (Or, 2015); *State v Crow*, 429 P 3d 1053, 1054 (Or Ct App, 2018); Jessica Rubin, ‘Desmond’s Law: A Novel Approach to Animal Advocacy’ (2018) 24(2) *Animal Law* 243, 275.

¹⁶⁰ Rochelle Morton, Michelle L Hebart and Alexandra L Whittaker, ‘Explaining the Gap between the Ambitious Goals and Practical Reality of Animal Welfare Law Enforcement: A Review of the Enforcement Gap in Australia’ (2020) 10(3) *Animals* 482.

¹⁶¹ *Zuchtvieh-Export GmbH v Stadt Kempten* (Court of Justice of the European Union, C-424/13, ECLI:EU:C:2015:259, 23 April 2015) (‘*Zuchtvieh*’). See also UK Centre for Animal Law (n 146) 5.

¹⁶² *Zuchtvieh* (n 161) [56].

¹⁶³ *Ibid* [35]; *Liga* (n 153) [110]; *French Republic v European Parliament and Council of the European Union* (C-244/03) [2005] ECR 4021, 4049 [97].

¹⁶⁴ *Driessen* (n 144) 552.

¹⁶⁵ Note that enforcement of the *AWANZ* is the responsibility of the Ministry for Primary Industries (NZ) and the Royal New Zealand Society for the Prevention of Cruelty to Animals (‘SPCA’): *Ministry for Primary Industries (NZ) Animal Welfare* (Web Page, 12 September 2020) <<https://www.mpi.govt.nz/law-and-policy/legal-overviews/animal-welfare>>. The vast majority of investigations are undertaken by the SPCA, a charitable organisation, and a very small proportion of investigations result in prosecution: SPCA, *Annual Report 2018–19*, 7 <<https://www.sPCA.nz/downloads/assets/152111/1/spca-annual-report-2018-19.pdf>>. Accordingly, the lack of case law in relation to the sentience provision is understandable. See also Annabel Markham, ‘Animal Cruelty Sentencing in Australia

Primary Industries is a key case in this respect.¹⁶⁶ *Erickson* concerned the violent conduct of a casually employed slaughterman towards bobby calves. The defendant pleaded guilty to the charges brought against him under ss 28(1)(d), 12(c), 28A(1)(d), 29(a) and 12(a) of the AWANZ.¹⁶⁷ Two of these charges related to the wilful treatment of a calf with the result that it was seriously injured or impaired, one charge related to killing a calf in such a manner that it suffered unreasonable or unnecessary pain or distress, two representative charges were brought for recklessly ill-treating calves with the result that they were seriously injured or impaired, four representative charges were brought for ill-treating calves and one representative charge was related to failing to meet the calves' physical, health and behavioural needs.¹⁶⁸ In its judgment, the Court of Appeal set out the considerations that determine the gravity of offending in cases of wilful and reckless ill-treatment of animals, with a view to giving assistance to sentencing courts when sentencing offenders for these types of crimes.¹⁶⁹

The Court of Appeal in *Erickson* stated that '[t]he primary purpose of the Act is stated in its title, parts of which read: ... to recognise that animals are sentient'.¹⁷⁰ Yet the Court did not look at the long title in detail, but merely implied that one must have the purpose of the AWANZ in mind when interpreting it. Unfortunately, the Court did not explain how it applied the purpose when interpreting the relevant provisions in the particular circumstances of the case. Further, the Court also referred to pre-2015 amendment cases as precedent for determining the 'gravity of the offending'.¹⁷¹ The discussion of these cases does not reference the 2015 amendments, and thus it seems that explicit legal recognition of sentience did not influence a determination of the gravity of the offence under s 28.

*Police v Witehira*¹⁷² and *McCartney v Canterbury Society for the Prevention of Cruelty to Animals*¹⁷³ also reference the recognition of animal sentience in the AWANZ.¹⁷⁴ *Witehira* was concerned with sentencing the defendant for brutally bashing to death his son's dog while he was under the influence of alcohol. The relevant charges were brought under s 28(1)(c) of the AWANZ.¹⁷⁵ As the Court of Appeal did in *Erickson*, the District Court in *Witehira* noted the stated primary purpose of the AWANZ, including the recognition of animal sentience, yet failed to

and New Zealand' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia* (Federation Press, 2nd ed, 2013) 208, 210–11.

¹⁶⁶ *Erickson v Ministry for Primary Industries* [2017] NZAR 1015 ('*Erickson*').

¹⁶⁷ *Ibid* 1018–19 [4].

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid* 1018 [1]–[2]. See also *Auckland Royal New Zealand Society for the Prevention of Cruelty to Animals v MacPherson* [2019] NZDC 4102, [15]–[16]; *Waikato SPCA v Tupaipiki* [2018] NZDC 17046, 12–13; *Ministry for Primary Industries v Down Cow Ltd* [2020] DCR 138, 142 [13]–[14]; *Ministry for Primary Industries v Little* [2017] NZDC 25077, [15]; *Ministry of Primary Industries v Castlerock Dairies Ltd* [2017] NZDC 18237, [52].

¹⁷⁰ *Erickson* (n 166) 1025 [32].

¹⁷¹ *Ibid* 1027 [42]. See also *Ministry for Primary Industries v Erasmus* [2013] NZAR 311.

¹⁷² *Police v Witehira* [2018] DCR 638 ('*Witehira*').

¹⁷³ *McCartney v Canterbury Society for the Prevention of Cruelty to Animals* [2018] NZHC 2624 ('*McCartney*').

¹⁷⁴ See also *Whangarei SPCA v Peart* [2018] NZDC 14948, [16]–[17].

¹⁷⁵ *Witehira* (n 172) 640 [4].

explain how that purpose influenced its interpretation of provisions in the *AWANZ*.¹⁷⁶ The case of *McCartney* was also concerned with companion animals and a particular owner's failure to euthanise one cat and to obtain appropriate medical treatment for a second cat.¹⁷⁷ In its judgment, the New Zealand High Court acknowledged that the 2015 amendments 'recognised that animals are sentient' and placed obligations upon their owners.¹⁷⁸ As in *Erickson* and *Witehira*, however, it is not clear how this purpose influenced the High Court's interpretation of the *AWANZ*'s provisions.

*Wallace v Royal Society for Prevention of Cruelty to Animals Auckland (SPCA Auckland)*¹⁷⁹ provides a more tangible example of how recognition of animal sentience may influence statutory interpretation of the *AWANZ*. Wallace and Glover were charged with offences under the *AWANZ*.¹⁸⁰ Before the determination of those charges, the SPCA brought an application for disposal orders under the *AWANZ* in order to 'sell, rehome or, as a last resort, euthanise the dogs' the subject of the alleged offences.¹⁸¹ Wallace and Glover applied to stay or adjourn the application pending the resolution of the criminal charges.¹⁸² The District Court declined to grant an adjournment and the matter was appealed to the High Court.¹⁸³ In affirming the District Court's decision, the High Court identified the purpose of the disposal provision as including the prevention of negative impacts for animals, which it stated was appropriate for the purpose of the *AWANZ* as set out in its long title.¹⁸⁴ In other words, the High Court used the purpose of the *AWANZ*, including recognition that animals are sentient, to support their interpretation of the disposal provision as including the avoidance of harm to animals.

Recent case law in Quebec also provides some insight into how legislative recognition of animal sentience may influence statutory interpretation. In *Trahan v Ville de Montréal*,¹⁸⁵ the Quebec Superior Court needed to determine whether the City of Montreal was required to consider the dog owner's point of view before issuing a euthanasia order.¹⁸⁶ The Court referred to the legislative recognition of the sentience of animals, which it said supported answering this question in the affirmative.¹⁸⁷ *Road to Home Rescue Support v Ville de Montréal* provides further instruction.¹⁸⁸ In that case, the Quebec Court of Criminal Appeal held that there is no incompatibility between provisions that permit the euthanasia of dangerous dogs and the recognition of sentience in s 898.1.¹⁸⁹ In obiter dicta, the Court also indicated

¹⁷⁶ Ibid 640 [7].

¹⁷⁷ *McCartney* (n 173) [16]–[17].

¹⁷⁸ Ibid [48].

¹⁷⁹ *Wallace v Royal Society for Prevention of Cruelty to Animals Auckland (SPCA Auckland)* [2019] NZAR 1393.

¹⁸⁰ Ibid 1395 [5].

¹⁸¹ Ibid [3].

¹⁸² Ibid 1394–5 [1].

¹⁸³ Ibid.

¹⁸⁴ Ibid 1400–1 [23].

¹⁸⁵ *Trahan v Ville de Montréal* [2019] QCCS 4607 (Quebec Superior Court, Bachand, JCS, 1 November 2019).

¹⁸⁶ Ibid [13].

¹⁸⁷ Ibid at [30]–[31].

¹⁸⁸ *Road to Home Rescue Support v Ville de Montréal* [2019] QCCA 2187 (Quebec Court of Criminal Appeal, Bich JCA, Savard JCA and Rancourt JCA, 20 December 2019).

¹⁸⁹ Ibid [56].

that s 898.1 ‘has the value of a behavioural standard’ in that it should regulate the behaviour of those that interact with animals and may have a direct effect on the content of legal regulations.¹⁹⁰

D *Sentience as a Tool for Advocacy*

In a recent study, Blattner identifies that the legal recognition of animal sentience effectively operates as a ‘gateway to according animals protection under the law’.¹⁹¹ In other words, it must be shown that animals have sentience before they merit legal protection. This is not immediately obvious when looking at relevant legislation. Under the AWA, for example, the legislative objects are set out in s 4A, which includes the aim of recognising that animals are sentient beings. The dictionary at the end of the AWA defines ‘animal’ to include live vertebrates, cephalopods and crustaceans.¹⁹² In order to come within the scope of the AWA then, an animal needs to come within this definition, and does not need to demonstrate sentience. Nevertheless, the legislative reliance on the concept of sentience suggests that a species is only likely to be explicitly included within the scope of animal protection legislation if science establishes that it is sentient.

The use of sentience as a gateway to the legal protection of animals has significant potential for animal advocates, and thus for improved levels of animal protection. This is because it recognises the intrinsic value of animals and bases it on a scientific criterion, as opposed to other potential criteria, like human use, human popularity or rationality.¹⁹³ If animals are protected *because* they are sentient, then many of the exclusions and defences commonly found in animal protection laws are open to challenge.¹⁹⁴ In short, animal advocates will be able to present compelling arguments that if animals are protected because they are sentient, then that protection should also be commensurate with their sentience.

E *Public Awareness and Further Change*

A further way in which legal recognition of animal sentience could improve the lives and treatment of animals is through its impact on public awareness and possible further resulting changes. The nature of the ACT amendments, as an Australian legal first and as part of a broader legal movement, means that the change has generated significant media attention. Mainstream news, internet, radio and academic writing provide commentary on the ACT amendments.¹⁹⁵ This exposure is likely to increase

¹⁹⁰ Ibid [57].

¹⁹¹ Blattner (n 19) 125, 131.

¹⁹² AWA (n 10) Dictionary (definition of ‘animal’).

¹⁹³ Blattner (n 19) 121–2.

¹⁹⁴ In relation to exclusions, see, eg, Steven White, ‘Farm Animal Protection Policymaking and the Law: The Impetus for Change’ (2018) 43(4) *Alternative Law Journal* 244.

¹⁹⁵ See, eg, Ross Kelly, ‘Recognition of Animal Sentience on the Rise’ *Veterinary Information Network News Service* (online, 14 May 2020) <<https://news.vin.com/default.aspx?pid=210&Id=9639465>>; David Brooks with Danielle Celermajer, ‘Wild Lives and Broken Promises: Why are Kangaroos Deemed “Killable”?’ *ABC News* (online, 20 July 2020) <<https://www.abc.net.au/religion/david-brooks-danielle-celermajer-wild-lives-and-broken-promises/12474146>>; Jane Kotzmann, ‘ACT’s New Animal Sentience Law Recognises an Animal’s Psychological Pain and Pleasure, and May Lead

public awareness of the science in relation to animal sentience and the way in which some laws are changing to respond to that science. Increased awareness may generate change in the way people deal with and treat animals.

The ACT amendments are likely to generate further legal changes in other Australian jurisdictions. The Northern Territory Social Policy Scrutiny Committee undertook the *Inquiry into the Animal Protection Bill 2018* and in doing so, considered a number of submissions advocating for legal recognition of animal sentience.¹⁹⁶ Nevertheless, the Committee decided not to recommend recognising animal sentience in the legislation, as they felt that it was already implicitly present.¹⁹⁷ While there is some basis to this argument, express recognition of animal sentience does clarify, and thus elevate, the importance of animal mental states separate to the issue of physical harm to animals. Aside from the Northern Territory, Victoria is also currently reviewing its *Prevention of Cruelty to Animals Act 1986* (Vic) and is expected to amend the Act to legally recognise animal sentience.¹⁹⁸ Further, Western Australia is also undertaking a review of their *Animal Welfare Act 2002* (WA) and has received submissions for the legal recognition of animal sentience.¹⁹⁹

F *Limitations*

While legal recognition of animal sentience is a positive step forward for animal protection, this type of legal amendment fails to address aspects of animal welfare laws that leave animals vulnerable to human exploitation. This section discusses the deficiencies in the way that animal welfare laws address the human–animal relationship.²⁰⁰

to Better Protections’, *The Conversation* (online, 3 October 2019) <<https://theconversation.com/acts-new-animal-sentience-law-recognises-an-animals-psychological-pain-and-pleasure-and-may-lead-to-better-protections-124577>>; Dan Jervis-Bardy, ‘ACT’s “Sentience” Laws Impose Tough New Penalties for Mistreating Animals’, *The Sydney Morning Herald* (online, 27 September 2019) <<https://www.smh.com.au/environment/sustainability/act-s-sentience-laws-impose-tough-new-penalties-for-mistreating-animals-20190927-p52vfe.html>>; Elise Scott, Tahlia Roy and Niki Burnside, ‘Canberra Set to Recognise Animals as “Sentient Beings” that are Able to Feel and Perceive in Australian First’, *ABC News* (online, 13 May 2019) <<https://www.abc.net.au/news/2019-05-13/canberra-animal-laws-fine-owners-who-dont-exercise-dogs/11106158>>; *Breakfast with Ewan Gilbert* (ABC Central West NSW, 9 October 2019) <<https://www.abc.net.au/radio/centralwest/programs/breakfast/breakfast/11569494>>.

¹⁹⁶ Social Policy Scrutiny Committee, Parliament of the Northern Territory, *Inquiry into the Animal Protection Bill 2018* (Report, May 2018) 19 [3.7]–[3.9].

¹⁹⁷ *Ibid* 20 [3.12].

¹⁹⁸ Minister for Agriculture (Vic), ‘Andrews Labor Government Delivers More Support for Animal Welfare’ (Media Release, 19 October 2017) <<https://www.premier.vic.gov.au/andrews-labor-government-delivers-more-support-animal-welfare>>. Note the *Prevention of Cruelty to Animals Regulations 2019* (Vic) came into force on 14 December 2019 and strengthen the requirements of the *Prevention of Cruelty to Animals Act 1986* (Vic).

¹⁹⁹ Department of Primary Industries and Regional Development (WA), ‘Review of the *Animal Welfare Act 2002*’ (Web Page, 18 August 2020) <https://www.agric.wa.gov.au/animalwelfare/review-animal-welfare-act-2002?page=0%2C0#smartpaging_toc_p0_s2_h3>; Animal Welfare Review Panel (WA), *Review of the Animal Welfare Act 2002: Summary Report on the Public Consultation* (June 2020) 8–9.

²⁰⁰ See the discussion at Part IIA regarding welfare versus rights approaches to animals.

1 *The Legal Status of Animals*

While expressly recognising the sentience of animals in law suggests that the public perceives animals as sentient beings and not as objects, it fails to change the legal status of animals as property. In some jurisdictions, legislation expressly states the continuing application of property laws to animals. For example, in Quebec, while the *Civil Code of Quebec* and the *AWSA (Quebec)* recognise animal sentience, s 898.1 of the *Civil Code of Quebec* explicitly indicates that laws concerning property continue to apply to animals. In other jurisdictions, laws do not state that property laws will continue to apply to animals, and yet this is the case.²⁰¹ In the ACT, for example, while the *AWA* acknowledges animal sentience, the common law property status of animals is unaffected, and statutory laws such as s 4 of the *Competition and Consumer Act 2010* (Cth) continue to apply to animals.

Under EU legislation animals are referred to as both ‘sentient beings’ and ‘tradable products’, and thus according to Sowers hold a ‘dual status’.²⁰² While EU law considers animals to be sentient beings (in keeping with popular sentiment and scientific advancements), they also remain agricultural products. For example, art 38 of the *TFEU* defines agricultural products to include the products of stock farming and fisheries.²⁰³ Some EU legislation also describes animals merely as property.²⁰⁴ The reformed EU Common Agricultural Policy instruments do not explicitly, or directly, aim to improve farm animal welfare.²⁰⁵

Many animal advocates consider the property status of animals to be a significant obstacle to achieving genuine protection for animals.²⁰⁶ Francione, a leading animal rights advocate, argues that animals need only the right not to be treated as property.²⁰⁷ Similarly, the animal protection organisation, Voiceless, asserts that the property status of animals is ‘a key issue in their abuse and exploitation’.²⁰⁸ This is because the law frames property as ‘things’ that have no legal rights and no standing to challenge decisions made in relation to them.

²⁰¹ This may be because the property status of animals forms part of the common law.

²⁰² Sowers (n 116) 55.

²⁰³ *TFEU* (n 34) art 38(1).

²⁰⁴ Broom, ‘Animal Welfare in the European Union’ (n 41) 26, 53.

²⁰⁵ ‘The Common Agricultural Policy at a Glance’, *European Commission* (Web Page) <https://ec.europa.eu/info/food-farming-fisheries/key-policies/common-agricultural-policy/cap-glance_en#title>; Diane Ryland, ‘Animal Welfare in the Reformed Common Agricultural Policy: Wherefore Art Thou?’ (2015) 17(1) *Environmental Law Review* 22.

²⁰⁶ See, eg, Geeta Shyam, ‘The Legal Status of Animals: The World Rethinks Its Position’ (2015) 40(4) *Alternative Law Journal* 266; Taimie L Bryant, ‘Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans’ (2008) 39(2) *Rutgers Law Journal* 247, 254–5; Steven Wise, *Rattling the Cage: Toward Legal Rights for Animals* (Perseus Books, 2000); Tom Regan, *The Case for Animal Rights* (University of California Press, 1983) 347–9.

²⁰⁷ Francione (n 25). See also Gary L Francione, *Animals, Property and the Law* (Temple University Press, 1995).

²⁰⁸ Voiceless, *The Animal Law Toolkit* (Report, December 2009) 3.

2 *Legal Representation and Standing for Animals*

Relatedly, expressly recognising animal sentience does not give rise to additional avenues for challenging decisions concerning animals via legal means. In order to bring an action in court, most jurisdictions require that the claimant have legal personality and standing to bring an action. However, property does not have legal personality or standing. *Durand v Attorney General of Quebec*, which concerned an attempt to bring a class action relating to electromagnetic field pollution, highlights this issue.²⁰⁹ The plaintiffs sought to bring a class action, including ‘flora, fauna, pets and animals’ as class members.²¹⁰ The Court stated that s 898.1 of the *Civil Code of Quebec* ‘does not grant status as class members to flora, fauna, pets or animals’.²¹¹ It explained that while the *Civil Code* provides that ‘animals are not things’, they can still be property.²¹² This, the Court said, was ‘not indicative of being qualified to be a class member’.²¹³

This issue extends beyond the capacity of animals themselves to bring legal action, to both the capacity of animals to have their interests represented by people, and the capacity of people with an interest in animals to have standing in a particular case. For example, in the EU, it is clear that *TFEU* art 13 does not introduce any entitlement for legal representation of animals’ interests. *European Coalition*, decided in 2015, concerned a challenge to a decision made to retest a particular chemical on rabbits.²¹⁴ The key issue for the Court was whether the European Coalition to End Animal Experiments, an animal welfare group, had standing to bring the proceeding. The Court decided that the applicant did not meet any of the relevant standing requirements and, in particular, that the contested decision did not directly affect the applicant’s legal position.²¹⁵ While the applicant argued that a refusal to grant standing would mean that the interests of the laboratory animals would be unrepresented, this was insufficient to grant standing. Thus, while the *TFEU* recognises animals as sentient beings, such recognition does not create new or additional rights to have animals’ interests legally represented.

In Australia, there is limited scope for animals to have their interests represented before the law. Following the case of *Australian Conservation Foundation Inc v Commonwealth*,²¹⁶ a person or organisation wishing to challenge a decision must have a ‘special interest’ in the matter, which is more than a ‘mere intellectual or emotional concern’.²¹⁷ Unfortunately, an interest in the protection of animals and prevention of cruelty alone ‘does not constitute a special interest’.²¹⁸ Nevertheless, a court may grant standing to an animal protection group that is able

²⁰⁹ *Durand v Attorney General of Quebec* [2018] QCCS 2817, [1] (Superior Court).

²¹⁰ *Ibid* [42].

²¹¹ *Ibid* [48]–[49].

²¹² *Ibid* [50].

²¹³ *Ibid*.

²¹⁴ *European Coalition* (n 150) [3].

²¹⁵ *Ibid* [60].

²¹⁶ *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 (*‘ACF v Cth’*).

²¹⁷ *Ibid* 530 (Gibbs J).

²¹⁸ *Animal Liberation Ltd v Department of Environment and Conservation* [2007] NSWSC 221, [7], quoting *ACF v Cth* (n 216) 530–1 (Gibbs J).

to show some of the features that can indicate a special interest.²¹⁹ This was the case in *Animals' Angels eV v Secretary, Department of Agriculture*,²²⁰ where a variety of factors, including recognition by the Government, led to the Court granting the animal protection group Animals' Angels standing to challenge governmental decisions in relation to a live export voyage. While this limited scope for the legal representation of animal interests exists, however, there is no indication that the legal recognition of animal sentience in legislation will give rise to expanded or additional avenues for challenging decisions concerning animals via legal means.

3 *Human Cultural and Religious Rights*

Further, acknowledging animal sentience in the law does not mean that decisions that have consequences for animals will always seek to minimise animal pain and suffering. In particular, where there is a conflict between human cultural and religious rights and the welfare interests of animals, it is likely that human interests will prevail. Reference to *TFEU* art 13 demonstrates this point. Pursuant to that provision, the recognition of animal sentience and the associated legal obligation to 'pay full regard to the welfare requirements of animals' must be balanced with respect for other legislative provisions, and for customs, including religious rites, cultural traditions and regional heritage.²²¹ While animals may suffer less, for example, if they are stunned before slaughter, respect for religious rites that require slaughter by cutting through the jugular, carotid artery and windpipe while the animal is alive and healthy may take precedence.²²² In *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen VZW v Vlaams Gewest*, Advocate General Wahl noted the EU's 'wish to reconcile protection of the freedom to practise a religion with the protection of animal welfare' and that the EU rules 'strike a balance between the right to freedom of religion, on the one hand, and the requirements which flow from the protection of human health, animal welfare and food safety, on the other'.²²³ Similarly, *Inuit Tapiriit Kanatami v Parliament and Council, Regulation No 1007/2009* permitted 'seal products' to be sold where they were obtained from 'hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence'.²²⁴ The preferencing of human cultural and religious interests over animal interests is also evident in Australia. For example, the *Native Title Act 1993* (Cth) recognises traditional Indigenous hunting rights and exempts native title holders from federal and state/territory laws that prohibit hunting or fishing in certain areas or of certain animals.²²⁵

²¹⁹ See *North Coast Environment Council Inc v Minister for Resources (No 2)* (1994) 55 FCR 492.

²²⁰ *Animals' Angels eV v Secretary, Department of Agriculture* (2014) 228 FCR 35, 72 [120]–[121].

²²¹ *TFEU* (n 34) art 13.

²²² See Bruce (n 5) 211, 226–8.

²²³ *Liga* (n 153) [1], [5].

²²⁴ *Inuit Tapiriit Kanatami v Parliament and Council* (T-18/10) [2011] ECR-SC II-5604, II-5625 [74].

²²⁵ *Native Title Act 1993* (Cth) ss 211, 223(1)–(2).

4 *Influence of Human Use on Human–Animal Relationships*

Legally acknowledging animal sentience may suggest that the value ascribed to animals, and treatment of animals, will be influenced primarily by the understanding that animals are sentient. In other words, given that the law accepts that animals are sentient, human interactions with animals may be expected to be governed by an intention to minimise unnecessary animal pain and suffering. Experience in New Zealand, however, indicates that the ways in which humans use animals, as opposed to legally acknowledged animal sentience, remains a significant influence on human-animal relationships.

The New Zealand case of *Erickson* demonstrates the influence of human use of animals. In that case, the Court noted that, following the 2015 amendments, although the AWANZ drew a distinction between wild and domesticated animals, it did not distinguish between farm herd, working or companion animals.²²⁶ Nevertheless, the Court stated that ‘it is inevitable’ that such distinction be made, particularly because ‘[t]he objects they are kept for are different’.²²⁷ Thus, it seems that while the AWANZ acknowledges that *all* animals are sentient, that sentience does not prevent distinctions being made between different types of animals, or the same type of animal in different contexts, based on their value to humans, rather than the degree to which they have feelings, perceptions and experiences.

Comparison of the sentences in the cases of *Witehira* and *Erickson* may also support this conclusion. *Witehira* concerned sentencing the defendant for brutally bashing to death his son’s dog, while *Erickson* related to the violent conduct of a slaughterman towards 115 bobby calves.²²⁸ In *Witehira*, the sentence attached to the animal cruelty charges was 30 months’ imprisonment (prior to mitigating factors being applied), in comparison with 39 months’ imprisonment in *Erickson*.²²⁹ While various aggravating factors applied in each case, the broadly comparable starting points may be seen as indicative of the value that humans attach to a single family pet, as opposed to a significant number of livestock intended for slaughter.

5 *Exemptions from Animal Welfare Legislation*

One of the most significant failings of animal welfare laws, even in jurisdictions where sentience is expressly recognised, is that anti-cruelty legislation routinely excludes animals used in specified contexts.²³⁰ For example, under the AWA, the anti-cruelty provisions do not apply if the relevant conduct was in accordance with a code of practice.²³¹ Codes of practice may deal with a variety of matters including, for example, animal welfare in intensive farming, trapping and snaring of animals, and animal welfare in the racing industry.²³² Thus, conduct that is in accordance with

²²⁶ *Erickson* (n 166) 34.

²²⁷ *Ibid* 1026 [34].

²²⁸ Note that in *Erickson* a number of the charges were brought on a representative basis: *Erickson* (n 166) 4.

²²⁹ *Witehira* (n 172) 644 [26]; *Erickson* (n 166) 1033 [64].

²³⁰ See Ellis (n 157) 8.

²³¹ AWA (n 10) s 20.

²³² *Ibid* ss 21(j), (r), (y).

a code in relation to animal welfare in intensive farming will not breach the anti-cruelty provisions set out in ss 7 and 7A *even if* it satisfies the definition of cruelty in s 6A.

Codes of practice provide helpful guidance to people that work with animals by defining clearly what practices are acceptable and what are unacceptable.²³³ However, the bodies that develop codes of practice may be perceived as biased given industry influence over them and a view that government agriculture departments have a conflict of interest.²³⁴ Further, there has been a failure to incorporate independent scientific research and research on community views in relation to animal welfare into the codes.²³⁵ As a result, the codes of practice and their incorporation into animal welfare legislation effectively permit ‘institutionalised cruelty to millions of animals’ in Australia each year.²³⁶

V Reform Proposal for ACT and Other Australian Jurisdictions

Explicitly acknowledging that animals are sentient is a positive step to improve legal protection for animals in the ACT. This is because it generates public awareness of the situation of animals, is likely to have an impact on the interpretation of other provisions within the AWA and may generate further legislative changes in this area. Accordingly, this article argues that the other states and territories within Australia should adopt amendments to their respective animal welfare laws to recognise animal sentience.

Nevertheless, recognising animal sentience is only a very small step toward sufficiently protecting animals from human harm. Significant legal issues in the ACT and in other Australian jurisdictions remain, with the result being that animals continue to be vulnerable to human abuse. While this means that quite extensive legal reforms in this area are desirable, the reality is that meaningful change generally proceeds on an incremental basis. It was not until 1965, for example, that Indigenous Australians had the right to vote in all states and territories of Australia,²³⁷ and they continue to suffer from significant levels of discrimination.²³⁸

²³³ Jed Goodfellow, ‘Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis’ (PhD Thesis, Macquarie University, 2015) 127–8.

²³⁴ *Ibid* ch 7; Productivity Commission (Cth), *Regulation of Australian Agriculture* (Inquiry Report No 79, November 2016) 21; Ellis (n 157) 14–15.

²³⁵ Productivity Commission (n 234) 22.

²³⁶ Goodfellow (n 233) 125; Ellis (n 157) 9.

²³⁷ ‘Electoral Milestones for Indigenous Australians’, *Australian Electoral Commission* (Web Page, 22 August 2019) <<https://www.aec.gov.au/indigenous/milestones.htm>>.

²³⁸ Alison Markwick et al, ‘Experiences of Racism among Aboriginal and Torres Strait Islander Adults Living in the Australian State of Victoria: A Cross-Sectional Population-Based Study’ (2019) 19(309) *BMC Public Health* 1, 1; Shelley Bielefeld and Jon Altman, ‘Australia’s First Peoples — Still Struggling for Protection Against Racial Discrimination’ (Conference Paper, Australian Human Rights Commission, Papers from the 40 Years of the *Racial Discrimination Act 1975* (Cth) Conference, August 2015); Naomi Priest et al, ‘Bullying Victimization and Racial Discrimination among Australian Children’ (2016) 106(10) *American Journal of Public Health* 1882.

Given that this is the case, this article advocates only for the most pressing reforms to bring animal welfare law into line with recognition of animal sentience.²³⁹

While all states and territories in Australia should recognise animal sentience in their laws, they should also explicitly link this recognition to obligations on humans to care for animals, as well as prohibitions on certain conduct towards animals. This is important because it clarifies why animal welfare is important and will make it more likely that the recognition of animal sentience will influence the statutory interpretation of other provisions. Further, it should be clarified that provisions within animal welfare legislation, such as prohibitions on causing unnecessary pain, should not be interpreted from the perspective of human interest, but from the perspective of the animal in question.

This article advocates two further, more significant, changes. First, a national independent statutory agency, including animal welfare science and community ethics advisory committees, should be established, with responsibility for developing national animal welfare standards. This would address concerns about conflicts of interest in current code-setting arrangements and enable codes to better reflect community views regarding the ways in which animals should be treated.²⁴⁰ Second, in order to ensure that animal interests are sufficiently represented in decisions that affect them, people should have the capacity to legally represent animals. Further research is required to elaborate on the details of this proposed change to standing rules.²⁴¹ However, the change should fundamentally enable people and organisations to bring legal actions on behalf of animals and to represent animals in existing proceedings where the relevant decision would affect those animals.

VI Conclusion

Legal recognition of animal sentience in the ACT is primarily of symbolic value. Commentary in relation to analogous legislation supports this conclusion. For example, Cupp asserts that '[d]escribing an animal as "sentient" does not in itself create new legal obligations'.²⁴² Similarly, when discussing the legal recognition of animal sentience in France, Neumann states that 'it can be considered as a highly "symbolic move" which should be warmly welcomed'.²⁴³

Yet, legally recognising that animals are sentient still constitutes a significant step towards improving protections for animals in the ACT. The legal recognition of animal sentience does have very real potential to influence the interpretation of other

²³⁹ To the extent that this might be possible; see Sowery (n 116) 97.

²⁴⁰ This proposal is not new: see Productivity Commission (n 234) 21–2; Goodfellow (n 233) 284–8.

²⁴¹ Academic research provides guidance here: see, eg, Christopher D Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects' (1972) 45(2) *Southern California Law Review* 450, 464; Marguerite Hogan, 'Standing for Nonhuman Animals: Developing a Guardianship Model from the Dissents in *Sierra Club v Morton*' (2007) 95(2) *California Law Review* 513; Cass R Sunstein, 'Standing for Animals (With Notes on Animal Rights)' (2000) 47(5) *UCLA Law Review* 1333.

²⁴² Cupp (n 63) 1049.

²⁴³ Jean-Marc Neumann, 'The Legal Status of Animals in the French Civil Code' (2015) 1 *Global Journal of Animal Law* 1, 13.

substantive provisions affecting animals.²⁴⁴ When interpreting legislation, courts in the ACT are required to interpret legislation in light of its purpose.²⁴⁵ Recognising animal sentience in the legislation, particularly as an expressed purpose of the legislation, is therefore likely to influence the interpretation of other provisions within the legislation.

The legal recognition of animal sentience in the ACT will also have a broader impact. First, it is likely that the change will generate an increase in public awareness of the issues facing animals. In this respect, Gacek and Jochelson's assertions that the '[l]aw can perform a symbolic function by identifying normative social values from which legal subjects are formed' and that '[e]ven minor legal advances have the potential to bring into cultural consciousness new conceptions of ways to think of and discuss animal life and regulation'²⁴⁶ highlight the importance of such public awareness. As Cupp argues, 'framing is a powerful tool',²⁴⁷ and the language of sentience can help the public to think about animals in a more sophisticated, and hopefully more compassionate, way. Second, the legislative change is also likely to generate further legal changes in this space. In particular, other Australian jurisdictions are likely to adopt similar legislative changes.

While acknowledging animal sentience is commendable, it nevertheless fails to address the significant ways in which the law renders animals vulnerable to human cruelty. In this respect, this article has suggested reforms to the law that stem directly from a genuine appreciation of animal sentience, and advocates that they be adopted in all Australian jurisdictions. First, the legal obligations that humans have vis-à-vis animals and the recognition of animal sentience should be expressly linked, and sentience should be the primary consideration taken into account when interpreting those obligations. Second, the Federal Government should establish a national independent statutory agency, including animal welfare science and community ethics advisory committees, to develop national animal welfare standards. Finally, humans and organisations should be empowered to legally represent animal interests, to ensure that their interests in avoiding pain and suffering, and in experiencing happiness and pleasure, are adequately represented and taken into account.

²⁴⁴ Annie Perkins, 'Animal Sentience Workshop Report' (Research Paper, Groundwork Associates Ltd, 15 November 2017) 12.

²⁴⁵ See *Acts Interpretation Act* (n 14) s 15AA.

²⁴⁶ Gacek and Jochelson (n 63) 344–5.

²⁴⁷ Cupp (n 63) 1046.

Bargaining in a Vacuum?

An Examination of the Proposed Class Exemption for Collective Bargaining for Small Businesses


Tess Hardy* and Shae McCrystal†


Abstract

The Australian Competition and Consumer Commission ('ACCC') is on the cusp of introducing a class exemption for collective bargaining for small businesses. This development is not just novel in the context of Australian competition law, it is important in terms of addressing entrenched imbalances of bargaining power in business-to-business transactions. By surveying the recent legislative history relating to collective bargaining in the commercial context, we show that the class exemption fills critical gaps in the ACCC's existing authorisation and notification processes. The article outlines key features of the proposed class exemption. Drawing on labour and industrial relations theories, the article then critically examines the class exemption through a series of dimensions, including the status, agent, level, scope and coverage of bargaining. This analysis reveals that the failure to formalise the bargaining processes and outcomes, the emphasis on voluntarism and the absence of any right to take collective boycotts, will not only lead to uncertainty, it will ultimately limit the overall effectiveness of collective bargaining in this forum.

I Introduction

The Australian Competition and Consumer Commission ('ACCC') has been developing a new class exemption for collective bargaining for small businesses.¹ Along with the existing notification and authorisation processes, a class exemption is one novel way to ensure that collective bargaining between commercial parties

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¹ Australian Competition and Consumer Commission ('ACCC'), *Potential ACCC 'Class Exemption' for Collective Bargaining* (Discussion Paper, 23 August 2018) ('*ACCC Discussion Paper*'); ACCC, 'ACCC Class Exemption for Collective Bargaining — Update' (Media Release, 19 December 2018).

does not breach competition law.² While collective bargaining is a concept that is familiar to most labour lawyers, it is less clear how this concept will be interpreted and implemented in the context of business-to-business relationships. Will the proposed class exemption achieve the purported policy objective of permitting small businesses to work together as a group so that they can ‘negotiate more efficiently with larger businesses, and achieve better terms and conditions, than they can on their own’?³

Section II of this article considers and compares the traditional conception and regulation of collective bargaining in labour law and in competition law respectively. This analysis highlights that labour law and competition law each have a distinct view of the potential and perils of collective action and a different view on the most effective mechanisms for addressing the perceived market failures. In labour law, collective bargaining is a core principle and a fundamental right.⁴ As a consequence, the regulation of employee labour markets in Australia has been ‘largely excised from competition law’.⁵ In practice, this means that some degree of anti-competitive conduct by unions and employer associations is permitted (albeit it is not entirely unconstrained).⁶ In contrast, competition law (and the common law more generally) views collective bargaining between two commercial parties as a restraint of trade. Collective action in this context is unacceptable and should be restricted (if not prohibited entirely). Expanding the circumstances in which collective bargaining can lawfully take place in a commercial context requires a rebalancing of these conflicting objectives and priorities. These tensions are especially pronounced in relation to self-employed workers and franchisees. These business forms resemble traditional employment in significant ways,⁷ but their status as small businesses means that they have always been denied the right to lawfully engage in collective bargaining. The rise of the so-called ‘gig’ economy,⁸ and the renewed focus on the regulatory challenges posed by the franchising model,⁹ have

² Exemptions of this type are relatively common in overseas jurisdictions, see generally Stephen King, ‘Collective Bargaining by Business: Economic and Legal Implications’ (2013) 36(1) *University of New South Wales (UNSW) Law Journal* 107, 108.

³ *ACCC Discussion Paper* (n 1) 2. See also ACCC, *Small Business Collective Bargaining: Notification and Authorisation Guidelines* (Guide No 12/18_1472, December 2018) (‘ACCC Guidelines’).

⁴ See, eg, International Labour Organization, *Freedom of Association and Protection of the Right to Organise Convention* (Convention No 87, adopted 9 July 1948, entered into force 4 July 1950) and *Right to Organise and Collective Bargaining Convention* (Convention No 98, adopted 1 July 1949, entered into force 18 July 1951).

⁵ Productivity Commission (Cth), *Workplace Relations Framework: Productivity Commission Inquiry Report* (Report No 76, 30 November 2015) vol 2, 948. See also Gary Banks, ‘Competition Policy’s Regulatory Innovations: Quo Vadis?’ (Speech, ACCC Regulatory Conference, 26 July 2012 and Economists Conference Business Symposium, 12 July 2012) 8.

⁶ See *Competition and Consumer Act 2010* (Cth) ss 45D–45DD (‘CC Act’), which prohibit boycotts and secondary boycotts by trade unions (and others). See also Shae McCrystal, ‘Why is it so Hard to Take Lawful Strike Action in Australia?’ (2019) 61(1) *Journal of Industrial Relations* 129.

⁷ See Richard Johnstone et al, *Beyond Employment: The Legal Regulation of Work Relationships* (Federation Press, 2012) ch 3.

⁸ See generally Department of Premier and Cabinet (Vic), *Inquiry into the Victorian On-Demand Workforce* (Background Paper, December 2018).

⁹ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Fairness in Franchising* (Report, March 2019).

reignited concerns on how best to prevent exploitation and promote fairness among these groups.¹⁰

In Section III, the article traces the history preceding the introduction of the class exemption. We show the regulatory steps that have gradually removed the once-formidable barriers to small business collective bargaining. The notion of allowing small businesses to engage in conduct resembling bargaining had its genesis in authorisation provisions included in the *Trade Practices Act 1974* (Cth) ('*TP Act*').¹¹ In 2007, the authorisation provisions were augmented by the introduction of the notification provisions.¹² Following the Harper Review of competition law and policy ('Harper Review'),¹³ the *Competition and Consumer Act 2010* (Cth) ('*CC Act*') was further amended so as to allow class exemptions to be implemented by the ACCC. The current proposed collective bargaining class exemption — first floated in mid-2018 and still under consultation — is the latest instalment in this statutory evolution.

Section IV then examines the class exemption itself by outlining the key features of the exemption based on the draft legislative instrument released in mid-2019, and the accompanying materials.¹⁴ We argue that providing small businesses access to the capacity to improve their circumstances through collective bargaining is a step in the right direction. However, a range of obstacles remain. Section V explores these obstacles by reference to the elements of bargaining structures identified within the labour law context. This analysis provides a useful lens through which to identify the shortcomings of the type of collective bargaining that could be fostered by the ACCC exemption. While the class exemption makes it easier to identify whether a group should be allowed to bargain collectively and gain immunity from competition law, it does little to clarify how the parties should bargain.¹⁵ For example, the exemption does not permit collective boycott conduct and limits information-sharing among group members. In practice, the absence of any capacity to lawfully withdraw labour is likely to mean that collective bargaining will realistically only take place on a voluntary basis between willing participants. Another critical weakness relates to accountability and enforcement. The legal status of any collective agreement, and the possible consequences of failing to comply with its terms, are unclear. Finally, the class exemption may provide bargaining parties immunity from competition law, but it does little to address other legal risks and exposures arising under the common law. Drawing on a broader conception of

¹⁰ See, eg. Andrew Stewart and Shae McCrystal, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32(1) *Australian Journal of Labour Law* 4; Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What are the Options?' (2017) 28(3) *The Economic and Labour Relations Review* 420.

¹¹ *Trade Practices Act 1974* (Cth) ss 88–91 ('*TP Act*').

¹² *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth) sch 3. These sections became pt VII div 2 sub-div B of the *TP Act* (n 11).

¹³ Ian Harper et al, Parliament of Australia, *Competition Policy Review: Final Report* (Report, March 2015) ('Harper Review').

¹⁴ ACCC, *Competition and Consumer (Class Exemption — Collective Bargaining) Determination 2019* (Exposure Draft, May 2019) ('Exposure Draft Determination'). See also ACCC, *Class Exemption for Collective Bargaining: Guidance Note* (Draft for Consultation, June 2019) ('ACCC Draft Guidance Note').

¹⁵ Productivity Commission (n 5) vol 2, 955.

collective rights and their regulation, the article concludes with some suggestions about how the class exemption might be reimagined so that parties do not end up bargaining in a vacuum.

II The Contested Concept of ‘Collective Bargaining’

The ACCC class exemption is designed to allow small businesses to engage in ‘collective bargaining’.¹⁶ Under the *CC Act* there is no statutory definition of the term ‘collective bargaining’. Rather, there is only a reference to a ‘collective bargaining notice’, which is a notice given to the ACCC by a ‘collective’ that it intends to engage in conduct contrary to the ‘restrictive trade practices’ provisions of the *CC Act*.¹⁷ These provisions encompass various types of ‘anti-competitive’ conduct, including contracts, arrangements or understandings that have the purpose or effect of lessening competition,¹⁸ concerted practices, price-fixing, bid rigging, exclusive dealing, territory allocation and collective boycotts.¹⁹ In short, collective bargaining is used in the statute in a somewhat circular sense, to refer to conduct that would otherwise breach the anti-competitive conduct provisions of the *CC Act*.

This definition of ‘collective bargaining’ stands in stark contrast to how this term is used in the labour law context. In Australia, the term ‘collective bargaining’ has historically been used to refer to the complex systems put in place at federal and state levels to govern the relationship between employee trade unions and employers. In this context, ‘collective bargaining’ is generally understood as

a method or process of negotiating about wages and working conditions and other terms of employment between an employer ... on the one hand, and representatives of workers and their organisations on the other, with a view to arriving at collective agreements ...²⁰

These differences between the labour and competition conceptions of collective bargaining stem from underlying differences in the rationales for collectivisation.

Competition regulation involves a particular economic approach, namely that ‘competitive markets are efficient and so result in better welfare outcomes than markets that are not competitive’.²¹ Put simply, under a competition-based approach to market regulation, individual market actors compete against each other to determine what goods and services will best serve public need, and to determine the

¹⁶ *ACCC Discussion Paper* (n 1) 2.

¹⁷ *CC Act* (n 6) pt IV.

¹⁸ *Ibid* s 45.

¹⁹ *Ibid* ss 45AA–45AU.

²⁰ Arthur Marsh and Edward Evans, *The Dictionary of Industrial Relations* (Hutchison, 1973) 61. Not all collective agreements made under the *Fair Work Act 2009* (Cth) (*FW Act*) involve a trade union or entail bargaining: Shae McCrystal and Mark Bray, ‘Non-union Agreement-making in Australia in Comparative and Historical Context’ (2020) 41(3) *Comparative Labor Law & Policy Journal* (forthcoming).

²¹ Rhonda L Smith and Arlen Duke, ‘Inequality and Competition Law’ (2019) 27(1) *Competition and Consumer Law Journal* 1. Cf Adam Triggs and Andrew Leigh, ‘A Giant Problem: The Influence of the Chicago School on Australian Competition Law, Economic Dynamism and Inequality’ (2019) 47(4) *Federal Law Review* 696.

most efficient and cost-effective way to deliver those goods and services.²² The pursuit of efficiency is driven explicitly by a standard cost-benefit economic analysis. It is generally assumed that if goods and services are produced in an economically efficient manner, consumers will benefit through reduced prices and enhanced products.

A lack of competition between market actors is said to lead to the distortion of price signals, which potentially allows these actors to obtain prices for their goods and services that are not driven by the most efficient use of their resources. This may allow firms to extract ‘super profits’ from transactions (profit above that which could be realised in a properly functioning competitive market),²³ which can, in turn, lead to poorer market outcomes.²⁴ Instead, to ensure optimal market outcomes, competitors operating in the same market must be prevented from ‘colluding’ or forming ‘cartels’ — sharing business information or making arrangements to split territory between them or to set the same prices. As King has observed, ‘[c]artel laws are explicit and attempts by businesses to circumvent these laws, even if for a “socially desirable” end, are likely to meet considerable resistance from regulators and the courts.’²⁵

The application of these principles to labour markets would have the effect of rendering trade unions and collective bargaining ‘anti-competitive’, an approach that would produce unjust outcomes. Individual workers face disadvantages in the market for their labour. Labour is not storable — if insufficient wages are offered, labour cannot be kept for another day like money or goods. Workers are at a further disadvantage in negotiating contracts with larger, better resourced employers, who have greater access to information, capital and contractual power. Moreover, most employment relationships involve long-term relational contracts — where the cost of losing the employment contract is much higher to the worker than the cost to the employer of losing the worker.²⁶

In addition to arguments based on the fundamental characteristics of labour markets, are arguments challenging the core assumption of competition law that collective action by ‘competitors’ is necessarily anti-competitive and automatically detrimental.²⁷ Acting collectively can be more efficient than acting solely,

²² *Re Queensland Co-Operative Milling Association Ltd* (1976) 8 ALR 481, 515 (Woodward J, Shipton and Brunt (Members)) (‘*Queensland Co-Operative Milling*’); *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR ¶41-783, 41-267 [11] (Burchett and Hely JJ).

²³ The economic theories here are outlined in greater detail in: Hugh Collins, *Employment Law* (Oxford University Press, 2003) 140; Simon Deakin and Frank Wilkinson, ‘Labour Law and Economic Theory: A Reappraisal’ in Hugh Collins, Paul Davies and Roger Rideout (eds), *The Legal Regulation of the Employment Relation* (Kluwer Law, 2000) 29.

²⁴ See generally King (n 2) 124.

²⁵ *Ibid* 115.

²⁶ See Warren Grimes, ‘The *Sherman Act*’s Unintended Bias against Lilliputians: Small Players Collective Action as a Counter to Relational Market Power’ (2001) 69(1) *Antitrust Law Journal* 195.

²⁷ See, eg, *ibid*; Robert H Lande and Richard O Zerbe Jr, ‘Reducing Unions Monopoly Power: Costs and Benefits’ (1985) 28(2) *Journal of Law & Economics* 297; Karl Klare, ‘Countervailing Workers’ Power as a Regulatory Strategy’ in Hugh Collins, Paul Davies and Roger Rideout (eds), *The Legal Regulation of the Employment Relation* (Kluwer Law, 2000) 63; Sanjukta M Paul, ‘The Enduring Ambiguities of Antitrust Liability for Worker Collective Action’ (2016) 47(3) *Loyola University Chicago Law Journal* 969.

particularly in dealings with larger businesses who have been accustomed to contracting through the use of standard form, non-negotiable contracts.²⁸ In these scenarios, the stronger party sets all the terms and conditions, without the benefit of the views of the weaker party who may be able to identify better ways of doing things, and is able to maximise their own profit by arranging all circumstances to their benefit. Where those smaller parties can act collectively, they can influence contract terms, bringing their own experience to the table to create better contracts. They can reduce the transaction costs of each individual in entering those contracts by obtaining and sharing common legal advice and other critical information among all group members. Other benefits may include reductions in the time and cost associated with establishing supply arrangements, the creation of new marketing opportunities through combined sales or purchasing volume, or the development of supply chain efficiencies.²⁹ There is also the potential to enhance the public good through bargained outcomes with broader impact — for example, through improved safety in the production of goods and provision of services, enhanced environmental outcomes, increased industrial harmony, and improved grievance or dispute resolution procedures.³⁰ Of course, these benefits can only be realised if collective bargaining takes place, and if members of a collective have a credible basis on which to engage in collective bargaining and bring the stronger counterparty or target to the bargaining table.

Labour market failures have long been used to justify labour market exemptions under various state *Trade Union Acts*,³¹ the *Fair Work Act 2009* (Cth) (*'FW Act'*) and its predecessors,³² as well as a broad exemption applied to contracts for remuneration and conditions of employment under the *CC Act*.³³ Such market failures have also been used to justify the right not just of workers to form collectives and bargain, but also to strike, based on the fact that collectivisation in itself is insufficient to gain bargaining power.³⁴ Given that 'labour markets are more complex than product markets and involve a significant human dimension',³⁵ the regulation of employee labour markets have been generally excluded from competition law through the use of broad exemptions.³⁶ In effect, a bright line has been drawn between those regulated generally by labour legislation — common law employees, and those regulated generally in the commercial sphere — everyone else.

²⁸ King (n 2) 113–15.

²⁹ These benefits are discussed further in *ACCC Guidelines* (n 3).

³⁰ Lande and Zerbe (n 277) 299.

³¹ See, eg, *Trade Unions Act 1958* (Vic) s 3(1); *Trade Unions Act 1889* (Tas) s 2(1); *Industrial Relations Act 1996* (NSW) s 304; *Fair Work Act 1994* (SA) s 137. Although there is no such protection in the State of Queensland: see Shae McCrystal, 'Collective Bargaining by Independent Contractors: Challenges from Labour Law' (2007) 20(1) *Australian Journal of Labour Law* 1, 15–17.

³² Currently *FW Act* (n 20) s 415.

³³ *CC Act* (n 6) s 51(2)(a), discussed in Shae McCrystal and Phil Syrpis, 'Competition Law and Worker Voice: Competition Law Impediments to Collective Bargaining in Australia and the European Union' in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 421, 425–6.

³⁴ For an overview of the issues, see Lord Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18(1) *Industrial Law Journal* 1; Tonia Novitz, *International and European Protection of the Right to Strike* (Oxford University Press, 2003) 5–8.

³⁵ Banks (n 5) 8.

³⁶ Productivity Commission (n 5).

Modern Australian labour law, in the form of the *FW Act*, involves a highly regulated system of collective bargaining, with a framework for the negotiation, registration and enforcement of collective agreements supported by access to the right to strike for both employees and employers.³⁷ However, the scope of these provisions remain firmly linked to the common law definition of ‘employee’, while the structure of labour markets and the contractual arrangements used to engage labour have fundamentally changed. The rise of the gig economy is one of the most pronounced, but not the only, manifestations of this shift.³⁸ These underlying structural changes have reduced the scope of the regulatory coverage of labour laws, leaving more work arrangements subject to commercial regulation that is designed for product and services markets. These shifts, combined with the development of provisions allowing for collective bargaining within the competition law framework, challenge that formerly bright line between the coverage of labour and competition laws.

III The Development of *Competition and Consumer Act 2010 (Cth)* Provisions Permitting Collective Bargaining

A *Background to the Anti-Competitive Conduct Provisions of the Competition and Consumer Act 2010 (Cth)*

The objects of the *CC Act* are ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’.³⁹ In keeping with this objective, the *CC Act* involves the application of competition theory to product and services markets in Australia. This is done through pt IV, which regulates restrictive trade practices, rendering certain anti-competitive conduct unlawful as a breach of the Act.

However, the *CC Act* also contains provisions acknowledging that the wholesale and undifferentiated application of the anti-competitive conduct provisions to all markets may produce unfair outcomes or deny potential public benefits that might otherwise arise if conduct were permitted to occur.⁴⁰ The balance is achieved through provisions that allow conduct to occur that would otherwise breach the Act. This is done primarily through three mechanisms:

- (1) **Authorisations** that allow parties to apply to the ACCC and make a case for permission to engage in conduct that would otherwise breach the Act;⁴¹
- (2) **Notifications** that allow parties to notify the ACCC that they intend to engage in conduct that would otherwise breach the Act. The conduct may

³⁷ See Shae McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining under the Fair Work Act* (Federation Press, 2018).

³⁸ Recent developments in the legal status of gig economy workers are discussed in Stewart and Stanford (n 10); Stewart and McCrystal (n 10).

³⁹ *CC Act* (n 6) s 2.

⁴⁰ Robert Officer and Phillip Williams, ‘The Public Benefit Test in an Authorisation Decision’ in Megan Richardson and Phillip Williams (eds), *The Law and the Market* (Federation Press, 1995) 157, 158.

⁴¹ *CC Act* (n 6) pt VII div I.

proceed free of liability under the Act provided that the ACCC does not object or revoke the notification;⁴² and

- (3) **Exemptions** that are provided in the Act for certain conduct (for example, the exemption for contracts regulating the remuneration and conditions of engagement of employees) or that can be granted in certain circumstances by the ACCC to a defined group for defined conduct.⁴³

In respect of collective bargaining, the ACCC has gradually adopted all three forms of regulation, with the most recent being the proposed declaration of an exemption. If this exemption is implemented, it will mean that collective bargaining can occur without the need for small businesses to justify their proposed conduct. The process of getting to this position has been a lengthy one, and the history behind its development usefully illustrates the tensions at play in the regulation of markets from the perspective of competition when considering the position of small business actors with little market power.

B *The Authorisation Provisions of the Competition and Consumer Act 2010 (Cth) – Their Origins and Limitations*

When the *TP Act* took effect in 1974, it contained the first federal provisions expressly rendering unlawful contracts, arrangements or understandings in restraint of trade.⁴⁴ Applying competition theory, the provisions rendered unlawful ‘collusive’ conduct between competitors, which could potentially include a very broad range of conduct undertaken between business actors — from the sharing of information on prices and business processes through to price-fixing.

However, even in this original statutory iteration, there was a recognition that the application of competition theory might not produce optimal results in all circumstances.⁴⁵ The Explanatory Memorandum to the Trade Practices Bill 1973 (Cth) noted that the inclusion of the authorisation procedure acknowledged ‘that in certain circumstances some prohibited practices may be capable of justification’.⁴⁶ While authorisation of price-fixing conduct in respect of goods was carved out of the authorisation provisions,⁴⁷ authorisation of price-fixing conduct in respect of *services* was possible under this original statutory framework. This meant that combinations seeking to control the price at which members of the group sold their

⁴² *Ibid* pt VII div II.

⁴³ *Ibid* pt VII div III.

⁴⁴ *TP Act* (n 11) s 45. Section 51(2)(a) exempted provisions of contracts in relation to the remuneration, conditions of employment, hours of work or working conditions of employees, or to any act done by employees or by an organisation of employees not being an act done in the course of the carrying on of a business of the employer of those employees or of a business of that organisation ...

⁴⁵ *Ibid* s 90(5).

⁴⁶ Explanatory Memorandum, Trade Practices Bill 1973 (Cth) [7].

⁴⁷ Contracts or combinations entered into for the purpose of fixing, controlling or maintaining prices for the supply of goods (price-fixing) were expressly excluded from the scope of any authorisation: see *TP Act* (n 11) s 88.

own labour as services could seek authorisation under the provisions. However, in practice, such authorisations were unlikely to be granted.⁴⁸

The inclusion of the authorisation provisions in the 1974 legislation is highly significant, constituting ‘the feature most at odds, at least potentially, with a view of competition law which sees the promotion of efficiency as its only proper goal’.⁴⁹ The authorisation provisions recognise that certain arrangements between businesses which would otherwise be in competition can produce benefits that outweigh any purported anti-competitive effect.

In 1976, the Swanson Review recommended various modifications to the authorisation provisions, but suggested that price-fixing in respect of goods remain outside of authorisation.⁵⁰ The 1993 Hilmer Report (which led to the National Competition Policy Reforms) recommended aligning the price-fixing provisions for goods and services by removing access to authorisations for price-fixing in respect of services.⁵¹ However, when the various recommendations were implemented in 1995, the legislation was amended to permit authorisation of price-fixing for both goods and services — expanding the scope of the authorisation provisions, rather than restricting them.⁵²

The modern authorisation provisions are found in pt VII div 1 of the *CC Act*. They enable the ACCC (or the Australian Competition Tribunal on appeal) to authorise conduct contrary to pt IV of the *CC Act* including contracts, arrangements or understandings that have the purpose or effect of lessening competition,⁵³ ‘cartel conduct,’⁵⁴ and, since 2017, ‘concerted practices’ under s 45 of the *CC Act*.⁵⁵ Cartel conduct by parties that are in competition with each other is conduct relating to contracts, arrangements or understandings in the supply or acquisition of goods or services that involve price-fixing, restrictions on outputs in production or supply chains, customer or territory allocation, bid-rigging, or collective boycotts. While concerted practices are not specifically defined in the *CC Act*, the provision is ‘intended to capture conduct that falls short of a contract, arrangement or understanding’ where that conduct has the purpose or effect of lessening competition.⁵⁶

The prohibitions in s 45 or the cartel provisions in pt IV div 1 are likely to be triggered in circumstances where parties that would otherwise be in competition with each other: make a collective attempt to set the price or terms on which they sell their

⁴⁸ Frederick Hilmer, Mark Rayner and Geoffery Taperall, *National Competition Policy* (Report, 25 August 1993) 38 (‘Hilmer Report’).

⁴⁹ John Duns, ‘Competition Law and Public Benefits’ (1994) 16 *Adelaide Law Review* 245, 266.

⁵⁰ Trade Practices Act Review Committee (Cth), *Report to the Minister for Business and Consumer Affairs* (Report, 1976).

⁵¹ Hilmer Report (n 48) 38–9.

⁵² *Competition Policy Reform Act 1995* (Cth).

⁵³ *CC Act* (n 6) s 45(2).

⁵⁴ *Ibid* ss 45AA–45AU.

⁵⁵ *Ibid* s 45(1)(c). For discussion, see Alex Bruce, *Australian Competition Law* (LexisNexis, 3rd ed, 2019) ch 7.

⁵⁶ Lindsay Foster and Hanna Kaci, ‘Concerted Practices: A Contravention without a Definition’ (2018) 26(1) *Competition and Consumer Law Journal* 1, 9. See also Caitlin Davies and Luke Wainscoat, ‘Not Quite a Cartel: Applying the New Concerted Practices Prohibition’ (2017) 25(2) *Competition and Consumer Law Journal* 173, 174–9.

services; share sensitive business information; collectively withhold their labour; or collectively refuse to sign up to new contracts unless an agreement can be reached.⁵⁷

An application for authorisation may be made by any person, which can include any business, industry association or trade union on behalf of itself and the group. Once an application for authorisation is made, the ACCC consults with relevant parties, including the applicant, and then produces a draft determination (either authorising or rejecting the application).⁵⁸ The process can be expensive, both in terms of the necessity for legal advice in preparing an application and due to the application fees.⁵⁹ It can also be time consuming, given that authorisations generally take around six months to finalise.⁶⁰ If the authorisation is granted, it only extends to the conduct set out in the application for the purposes of the *CC Act* provisions. It does not extend to conduct that is not in the application and does not protect against liability under the common law or other legislative regimes.⁶¹

C *The Notification Provisions of the Competition and Consumer Act 2010 (Cth)*

In 2003, concerns with the authorisation process were raised in the *Review of the Competition Provisions of the Trade Practices Act* ('Dawson Review'), particularly in respect of the impact of the anti-competitive conduct provisions on small business actors, including the self-employed and most franchisees.⁶² Submissions to the Review called for the provision of a notification process that would allow small businesses to notify proposed collective bargaining conduct and proceed with the conduct unless the ACCC objected.⁶³ This would enable small businesses more frequently to act collectively in their dealings with larger businesses wielding a significant degree of market power.

Considering these submissions, the Dawson Review acknowledged that many small business actors lack bargaining power when dealing with larger businesses, noting that while collective bargaining may 'at one level lessen competition', at another level, 'provided that the countervailing power is not excessive, it may be in the public interest to enable small business to negotiate more effectively with big business'.⁶⁴ However, the Review members were concerned that any changes to the authorisation provisions should not reverse the general expansion of competition law that had taken place in preceding years, and that any notification provisions introduced should not become a 'de facto' mechanism to allow parties to avoid the competition provisions.⁶⁵

⁵⁷ For consideration of the application of pt IV to self-employed workers, see McCrystal (n 31).

⁵⁸ See process outlined in *ACCC Guidelines* (n 3).

⁵⁹ See Daryl Dawson, Jillian Segal and Curt Rendall, *Review of the Competition Provisions of the Trade Practices Act* (2003) 118 ('Dawson Review').

⁶⁰ *Ibid.*

⁶¹ The potential for collective bargaining arrangements to attract liability outside of pt IV of the *CC Act* (n 6) is discussed in McCrystal (n 31).

⁶² Dawson Review (n 59) 110.

⁶³ See, eg, The Small Business Development Corporation, Submission No 86 to The Treasury, Australian Government, *Review of the Competition Provisions of the Trade Practices Act*, 5–6.

⁶⁴ Dawson Review (n 59) 115.

⁶⁵ *Ibid.* 118.

The Dawson Review also considered whether there should be a small business exemption from the competition provisions, ultimately rejecting the suggestion, which it considered would

have the effect of removing a substantial part of the Australian economy from the operation of this aspect of competition law and would effectively reverse many of the reforms achieved over the last decade. There would be no assessment of the public interest in relation to activities undertaken within the exception. An unfettered ability to bargain collectively would allow anti-competitive and undesirable conduct.⁶⁶

Ultimately, the Dawson Review recommended the introduction of a notification provision for small business collective bargaining. This was subsequently enacted in the *Trade Practices Legislation Amendment Act (No 1) 2006* (Cth), taking effect from 1 January 2007.⁶⁷

The notification provisions allow for parties to notify the same range of conduct that may be authorised by the ACCC, where the conduct involves transaction values of less than \$3 million.⁶⁸ Where this criterion is met, the applicant may notify the ACCC of the proposed conduct⁶⁹ and the ACCC has 14 days to object, unless the conduct involves boycott conduct, in which case the time period is 60 days.⁷⁰ If no objection is made, the notification will stand and immunity from the relevant provisions of the *CC Act* will apply unless the ACCC subsequently objects.⁷¹ As with authorisation, protection only extends to the conduct set out in the application and not beyond, and does not protect against liability under the common law or other legislative regimes.

One provision included in the notification provisions that was not suggested by the Dawson Review is that a notification lodged on behalf of a small business by a trade union will be invalid.⁷² In the Second Reading Speech accompanying the amending Bill in Federal Parliament it was suggested that this would stop the provisions being used to pursue 'employee entitlements'.⁷³ However, this explanation is not satisfactory given the extensive regulation of employee matters in labour law regulation. Moreover, simply stopping a union from lodging a notice would not stop employees using the provisions if they were so inclined. Further, the exclusion could have the effect, in practice, of denying groups of small business actors access to the considerable expertise and resources of the union movement who are more seasoned actors in collective forms of agreement-making.⁷⁴

⁶⁶ Ibid.

⁶⁷ See Shae McCrystal 'Collective Bargaining and the *Trade Practices Act: The Trade Practices Legislation Amendment Act (No 1) 2006* (Cth)' (2007) 20(2) *Australian Journal of Labour Law* 207.

⁶⁸ Regulations passed in March 2007 increased the contract price threshold in certain industries, such as petrol retailing: see *Competition and Consumer Regulations 2010* (Cth) regs 71A–71D.

⁶⁹ *CC Act* (n 6) s 93AB.

⁷⁰ Ibid s 93AD(1).

⁷¹ Ibid s 93AC.

⁷² Ibid s 93AB(9).

⁷³ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 March 2005, 17 (Christopher Pearce).

⁷⁴ For example, the Transport Workers' Union actively organises self-employed owner-drivers and routinely seeks authorisations.

The passage of the notification provisions was accompanied by statements from the incumbent Coalition Government that the aim was to make it easier for small businesses to engage in collective bargaining,⁷⁵ and by the Australian Labor Party that the changes should help ensure that power imbalances between small and large businesses are redressed.⁷⁶ However, since the passage of the amendments, the uptake rate for notifications has been low, confounding the fears of the Dawson Review that they could become a de facto mechanism enabling the avoidance of the competition provisions. In the 11 years to December 2018, only 56 notifications were made to the ACCC, 49 of which were allowed to stand.⁷⁷ At an average of only five notifications per year, it is difficult to see the notification system as a success in enabling access to collective bargaining arrangements for small businesses, including self-employed workers and franchisees. It is not clear why the provisions have had such a small uptake given the absence of research identifying the causes of this problem. However, it appears that the different process for notifications has not alleviated the difficulties that small business actors face when confronted by the necessity of establishing that their proposed conduct satisfies the public benefit test.

D *The Public Benefit Test*

The statutory test applied by the ACCC in determining whether or not to grant an authorisation or object to a notification is the ‘public benefit’ test.⁷⁸ The ACCC must determine whether or not the proposed collective bargaining conduct produces sufficient public benefit to outweigh any public detriment that would result from permitting the conduct to occur.

The terms ‘public benefit’ and ‘public detriment’ are not defined in the *CC Act*. Public detriment is the anti-competitive effect that results from allowing the conduct to proceed.⁷⁹ The ACCC has identified a number of ‘possible anti-competitive effects from collective bargaining’,⁸⁰ including: reduction in competition from joint conduct; effects on competitors and competition outside the bargaining group; and increased potential for collective activity beyond the notified collective bargaining.⁸¹

Public benefit is more complicated. The accepted legal meaning comes from *Re Queensland Co-Operative Milling Association Ltd*,⁸² where the Trade Practices Tribunal (now the Australian Competition Tribunal) adopted a wide definition of

⁷⁵ Liberal Party of Australia, *Policy Statement: Small Business, Big Future* (6 October 2004).

⁷⁶ Australian Labor Party, *Small Business and Contractors Platform* (April 2007).

⁷⁷ Where conduct has already been notified, it can be ‘re-notified’ once the time period for the original notification has passed. Therefore, a re-notification covers the same conduct as in the original notification. If re-notifications are excluded, only 40 distinct collective bargaining notifications were allowed to stand.

⁷⁸ *CC Act* (n 6) ss 90, 93AC(1). With respect to contracts, arrangements or understandings that could have the effect of substantially lessening competition, the ACCC must also be satisfied that the proposed conduct would actually have the effect of substantially lessening competition before it may object: *CC Act* (n 6) ss 90, 93AC(2).

⁷⁹ *ACCC Guidelines* (n 3) 8.

⁸⁰ *Ibid.*

⁸¹ See also King (n 2) 137.

⁸² *Queensland Co-Operative Milling* (n 22).

public benefit including ‘anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress’.⁸³ This definition embraces a broad range of tangible and intangible benefits which can flow from permitting collective bargaining to occur. The claimed benefits must be direct by-products of the bargaining process.⁸⁴

The public benefit test involves an assessment of the efficiencies gained through collective bargaining and how those efficiencies produce a ‘benefit’ to the public through ‘the best use of society’s resources’.⁸⁵ As noted above in Section II, in this process ‘efficiency’ is used in its economic sense — the test is focused on ensuring that any collective bargaining will produce the most economically efficient outcome. Efficiencies include: allocative efficiency, where resources are allocated to their most efficient use; production efficiency to minimise cost, waste and duplication; and dynamic efficiency involving investment in innovation to improve existing products or develop new products.⁸⁶ Improvements in the amount and quality of relevant information available to less informed parties has also been identified as a common public benefit.⁸⁷ These benefits must be such as to outweigh the detrimental impact on competition that collusion would entail. The test is broad enough to encompass a range of other benefits, but a more expansive approach has not been taken by the ACCC. In particular, the ACCC has been generally unwilling to accept benefits that flow to the members of the bargaining group (such as increased remuneration or decreased business tensions) as ‘public’ benefits, preferring benefits that flow through to consumers in the form of increased choice or reduced cost.⁸⁸ The goal here is not a ‘fair’ or ‘equal’ distribution of any resultant surplus between members of a bargaining group and the target of bargaining. An efficient outcome does not depend on who shares the spoils. The goal is the production of goods and services at the most optimally efficient cost, with price and product benefits flowing to consumers.

Similarly, the ACCC does not view any transfer in bargaining power as a public benefit, rather its focus remains fixed on benefits flowing from improved efficiency in the contracting process.⁸⁹ Rebalancing of bargaining power through a process of meaningful collective bargaining is not considered to be a public benefit in and of itself. As such, it is not perceived as a legitimate object of competition regulation and is not explicitly acknowledged as a relevant goal by the ACCC. As noted above in Section II, this is a critical departure from the way in which collective bargaining is conceived and applied in the labour law context.

⁸³ Ibid 508.

⁸⁴ Ibid. See also Rhonda Smith, ‘Authorisation and the Trade Practices Act: More about Public Benefit’ (2003) 11(1) *Competition and Consumer Law Journal* 21.

⁸⁵ *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357, 42,677.

⁸⁶ Ibid.

⁸⁷ *ACCC Guidelines* (n 3).

⁸⁸ Shae McCrystal, ‘Is There a “Public Benefit” in Improving Working Conditions for Independent Contractors? Collective Bargaining and the *Trade Practices Act 1974* (Cth)’ (2009) 37(2) *Federal Law Review* 263, 278–9.

⁸⁹ King (n 2) 127.

In applying the public benefit test, the ACCC quantifies the public benefit and public detriment for the purpose of determining if there is ‘net’ public benefit. In this equation, aspects of proposed bargaining that will keep public detriment low include low density in the bargaining group (where the group is only a small proportion of potential participants), low levels of existing negotiation between members of the group and the target of bargaining, and a limitation on the extent to which any eventual agreement restricts competition between members of the group.⁹⁰ Paradoxically, of course, the presence of these features in collective bargaining may ultimately weaken the chances of any effective agreement being reached by curbing the power of the collective. Further, any suggestion that a proposed contractual arrangement between the parties will be binding will be likely to produce a high degree of public detriment, overcoming any proposed public benefits. Parties to proposed bargaining generally have to demonstrate voluntariness in respect of membership of the bargaining group, participation in negotiations and the eventual agreement — that is, neither the target nor the members of the group will be required to abide by its terms.⁹¹ In other words, *voluntariness* is generally the key to ensuring that public detriment remains low enough for conduct to be permitted — but, if everything is entirely voluntary, the identified benefits themselves may never actually occur.

This point was put to the ACCC in a case involving self-employed journalists seeking authorisation to engage in collective bargaining over the terms of their contracts with large media outlets.⁹² The journalists in this case were seeking to bargain with powerful multinational corporations because they were routinely subject to oppressive standard form contract arrangements that placed considerable limits on their future earning capacity. In opposing the authorisation, the media outlets expressly indicated to the ACCC that they would refuse to bargain if the authorisation was granted, and asserted that, as no public benefit would follow, the authorisation should not be made. In the event, the ACCC did grant the authorisation, but refused to permit any mechanism within the proposed collective action that was not wholly voluntary in nature for all parties concerned, either in terms of the membership of the group, binding contractual outcomes or a collective boycott.⁹³ In its decision, the ACCC acknowledged that the public benefits that potentially could flow from collective bargaining would not ensue unless the targets were willing to engage collectively with the journalists. The potential for a collective boycott in this case that might have brought those media outlets to the table was not countenanced. However, without it, nothing was likely to happen. No public benefits were obtained and the expense, effort and energy expended by the Media Entertainment and Arts Alliance in obtaining the authorisation was effectively wasted.

⁹⁰ ACCC Guidelines (n 3) 9.

⁹¹ McCrystal (n 88) 281; Joe Isaac, ‘Collective Bargaining under Trade Practices Law’ (2008) 19(1) *The Economic and Labour Relations Review* 39, 54.

⁹² ACCC, *Application for Authorisation lodged by Media Entertainment and Arts Alliance in respect of Collective Negotiations of the Terms of Engagement of Freelance Journalists by Fairfax Media Limited, ACP Magazines Ltd, News Limited and Pacific Magazines* (Determination, Authorisation No A91204, 26 May 2010).

⁹³ *Ibid.*

The decision of the ACCC in this case highlights the inherent tension in the ACCC approach to public benefit where economic efficiency is prioritised over other forms of public good. In authorising the proposed conduct, the ACCC effectively acknowledged that the extant contracting practices of those media outlets were not producing the most economically efficient outcomes. However, by refusing effectively to deal with the underlying issues of power imbalance between the parties, and insisting on a form of bargaining that focused only on economic efficiencies in the pure sense, the ACCC left the journalists with very few options. How this outcome is the most 'efficient' in the circumstances is unclear.

E *The 2015 Harper Review and the Introduction of Class Exemptions*

The limitations of the authorisation and notification provisions were acknowledged by the ACCC in its submissions to the Harper Review of competition law and policy (which reported in 2015).⁹⁴ In addition to seeking greater flexibility in how the notification provisions operated, the ACCC sought the inclusion of a power in the *CC Act* to enable the ACCC to make an exemption for collective bargaining conduct that would provide a 'safe harbour' from competition laws for relevant conduct within that exemption.⁹⁵ The ACCC sought the power to make a block exemption in circumstances where conduct is unlikely to substantially lessen competition or that results in a net public benefit.⁹⁶ The Harper Review recommended the inclusion of such an exemption power in the *CC Act* 'in order to reduce compliance and administration costs and increase certainty'.⁹⁷ The ACCC was given the power to determine such class exemptions in 2017 in new pt VII div 3, s 95AA.⁹⁸ This change recognised that providing expanded access to collective bargaining was critical. The Explanatory Memorandum to the amending Bill stated that: 'By negotiating as a collective, small business may be able to negotiate with bargaining power equal to a larger firm, and achieve a more efficient and pro-competitive outcome.'⁹⁹

Under the new class exemption power, the ACCC may determine that identified provisions in pt IV will not apply to certain conduct where it is satisfied that the conduct would not substantially lessen competition and would be likely to result in a public benefit that would outweigh any public detriment.¹⁰⁰ The ACCC has the power to set conditions and limitations, and to revoke a class exemption once made.¹⁰¹ An exemption can apply for up to 10 years, unless revoked earlier.¹⁰² After extensive consultation, the ACCC announced its intention to make a class exemption

⁹⁴ ACCC, *Reinvigorating Australia's Competition Policy: Australian Competition & Consumer Commission Submission to the Competition Policy Review* (25 June 2014) 94–6, 108.

⁹⁵ Harper Review (n 13) 404.

⁹⁶ *Ibid.*

⁹⁷ Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) [9.9].

⁹⁸ Introduced by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

⁹⁹ Explanatory Memorandum (n 97) [9.11].

¹⁰⁰ *CC Act* (n 6) s 95AA.

¹⁰¹ *Ibid* s 95AA(2).

¹⁰² *Ibid* s 95AA(3).

for small business collective bargaining.¹⁰³ While this exemption is yet to take effect, its enactment appears imminent. The substance of the exemption is discussed in Section IV below.

F *The Australian Competition and Consumer Commission's Shifting Position on Collective Boycotts*

A final issue relevant to the issue of collective bargaining in the commercial context is boycott conduct. One of the more significant recommendations of the Dawson Review regarding the competition provisions of the *TP Act* was its acknowledgement that a 'collective bargaining agreement between buyers to refuse to buy from a supplier in the absence of a satisfactorily negotiated price' (ie a boycott) can be considered 'to be an integral part' of collective bargaining agreements.¹⁰⁴ Rejecting a suggestion from the ACCC that notification of collective bargaining should not extend to collective boycotts, the Dawson Review observed that 'collective bargaining, of its nature, may involve a collective boycott' and it would not favour such a restriction.¹⁰⁵

In keeping with this view, the *CC Act* allows for the authorisation, and (since 2007) the notification, of cartel conduct that includes a collective boycott of a target by a bargaining group.¹⁰⁶ However, in practice, collective boycotts are not approved.¹⁰⁷ This approach can be traced to a decision of the ACCC in 2005 involving an application for authorisation of collective bargaining that included proposed collective boycott conduct.¹⁰⁸ The case involved agricultural producers of chicken meat, who were at the bottom of complex supply chains and experiencing intense downward pressure on prices. At first instance, the ACCC authorised the proposed boycott noting that the bargaining group had no negotiating power as individuals and whose sunk investment costs made it very difficult for them to walk away from their businesses once established. This meant that they were price-takers and likely to remain so without the capacity to exercise some form of bargaining power.¹⁰⁹ However, on this first foray into authorising substantive collective boycott conduct, the ACCC was overturned on appeal to the Competition Tribunal.¹¹⁰ It found that the potential for anti-competitive detriment to arise from a collective

¹⁰³ ACCC, 'Feedback Sought on Collective Bargaining Plan for Small Business' (Media Release, 6 June 2019); ACCC Draft Guidance Note (n 14).

¹⁰⁴ Dawson Review (n 59).

¹⁰⁵ *Ibid.*

¹⁰⁶ *CC Act* (n 6) ss 88, 90.

¹⁰⁷ An anomalous case is ACCC, *Application for Authorisation Lodged by St Vincent's Health Australia Ltd* (Determination, Authorisations Nos A91295–A91297, 12 September 2012) (revoked and substituted in Revocation and Substitution pursuant to ACCC *Application for Revocation of Authorisation A91126 and Substitution with A91425 Lodged by Lottery Agents Association of Victoria* (Determination, Authorisation No A91425, 10 September 2014)). This case involved a small group of private hospitals that were unable to form a single corporate entity due to trust rules. The boycott conduct was permitted in this case in no small part because if not for the trust instruments, the hospitals would otherwise have been able to act as a single economic entity.

¹⁰⁸ ACCC, *Applications for Authorisation Lodged by the Victorian Farmers Federation on behalf of its Member Chicken Meat Growers* (Determination, Authorisation Nos A40093 and A90931, 2 March 2005).

¹⁰⁹ *Ibid.* 34. See also Isaac (n 91).

¹¹⁰ *Re VFF Chicken Meat Growers' Boycott Authorisation* (2006) ATPR 42-120.

boycott was too high and there was no guarantee that the collective boycott would only be used by the chicken growers to develop more 'efficient outcomes'.¹¹¹

It has been suggested that the Competition Tribunal in this case set a standard of proof for authorisation of boycott conduct 'with which it is quite literally, impossible for any applicant to comply'.¹¹² Such a standard of proof cannot legally be correct given that Parliament has provided that it is possible to authorise and (since 2007) notify boycott conduct. However, subsequent to the decision, ACCC official publications suggested that authorisation of a collective boycott would be virtually impossible to obtain. For example, the ACCC's 2008 *Guide to Collective Bargaining Notifications* stated 'given that the ACCC considers that collective boycotts can significantly increase the potential anti-competitive effects of collective bargaining arrangements, it is unlikely to allow protection from legal action to such conduct in most cases'.¹¹³ This approach contradicts the plain intention of Parliament to allow such conduct in appropriate circumstances.¹¹⁴

Since 2008, and in light of the fact that it must be possible to notify or authorise boycott conduct, the ACCC has softened its approach to boycotts in its official publications. In the 2011 *Guide to Collective Bargaining Notifications*, the ACCC confirms that it 'expects that strong justification would be provided to support an application for immunity for proposed collective boycott activity'.¹¹⁵ However, this approach continued to intimate that proposed collective boycotts raise the presumption that any public benefits to be gained by collective bargaining would come at too high an anti-competitive cost if an associated boycott were to be permitted.

By 2014, there was a significant shift in approach by the ACCC. In their submissions to the Harper Review, the ACCC observed that collective bargaining involving collective boycott activity could be 'efficiency enhancing',¹¹⁶ and noted that 'there may be a perception among small businesses and their advisers that a collective bargaining arrangement that includes the prospect of a collective boycott would not be approved'.¹¹⁷ It advocated for clearer statutory provisions 'to make collective boycott proposals more likely to be approved'.¹¹⁸ This included providing a longer timeframe to assess notifications involving proposed boycott conduct and the provision of a 'stop power' to allow the ACCC to terminate a collective boycott in the event of imminent serious detriment to the public.¹¹⁹ The ACCC also noted that it would amend its public information to 'help address the perception that collective boycotts are unlikely to be approved'.¹²⁰

¹¹¹ Ibid [451].

¹¹² Warren Pengilly, 'The Competition Tribunal and Chicken Meat: Do Exclusionary Provisions Have Any Future Hope of Authorisation?' (2006) 14(2) *Competition and Consumer Law Journal* 196.

¹¹³ ACCC, *Guide to Collective Bargaining Notifications* (2008) 33.

¹¹⁴ Pengilly (n 112) 199.

¹¹⁵ ACCC, *Guide to Collective Bargaining Notifications* (2011) 32.

¹¹⁶ Harper Review (n 13) 400.

¹¹⁷ Ibid.

¹¹⁸ Ibid 401.

¹¹⁹ Ibid.

¹²⁰ Ibid.

The changes sought by the ACCC were included in the *CC Act* in amendments in 2017.¹²¹ The ACCC's main publication relating to collective boycotts have also been significantly updated.¹²² These Guidelines — released in 2018 — now state that '[a] collective boycott can be a useful negotiating tool to bring the target business to the table or restart stalled negotiations.'¹²³ Factors identified as relevant to the assessment of proposed boycott conduct include the size of the target business, the strength of competition in downstream markets, the potential and likely duration of harm to third parties, outcomes of previous collective bargaining, and limitations on boycott activity.¹²⁴ The approach taken within the 2018 *ACCC Guidelines* is more in line with the clear intention of Parliament as expressed in the *CC Act*. This signals an increased willingness on the part of the ACCC to genuinely consider proposed bargaining arrangements including boycotts. However, it is notable that the ACCC has not included any form of boycott conduct in the proposed exemption for small business collective bargaining. This means that the pre-existing authorisation and notification provisions (and the barriers embedded in these provisions) will continue to apply to any proposed boycott activity taken by the bargaining group.

IV The Proposed Small Business Collective Bargaining Exemption: A Summary

The new class exemption proposed by the ACCC will provide a 'safe harbour' for three categories of 'eligible' businesses to engage in specific forms of collective bargaining without fear of breaching key provisions of the *CC Act*.¹²⁵ The Exposure Draft Determination, provides that:

- (1) A corporation with an aggregated turnover of less than \$10 million in the preceding financial year can form or join a collective bargaining group to negotiate with suppliers or customers about the supply or acquisition of goods or services.¹²⁶

¹²¹ *CC Act* (n 6) ss 93ACA, 93AG, introduced by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth). Section 93AG enables the ACCC to make a 'stop notice' where there has been a material change of circumstances since the conduct was notified or authorised and where the ACCC reasonably believes that serious public detriment is imminent or has occurred. This power is similar in nature to that currently possessed by the Fair Work Commission, under s 424 of the *FW Act* (n 20), to suspend or terminate protected industrial action threatening to endanger the life, health, safety or welfare of the population, or part of it, or the economy.

¹²² *ACCC Guidelines* (n 3) 33.

¹²³ *Ibid* 10.

¹²⁴ *Ibid*.

¹²⁵ Immunity is granted in respect of ss 45AF, 45AG, 45AJ, 45AK (offence and civil penalty provisions that deal with making a contract containing a cartel provision) and s 45 (contracts that restrict dealings or affect competition, including concerted practices).

¹²⁶ Exposure Draft Determination (n 14) s 7(2).

- (2) Franchisees who have franchise agreements with the same franchisor¹²⁷ can collectively bargain with their franchisor regardless of their size or other characteristics.¹²⁸
- (3) Fuel retailers who have fuel re-selling agreements with the same fuel wholesaler¹²⁹ can collectively bargain with their fuel wholesaler regardless of their size or other characteristics.¹³⁰

Each member of the group must undertake a self-assessment as to whether they meet the eligibility criteria.¹³¹ So long as a business is eligible to rely on the class exemption, there is no limit on the size of the bargaining group. Similarly, if the business falls within the relevant categories set out above, and complies with the notification procedure noted below, they can seek to collectively bargain with any target business (regardless of the size/turnover of the target business). However, in practice, no business can be compelled to join the bargaining group or engage in collective bargaining — which presents a significant structural barrier to effective bargaining (as we discuss in more detail in Section V below).¹³²

The Exposure Draft Determination does not define ‘collective bargaining’. Instead, it describes collective bargaining conduct as: the making of an ‘initial contract’; engaging with one or more persons ‘in a concerted practice’ in relation to an initial contract; or giving effect to an initial contract.¹³³ An ‘initial contract’ is defined as being a contract (or proposed contract) that is between a corporation and one or more other persons and that is about the supply of goods or services to, or acquisition of goods or services from, the target (or targets).¹³⁴

While the scope of the collective bargaining conduct is potentially quite broad, there are a number of express limitations on the class exemption for collective bargaining set out in the Exposure Draft Determination.¹³⁵

First, any contract struck between the group and the target cannot contain a ‘prohibited boycott provision’ — that is, a provision that has the direct or indirect

¹²⁷ Key terms such as ‘franchisee’, ‘franchise agreement’ and ‘franchisor’ are defined by reference to the *Franchising Code* (set out in sch 1 of the *Competition and Consumer (Industry Codes — Franchising) Regulation 2014*). See also Exposure Draft Determination (n 14) s 5.

¹²⁸ Exposure Draft Determination (n 14) s 7(3).

¹²⁹ Key terms such as ‘fuel retailer’, ‘fuel re-selling agreement’ and ‘fuel wholesaler’ are defined by reference to the Oil Code (set out in sch 1 of the *Competition and Consumer (Industry Codes — Oil) Regulation 2017*). See also Exposure Draft Determination (n 14) s 5.

¹³⁰ Exposure Draft Determination (n 14) s 7(4). If a group of franchisees or fuel retailers wish to collectively bargain with a target business (that is not the franchisor or fuel wholesaler respectively), then the class exemption will only apply if the franchisee/fuel retailer meets the general definition of ‘small business’ (ie it has an aggregated turnover of less than \$10 million).

¹³¹ There has been disquiet expressed about the capacity of small businesses to undertake this self-assessment without the benefit of legal advice and in light of the more expansive prohibition on ‘concerted practices’: see, eg, Institute of Public Accountants-Deakin SME Research Centre, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (21 September 2018) 10 (*Institute of Public Accountants-Deakin SME Research Centre Submission*).

¹³² ACCC Draft Guidance Note (n 14) 5.

¹³³ Exposure Draft Determination (n 14) s 7(2).

¹³⁴ *Ibid* s 6.

¹³⁵ *Ibid* div 2.

purpose of preventing, restricting, or limiting the supply of goods and services to, or acquisition of goods and services from, the target(s).¹³⁶ The ACCC Draft Guidance Note to the class exemption acknowledges that a collective boycott may help the group achieve some of the benefits of collective bargaining, especially when they are dealing with an unwilling target, but also notes the ACCC's oft-repeated view that 'collective boycotts can be costly and damage a wide range of market participants, including the group that is engaging in the boycott'.¹³⁷ It also makes it clear that the class exemption does not provide, and is not intended to provide, any protection for collective boycotts. We will return to this issue in Section V below.

Second, the legal protection afforded under the class exemption only applies where the relevant notification procedure has been followed. While there is some suggestion that businesses which meet the eligibility criteria of the class exemption will gain 'automatic protection',¹³⁸ this is not strictly correct. Instead, to be covered by the exemption, it is necessary for eligible businesses, or their nominated representative, to provide notice to the ACCC in the requisite form¹³⁹ and set out all relevant information, including: the bargaining group;¹⁴⁰ the relevant target(s) or type of target business(es);¹⁴¹ the subject on which the group wishes to bargain; and contact details for the group (which may be any member of the group or a nominated representative). This notice must be provided to the ACCC within 14 days of the date on which the group commenced collective negotiations.¹⁴² There is no fee for lodging the notice, but once received, the notice will be placed on a public register maintained by the ACCC. A copy of the notice must also be provided to the target business when the group or their representative first approaches the target business.¹⁴³

The Draft Exemption Notice prepared by the ACCC is designed to be completed and filed without legal advice. The use of generalised terms is intended to allow a level of flexibility so that future (and possibly unforeseen) changes in the bargaining group and/or target business(es) may be accommodated.¹⁴⁴ But the lack of categorical descriptions of these groups, combined with the blurred boundaries of many new or forming business associations, may lead to uncertainty about who falls

¹³⁶ Ibid s 8.

¹³⁷ ACCC Draft Guidance Note (n 14) 2–3.

¹³⁸ ACCC, *Collective Bargaining Class Exemption Notice: Draft for Consultation* (June 2019) ('Draft Exemption Notice').

¹³⁹ Ibid.

¹⁴⁰ The Draft Exemption Notice states that if there is a small group that is unlikely to change, the names of all members may be listed. Alternatively, 'a general description of the members of the group' may be provided in the Notice. See *ibid* item 1.

¹⁴¹ The Draft Exemption Notice states that if there is one particular target business or a small number of known target businesses, the names of each target business may be listed. However, it is sufficient to include 'a general description of the type of target businesses the group intends to collectively bargain with'. See *ibid* item 2.

¹⁴² Exposure Draft Determination (n 14) s 9.

¹⁴³ Ibid s 10.

¹⁴⁴ Australian Chamber of Commerce and Industry, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (12 July 2019) 1 ('*Australian Chamber of Commerce and Industry Submission*').

within the scope of the class exemption notice and who is able to rely on the legal immunity this provides.¹⁴⁵

Third, the class exemption only applies to collective bargaining conduct undertaken by eligible corporations¹⁴⁶ if they reasonably expect to make one or more *contracts* with one or more targets about the supply or acquisition of goods or services. This is somewhat confusing given that the Draft Guidance Note also suggests that joint tendering, a joint response to a tender and group mediation¹⁴⁷ are all covered by the class exemption.¹⁴⁸ Individual businesses may seek to form an association in order to further their interests, but this may not necessarily involve creating any common law contract. For example, the Franchise Council of Australia noted that ‘in most cases a group of franchisees who are collectively dealing with a franchisor will not have “entering a contract” as their objective’.¹⁴⁹ Instead, they may seek only ‘ongoing consultation on network changes’.¹⁵⁰ In a similar vein, the Australian Government Department of Jobs and Small Business (as it was then known)¹⁵¹ submitted that allowing ‘franchisees to, for example, collectively negotiate the pricing of inputs, aspects of contracts and mediate collectively may assist in restoring the power imbalance between franchisors and franchisees’.¹⁵² However, in circumstances where parties do not reasonably expect to, or intend to, make a contract, it is not clear whether the collective activity will fall within the scope of the class exemption and how the relevant subject matter should be articulated in the class exemption notice.

In addition, there are a number of implicit limitations on the way in which the class exemption is intended to operate in practice.

Information-sharing is only permitted under the Exposure Draft Determination when it is ‘necessary’ to facilitate the collective bargaining process.¹⁵³ If group members intend to share or use information that goes outside the collective bargaining negotiations, the class exemption will not apply and separate authorisation or notification will be required.¹⁵⁴ Further, the class exemption does

¹⁴⁵ Franchise Council of Australia, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (3 July 2019) 5 (*‘Franchise Council of Australia Submission’*).

¹⁴⁶ The requirement set out in s 11 of the Exposure Draft Determination (n 14) appears only to apply to eligible corporations seeking to rely on s 7(2) and does not refer to franchisees or fuel retailers who are granted immunity under s 7(3) and s 7(4), respectively.

¹⁴⁷ Group mediation is only expressly mentioned with respect to franchisees and fuel retailers. It is not clear from the Draft Guidance Note whether group mediation is also contemplated for eligible corporations outside of franchise networks or fuel retail arrangements: see ACCC Draft Guidance Note (n 14) 4.

¹⁴⁸ *Ibid* 4–5.

¹⁴⁹ *Franchise Council of Australia Submission* (n 145) point 7.

¹⁵⁰ *Ibid* point 8.

¹⁵¹ From May 2019, this Department is now known as the Department of Employment, Skills, Small and Family Business.

¹⁵² Department of Jobs and Small Business (Cth), Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (October 2018) 2.

¹⁵³ ACCC Draft Guidance Note (n 14) 7.

¹⁵⁴ *Ibid* (n 14) 7.

not ‘override any existing legal or contractual obligations between the parties, such as confidentiality clauses’.¹⁵⁵

Finally, in the Draft Guidance Note, there is a suggestion that the ACCC will retain the power to withdraw the benefit of the class exemption from particular businesses if the ACCC is satisfied that the business is engaging in collective bargaining conduct that substantially lessens competition and is not likely to result in overall public benefits.¹⁵⁶ This places businesses in a precarious position. Despite the existence of the exemption, they will still have to remain vigilant to ensure that any collective bargaining conduct does not lead to outcomes that the ACCC might consider to have become anti-competitive in effect. Until the exemption is in place and operational, when such a line might be crossed will be a matter entirely of speculation.

V Analysis: Problems with the Proposed Class Exemption

A *Benefits of the Class Exemption*

The introduction of a class exemption for collective bargaining is a good step in providing a simple and meaningful mechanism for accessing collective bargaining by small business. It will relieve pressure on the flagging notification and authorisation processes and provide a greater degree of certainty in the form of clearer, binding rules for eligible businesses.¹⁵⁷ The class exemption will also be free of cost,¹⁵⁸ much quicker in affording legal protection for collective bargaining conduct and provide for longer term protection.¹⁵⁹ While the class exemption is a welcome development, ultimately the class exemption ‘is merely an immunity, not an enhancement of rights’.¹⁶⁰ In our view, the exemption does not go far enough to ensure that the purported benefits of collective bargaining can be realised in practice.

B *Conflicting Rationales for the Class Exemption*

The intention behind the class exemption is to provide small businesses with immunity from the *CC Act* for collective bargaining conduct — an immunity that is already enjoyed by employees engaging in collective activities. However, the rationale for creating this ‘safe harbour’ is distinct in the competition law context, as compared to labour law. We argue that misplaced assumptions about the utility of collective bargaining in the absence of other collective rights — such as the right

¹⁵⁵ *Ibid.*

¹⁵⁶ *CC Act* (n 6) s 95AA(1).

¹⁵⁷ Brent Fisse, ‘Australian Cartel Law: Biopsies’ (Speech, Competition Law Conference, 5 May 2018) 32.

¹⁵⁸ In comparison, there is a lodgement fee of \$1,000 in relation to notifications and \$7,500 in relation to authorisations (albeit the ACCC can waive the authorisation lodgement fee in whole or part if the fee is unduly onerous). See *ACCC Guidelines* (n 3) 5.

¹⁵⁹ The proposed class exemption provides legal protection for up to 10 years, whereas the notification process currently provides three years of legal protection and authorisation processes generally provide legal protection for a period between five to 10 years. See *ibid.*

¹⁶⁰ *Franchise Council of Australia Submission* (n 145) point 3.

to strike or engage in boycott activity — has significant flow-on effects for businesses seeking to engage in effective collective action.

The ACCC's stated rationale for the class exemption is to increase market efficiencies and reduce transaction costs, rather than rebalance bargaining power.¹⁶¹ This is in line with the traditional policy justifications used in competition law and surveyed in Section III above. This approach was echoed by the Franchise Council of Australia:

The primary motive for franchisees participating in collective bargaining is to advocate for an improvement in their own circumstances and to further their own business interests. In most cases that would not give rise to a wider public benefit. Indeed, in some cases there may be a significant cost to the public as a consequence of the franchisees' collective bargaining initiative, in the form of higher prices or reduction of service to end customers.¹⁶²

In contrast, other submissions made to the ACCC during the consultation period perceived collective bargaining through a conceptual lens more aligned with labour law, namely that collective bargaining is a key mechanism for reducing possible bargaining power imbalances.¹⁶³ For example, the Victorian Government stated that:

Many industries in Australia are characterised by significant disparities in bargaining power between small businesses and independent contractors on the one hand and larger entities on the other hand. These disparities often result in sub-optimal outcomes for small businesses and independent contractors in terms of the prices they are paid for goods and services and their terms of trade with these larger entities. By addressing these disparities in bargaining power through simplified collective bargaining mechanisms, small businesses and independent contractors will be able to achieve fairer outcomes and avoid the imposition of onerous terms and conditions in their contracts.¹⁶⁴

These arguments are particularly pertinent when considering self-employed workers and franchisees, who may experience a high degree of dependency in their working arrangements. The New South Wales ('NSW') Small Business Commissioner highlighted, in particular, the inequality in bargaining power experienced by workers in the gig economy — who are generally treated by labour engagers as 'micro businesses', but experience significant vulnerability and inequality with those same engagers.¹⁶⁵

However, we believe that any rebalancing of bargaining power through collective bargaining (or otherwise) is unlikely to occur without addressing a

¹⁶¹ ACCC Discussion Paper (n 1).

¹⁶² Franchise Council of Australia Submission (n 145) point 10.

¹⁶³ Federal Chamber of Automotive Industries, Submission to the ACCC, ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption (3 July 2019) 1.

¹⁶⁴ Victorian Government, Submission to the ACCC, ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption (10 June 2019) 2 ('Victorian Government Submission'). See also New South Wales ('NSW') Small Business Commissioner, Submission to the ACCC, ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption (3 July 2019) 3 ('NSW Small Business Commissioner Submission').

¹⁶⁵ NSW Small Business Commissioner Submission (n 164) 51–9.

multitude of structural barriers that small businesses face in their dealings with larger businesses. Regulatory structures adopted for labour laws provide a context through which these challenges can be considered.

C *Residual Structural Barriers to Effective Collective Bargaining*

The concept of ‘bargaining structures’ is derived from various comparative and historical studies of collective bargaining arrangements (predominantly in the labour law context).¹⁶⁶ While there are some differences between these studies, scholars have generally sought to examine, compare and critique bargaining structures through a conceptual taxonomy consisting of five ‘dimensions’; namely, the status, agent, level, scope and coverage of bargaining.¹⁶⁷ In this section, we provide a short explanation of each of the five dimensions before considering where the current proposed class exemption sits within this analytical framework.

1 *Status of Bargaining*

The first dimension, and possibly the most important, refers to the status of bargaining, which is broadly understood as: the degree of formality in collective agreement-making procedures, including regulation of bargaining tactics; and the enforceability of the bargains struck between the parties.¹⁶⁸

(a) *Degree of Formality in Agreement-Making and Bargaining Tactics*

There are arguably two critical questions when it comes to the agreement-making process itself:

- (1) Are any rules imposed on the behaviour of parties who seek to engage in collective bargaining?
- (2) To what extent can parties take lawful industrial action (or collective boycotts) in aid of bargaining?

We deal with each of these questions in turn.

First, neither the *CC Act* nor the class exemption set out any rules or processes governing agreement-making or bargaining tactics once immunity from the *CC Act* is granted. Unlike the complex regulations that exist in the *FW Act* regulating

¹⁶⁶ See, eg, Keith Sisson, *The Management of Collective Bargaining: An International Comparison* (Blackwell, 1987); Hugh Clegg, *Trade Unionism under Collective Bargaining* (Blackwell, 1976); Mark Bray and Peter Waring, ‘The Rhetoric and Reality of Bargaining Structures under the Howard Government’ (1998) 9(2) *Labour and Industry* 61; Robert Macklin, Miles Goodwin and Jim Docherty, ‘Workplace Bargaining Structures and Processes in Australia’ in David Peetz, Alison Preston and Jim Docherty (eds), *Workplace Bargaining in the International Context* (Department of Industrial Relations (Cth) Research Monograph No 2, 1993).

¹⁶⁷ These dimensions are taken from Mark Bray et al, *Employment Relations: Theory and Practice* (McGraw Hill Australia, 4th ed, 2018) 382.

¹⁶⁸ According to Bray et al, the status of bargaining also encompasses the recognition of employee representatives for bargaining purposes: *ibid.* However, here, we discuss this issue in the context of the second dimension of bargaining agents.

collective bargaining by employees,¹⁶⁹ the *CC Act* leaves both the processes and outcomes of any associated collective bargaining to regulation under the general commercial law. There are no formalities for the process of making contracts, there are no rules governing the conduct of the parties, and there is no express regulation of bargaining tactics.

This absence of regulation may have significant repercussions. Parties with no experience or understanding of bargaining processes may struggle to understand how they should go about engaging in negotiations without any guiding framework, something that undermines the cost reductions purportedly associated with the exemption. Further, the *CC Act* does not appear to contain any provisions to protect members of a collective bargaining group from victimisation or prejudicial treatment on the basis of their claims to bargain collectively. In the franchising context, there is evidence that suggests franchisors have engaged in retaliatory behaviour after franchisees sought to negotiate terms in their favour or otherwise ‘speak out’. For example, the Motor Trades Association of Australia has noted that in response to dealers seeking to challenge the terms of dealer agreements on an individual or collective basis, the franchisor has not renewed longstanding and high-performing dealerships.¹⁷⁰ Similarly, in July 2018, a Foodora delivery rider claimed that he had been dismissed from the Foodora platform for publicly talking about his terms and conditions.¹⁷¹ If the right to collective bargaining under the *CC Act* is to be meaningful, there must be protection in respect of the exercise of those rights.¹⁷² The NSW Small Business Commissioner has argued that where target businesses hold superior bargaining power, they are

also likely to possess the capacity and resources to take retributive action against the members of a collective. This may subvert the collective bargaining process; indeed, the spectre of retribution may disincentive a potential collective from forming at all.¹⁷³

The NSW Small Business Commissioner recommends that the exemption ‘include provisions affording members of a collective protection against retributive action undertaken by a target’, protections which are supported by penalty provisions and enforcement oversight.¹⁷⁴ The importance of such protections in the labour law context is very well understood and we agree that the inclusion of appropriate provisions is critically important to protect the interests of members of any bargaining group.

The second critical question in relation to the agreement-making process is the extent to which parties can take lawful industrial action. As already discussed,

¹⁶⁹ See, eg, McCrystal, Creighton and Forsyth (n 37).

¹⁷⁰ Motor Trades Association of Australia, Submission to the Senate, *Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct* (4 May 2018) 21.

¹⁷¹ David Marchese, ‘Foodora Rider Fights Dismissal from Food Delivery Service in Australian First’, *ABC News* (online, 3 July 2018) <<https://www.abc.net.au/news/2018-07-03/foodora-rider-fights-dismissal-from-food-delivery-service/9934138>>.

¹⁷² Independent contractors are protected in the exercise of workplace rights by s 340 of the *FW Act* (n 20). This includes the exercise of rights arising under a workplace law. However, the relevant definition of ‘workplace law’ in *FW Act* (n 20) s 12 does not appear to encompass the *CC Act* (n 6).

¹⁷³ *NSW Small Business Commissioner Submission* (n 164).

¹⁷⁴ *Ibid.*

the ACCC has restricted the class exemption to conduct short of a collective boycott.¹⁷⁵ There remains a tension about how to resolve the perceived public benefit and detriment in respect of proposed boycott conduct.

The *CC Act* permits authorisation and notification of proposed collective boycott conduct, and the class exemption provision could encompass collective boycott conduct.¹⁷⁶ Instead the status quo has been maintained whereby, in practice, there seems to be almost no circumstances when such conduct will be authorised. Without the realistic ability to threaten, or take, a collective boycott, groups of small businesses and self-employed workers have no way to press their claims if target businesses refuse to deal collectively. As noted above in Section IIID, this was one of the substantial obstacles that faced freelance journalists when they sought to bring media outlets to the bargaining table and one of the major reasons why the collective bargaining bid ultimately failed to make significant gains.

This concern has been ventilated in submissions to the ACCC in respect of the class exemption. The Australian Automotive Dealer Association observed that franchisors have the right to ignore any collective bargaining notice and that this

will severely limit the utility of the class exemption in negotiations between franchisor and franchisees. While it may be that such behaviour could be curbed by the judicious use of public and media pressure, it remains a likely tactic for the less ethical franchisors, particularly when such decisions are made in corporate headquarters overseas.¹⁷⁷

Similar concerns have been raised in relation to workers in the gig economy. In particular, it was submitted that the proposed class exemption

is likely to be ineffective in assisting these microbusinesses to address the bargaining power disparity that they face. A core attribute of the draft exemption is that it would not compel a target to engage with a collective. Given the totality of bargaining power held by a principal, it is most unlikely to have any incentive to engage with any contractors' collective.¹⁷⁸

What remains unclear is whether the ACCC will, in the future, move significantly in its approach to dealing with authorisations or notifications that include proposed collective boycott conduct. As discussed above, in its submissions to the Harper Review, the ACCC expressed frustration that applicants for authorisations and notifications were not proposing collective boycott activity, which, it observed, could be 'efficiency enhancing' in some circumstances.¹⁷⁹ While recent ACCC publications signal a more expansive approach to collective boycotts,¹⁸⁰ there has not yet been a significant shift in practice.

¹⁷⁵ *ACCC Discussion Paper* (n 1) 4.

¹⁷⁶ *CC Act* (n 6) ss 88(1), 93AB(1A), 95AA(1).

¹⁷⁷ Australian Automotive Dealer Association, Submission to the ACCC, *ACCC Discussion Paper on a Potential Collective Bargaining Class Exemption* (4 July 2019).

¹⁷⁸ *NSW Small Business Commissioner Submission* (n 164) 9–10.

¹⁷⁹ Harper Review (n 13) 400.

¹⁸⁰ *ACCC Guidelines* (n 3); see above n 122–4 and accompanying text.

(b) *Enforceability of Bargains*

As noted above in Section III, the exemption process will only have the effect of removing potential liability under the *CC Act* for parties who engage in collective bargaining. It does not overcome any difficulties that the parties themselves may have in producing binding outcomes from their negotiations. The class exemption is framed on the premise of common law principles relating to binary contracts and does not directly contemplate the way in which multi-party agreements are made, implemented or enforced. Under the current proposed model, it appears that any arrangements produced through collective bargaining will either have to be completely voluntary or the parties will have to navigate the difficulties that arise when attempting to create multi-party contracts at common law. While this can be achieved, it can be difficult in practice and is almost impossible to do where the members of the collective may change over time.¹⁸¹ In the labour law context, this problem has been solved through the creation of statutory collective agreements, given force and effect by virtue of the *FW Act*.¹⁸² The introduction of some form of scheme to register collective agreements negotiated by parties subject to the class exemption could have particular benefits by providing a mechanism to make agreements enforceable and by enabling oversight of agreements once created.¹⁸³

One feature of ACCC authorisations, and of permitted notifications across time, is that the ACCC consistently finds that anti-competitive detriment is kept low through ensuring that the outcome of collective bargaining remains strictly voluntary on all parties. Binding agreements between the members of the collective or between the collective and the target are characterised as necessarily anti-competitive and likely to produce a level of detriment high enough to outweigh any potential public benefits. However, it is possible that the public benefits made possible through collective bargaining will only follow if the parties are able to create some form of binding agreement.

2 *Bargaining Agent*

The agents of collective bargaining refer to the individual or organisation that represents the bargaining group and/or the target business. In industrial relations, the bargaining agent has historically been the relevant trade union, but in more recent years in Australia it has extended to include non-union actors.¹⁸⁴ The role of the

¹⁸¹ See, eg, *Ryan v Textile Clothing and Footwear Union of Australia* [1996] 2 VR 235, discussed in *McCrystal* (n 31).

¹⁸² *FW Act* (n 20) pt 2-4.

¹⁸³ A range of different models and some potential solutions in respect of potential collective bargaining by self-employed workers are explored in Shae McCrystal 'Designing Collective Bargaining Frameworks for Self-Employed Workers: Lessons from Australia and Canada' (2014) 30(2) *International Journal of Comparative Labour Law and Industrial Relations* 217 and Shae McCrystal, 'Collective Bargaining Beyond the Boundaries of Employment: A Comparative Analysis' (2014) 37(3) *Melbourne University Law Review* 662.

¹⁸⁴ Under the *FW Act* (n 20) s 176, an employee bargaining representative can be a trade union or any person appointed in writing by a relevant employee: see Rosalind Read, 'The Role of Trade Unions and Individual Bargaining Representatives: Who Pays for the Work of Bargaining?' in Shae

bargaining agent is to act on behalf of the group, enabling the pooling of resources and expertise, and allowing the group to act with one voice. In the labour law context, there is an emphasis on the importance of the independence of the bargaining representative, and the ability of the agent to act for the collective without being undermined in that representative role.¹⁸⁵

The Exposure Draft Determination provides that the collective bargaining class exemption notice may be made by a member of the bargaining group itself, or an outside representative of the group, such as an industry association, cooperative, professional body or private consultant,¹⁸⁶ but not by a trade union¹⁸⁷ (albeit a trade union is permitted to represent groups in their negotiations).¹⁸⁸ The Draft Guidance Note observes that this is consistent with the notification provisions of the *CC Act*. This is true. However, exclusion of trade unions from making a class exemption notice is not aligned with the authorisation provisions (which permit a trade union to lodge authorisations).

The exclusion of unions from creating a class exemption notice is unnecessarily restrictive, especially when it comes to self-employed workers who have frequently had the benefit of trade union representation, such as owner-drivers and freelance journalists. It also appears to unjustifiably privilege advocates or groups that operate outside of the registered organisations regime, and may have the effect of leading groups to mistakenly assume that they cannot have the benefit of assistance from a relevant trade union in acting collectively. This would be unfortunate, given that trade unions have critical expertise in bargaining — expertise that is not widely available elsewhere. Further, the independence of trade unions is well established, and their use in this context may assist in ensuring the independence and integrity of bargaining agent representation.

3 *Level of Bargaining*

The level of bargaining refers to where bargaining takes place: with a single target business or multiple target businesses; across an industry or business network; and/or across enterprises in a particular locality, region or state/territory. The manner in which this is approached in labour law contexts varies markedly in different bargaining regimes (and the stringent regulation therein). In Australia, the *FW Act* allows for bargaining to take place at both single-enterprise and multi-enterprise (industry) level, but presently only permits coercive conduct in the form of strike action to take place in the context of single-enterprise collective bargaining. This reflects a policy preference for single-enterprise bargaining.¹⁸⁹

McCrystal, Breen Creighton and Anthony Forsyth (eds), *Collective Bargaining Under the Fair Work Act* (Federation Press, 2018) 69.

¹⁸⁵ See further Rosalind Read, 'Direct Dealing, Union Recognition and Good Faith Bargaining under the *Fair Work Act 2009*' (2012) 25(2) *Australian Journal of Labour Law* 130.

¹⁸⁶ Exposure Draft Determination (n 14) s 9(2)(b). If a representative is acting on behalf of the bargaining group, they do not need to meet the \$10 million turnover threshold: ACCC Draft Guidance Note (n 14) 6.

¹⁸⁷ Exposure Draft Determination (n 14) s 9(2)(c).

¹⁸⁸ ACCC Draft Guidance Note (n 14) 6.

¹⁸⁹ *FW Act* (n 20) s 413(2).

In the competition context, the level at which bargaining takes place encompasses the markets within which the participants operate and the degree of market share represented by the bargaining group or the target. While the class exemption implicitly reflects general contractual principles, it is clear that anything beyond single-enterprise bargaining will displace these assumptions. The proposed class exemption currently imposes no limit on the size or composition of the bargaining group. Nor are there any caps on the number of target business(es) that may be approached. While this contrasts markedly with the *FW Act*, it is arguable that the restrictions on collective boycott activity means that it is relatively unlikely that a bargaining group would have sufficient organising capacity or bargaining power to strike an industry-wide or nation-wide agreement. Moreover, given that the ACCC has reserved the power to withdraw the benefit of the class exemption if it finds that a business (or group of businesses) is engaging in collective bargaining conduct that substantially lessens competition and is not likely to result in overall public benefits, it is likely that bargaining exceeding certain limits may be subject to the ACCC intervention.¹⁹⁰

4 *Scope of Bargaining*

Bargaining scope refers to those issues that may be the legitimate subject of bargaining. In industrial relations, especially in the past 20 years, the scope of collective agreements has been the source of much debate, especially in relation to provisions protecting trade union rights. In comparison, the current proposed class exemption is largely silent as to the permitted scope of bargaining — with the notable exception that any provision relating to, or permitting, a collective boycott is prohibited.¹⁹¹

On the one hand, this means that the possible scope of bargaining may be quite broad. However, as noted above in Section IV, the class exemption imposes some express and implied limitations on the bargaining scope.

First, as already discussed, the class exemption (much like the existing notification and authorisation provisions) protects individuals from liability under the *CC Act*, but not further. The exemption has the effect of removing *CC Act* impediments to collective bargaining, but there are no regulatory provisions governing what might happen next. This may create substantial legal and practical problems for participants in collective bargaining. The Franchise Council of Australia highlighted the limits of the class exemption, submitting that an exemption does not:

- give franchisees a right to re-negotiate their franchise agreements;
 - oblige a franchisor to participate in negotiations with a collective bargaining group;
 - override contractual obligations, such as confidentiality provisions;
- and

¹⁹⁰ *CC Act* (n 6) s 95AA(1).

¹⁹¹ Exposure Draft Determination (n 14) s 8.

- override statutory obligations, including the duty of good faith under the Franchising Code of Conduct.¹⁹²

Another critical issue that goes to the scope of bargaining relates to the extent to which information-sharing is permitted (or not) under the class exemption. There is a lack of clarity with respect to this issue and this may present substantial risk to group members seeking to engage in collective bargaining. This uncertainty partly stems from the fact that ‘what is “necessary” to facilitate the collective bargaining process is not clearly defined’.¹⁹³ Moreover, the draft guidance material suggests that what is ‘necessary’ may depend on the nature of the relevant bargaining group and the scope and subject of the proposed bargaining.¹⁹⁴ In practice, sharing information around contract terms between group members may be required in order to agitate for improved terms and conditions via collective bargaining. However, such information is often classed as commercially sensitive, if not confidential. Sharing this information may be permitted under the proposed class exemption, but place group members in breach of contract.¹⁹⁵

In some circumstances, information-sharing may constitute a breach of the prohibition on concerted practices or the criminal cartel provisions.¹⁹⁶ For example, in relation to franchise relationships, the ‘vague’¹⁹⁷ boundaries of the immunity provided by the class exemption — particularly with respect to information-sharing — may place franchisees at risk of breaching competition laws. For example, if franchisees share information about issues outside the direct subject of collective bargaining (for example, around divisions of markets, setting prices, cost structures, customer lists and/or proprietary information), this arguably lies beyond the scope of the class exemption.¹⁹⁸ There is also uncertainty about the legal position of group members, and the status of collective bargaining more generally, where one member has sought to inappropriately share information with the group, or where information has been shared during negotiations, but no collective agreement is ultimately reached.¹⁹⁹

5 Coverage of Bargaining

This final dimension of bargaining structures is intended to direct attention towards who is covered by the bargained outcomes. The *FW Act* has detailed provisions relating to the application and coverage of enterprise agreements. There is a noticeable lack of detail on this issue with respect to collective agreements made under the auspices of the proposed class exemption. The ambiguous legal status of the agreements, combined with the loose definition of who falls within the relevant

¹⁹² *Franchise Council of Australia Submission* (n 145) point 1.

¹⁹³ *Australian Chamber of Commerce and Industry Submission* (n 144) 3.

¹⁹⁴ ACCC Draft Guidance Note (n 14) 7.

¹⁹⁵ *Institute of Public Accountants-Deakin SME Research Centre Submission* (n 131) 4.

¹⁹⁶ *Franchise Council of Australia Submission* (n 145) 3. See also *Victorian Government Submission* (n 164) 6.

¹⁹⁷ *Franchise Council of Australia Submission* (n 145) point 2.

¹⁹⁸ *Ibid.* See also *Victorian Government Submission* (n 164) 6.

¹⁹⁹ *Victorian Government Submission* (n 164) 6. See also *Institute of Public Accountants-Deakin SME Research Centre Submission* (n 131) 10–11.

bargaining group and/or who is the target business(es), means the question of who is ultimately covered by the collective agreement is a complex one.

This issue is likely to become further complicated where one member of the bargaining group has made an incorrect self-assessment about their eligibility to engage in collective bargaining. The Draft Guidance Note suggests that ongoing negotiations will not fall foul of *CC Act* in these circumstances and that all other eligible members of the bargaining group remain unaffected and retain their legal protection. However, there continues to be a lack of clarity about whether this has any effect on the legal status and coverage of the concluded agreement.

VI Conclusion

The introduction of a class exemption for collective bargaining for small businesses is a positive step, and one that is long overdue. In labour law, collective bargaining is considered an essential tool for correcting inherent imbalances of bargaining power. Traditionally, this rationale has not been widely accepted in the realm of competition law. Rather, collective bargaining — as perceived through an economic lens — is a mechanism for addressing market failure, improving contractual efficiencies, and correcting information asymmetries.

This article has traced the history of collective bargaining in the commercial context. Our detailed survey shows that policymakers have softened their stance towards collective bargaining over the course of the last 50 years — from an outright prohibition on restrictive trade practices, to reluctant acceptance of collective bargaining where a public benefit can be clearly evidenced. The proposed class exemption represents not just the most recent development, but the most progressive step in this regard. Our review of ACCC materials — in relation to the class exemption specifically and collective boycotts more generally — shows that the regulator is increasingly comfortable with the notion that collective bargaining produces public benefit and that collective boycotts can produce economic efficiencies. However, we argue that while the class exemption is being introduced as a reaction to the failures of the earlier authorisation and exemption processes to produce meaningful collective bargaining for small businesses, it repeats many of the failings of those models. Had the exercise been approached from the perspective of designing a more permissive model of bargaining that would actively promote collective agreement-making, lessons learned in the labour law context might have been drawn upon to assist in minimising those failings.

By applying the dimensional analysis developed by industrial relations theorists, and by examining key elements such as status, level and coverage of bargaining, we show that there are limited structural supports in place to encourage and facilitate effective collective bargaining. Indeed, the ACCC has promulgated remarkably few rules regarding the context, content and level of lawful collective bargaining. Instead, the proposed class exemption appears to establish a bargaining regime where the parties themselves are free to determine the processes and outcomes of bargaining, so long as it remains non-coercive throughout.

However, it is this very lack of regulatory context that may inhibit the development of meaningful bargaining. The Exposure Draft Determination, as well as the Draft Guidance Note and other materials, are noticeably silent on how to fruitfully engage in collective bargaining, especially when dealing with a reluctant target. There is also limited information about who is covered by the concluded agreement and how one might enforce its terms. While the class exemption creates immunity from competition law breaches, it does very little to create a functional collective bargaining system.

Although this assessment may be disheartening, we also recognise that there are highly-developed and well-structured systems of collective bargaining already in operation (albeit they have been established in the context of employment relationships, rather than business-to-business relationships). Nonetheless, we believe that there is value in looking across the regulatory aisle, so to speak, in seeking to reimagine collective bargaining under the *CC Act*. In designing a functional collective bargaining system for the commercial context, it is important to consider how each of the five critical bargaining dimensions — that is, the status, agent, level, scope and coverage of bargaining — will be addressed. In our view, an important starting point would be to enhance the binding and enforceable nature of any concluded collective agreement. Rather than rely on common law contractual principles that are ill-suited to multi-party agreements, finalised collective agreements should be given statutory force. A second critical step is to protect bargaining parties from any form of retribution, retaliation or victimisation. Protecting the right of freedom of association is a longstanding principle in the labour law sphere and remains an essential feature of the current collective bargaining framework under the *FW Act*. The right to withdraw labour, or engage in a collective boycott, is another crucial, albeit far more controversial, element. In our view, all of these issues need to be given more detailed consideration if policymakers are serious about promoting small business collective bargaining, protecting the parties involved, and producing viable and valuable outcomes.

POSTSCRIPT

After more than two years of public consultations, the ACCC announced in October 2020 that it had finalised the small business collective bargaining class exemption and expects that the exemption will be available for use by small businesses in early 2021. The *Competition and Consumer (Class Exemption—Collective Bargaining) Determination 2020* is on much the same terms as the Exposure Draft Determination released in June 2019 and referred to extensively in this article. One notable change relates to the information-sharing provisions. The Determination makes clear that the class exemption will only apply if the information is shared or used by the corporation to engage in collective bargaining and the corporation believes that it is ‘reasonably necessary’ to share or use that information for that purpose. In short, whether information-sharing is covered by the class exemption will be assessed on an objective, not subjective, basis. Before the Determination can take effect, it and the accompanying Explanatory Statement must be lodged for registration on the Federal Register of Legislation and tabled in Parliament. It will then be subject to a parliamentary disallowance period of 15 sitting days, after which the ACCC will set a commencement date for the class exemption.

Before the High Court

Police Doorknocking in Comparative and Constitutional Perspective: *Roy v O'Neill*

Julian R Murphy*

Abstract

Roy v O'Neill, currently before the High Court of Australia, raises the question of whether a police officer can knock on a person's front door to investigate them for potential criminal offending, in circumstances where the police officer has no explicit common law or statutory power to do so. In order to resolve that question, the High Court will need to develop, or at least refine, the common law relating to trespass and implied licences. This column explores two issues relevant to the development of the common law in this area, namely: the approach taken to implied licences in other common law jurisdictions; and the influence, if any, that divergent state and territory legislative positions in this area should have on the development of the single common law of Australia.

I Introduction

The questions raised by *Roy v O'Neill*,¹ currently before the High Court of Australia, are so fundamental that it is surprising they have not previously been definitively answered. Can a police officer knock on a person's front door to investigate them for potential criminal offending, in circumstances where the police officer has no explicit common law or statutory power to do so? In this situation, can the police officer claim the cover of the same implied licence extended to the door-to-door salesperson or the Jehovah's Witness? Or is the police officer's attendance so different that they are a trespasser? Unsurprisingly, the parties' written submissions on these questions focus on the Australian case law of trespass and implied licences.² The parties join issue on the principles to be extracted from the authorities relating to dual purposes for attendance and multiple occupancy residences. The authorities on these issues are not entirely in

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¹ High Court of Australia, Case No D2/2020 ('*Roy*').

² Aileen Roy, 'Appellant's Submissions', Submission in *Roy v O'Neill*, Case No D2/2020, 8 May 2020, 5–16 [18]–[43] ('*Appellant's Submissions*'); Julie O'Neill, 'Respondent's Submissions', Submission in *Roy v O'Neill*, Case No D2/2020, 5 June 2020, 5–17 [23]–[78] ('*Respondent's Submissions*'); Aileen Roy, 'Appellant's Reply', Submission in *Roy v O'Neill*, Case No D2/2020, 29 June 2020, 2–5 [4]–[13] ('*Appellant's Reply*').

agreement,³ and thus it appears likely that the Court will be required to develop the common law in order to resolve the dispute in *Roy*. This column raises two considerations — neither considered in detail by the parties — that ought to inform the Court’s development of the common law in this area: the approach taken to implied licences in other common law jurisdictions; and the influence, if any, that divergent state and territory legislative positions in this area should have on the development of the single common law of Australia. Ultimately, it is suggested that the High Court should develop the common law cognisant of the scope for reasonable disagreement as to the balance to be struck between public safety, personal privacy and individual property rights. Such an approach has constitutional considerations to recommend it where, as in the present case, the universalising force of the single common law has the capacity to render obsolete the balances struck by different state and territory legislatures within the Federation.

II A Knock at the Door

At lunchtime on a Friday in April 2018, three police officers attended the public housing compound in which Ms Roy lived with her partner, Mr Johnson, in Katherine in the Northern Territory.⁴ Ms Roy was subject to a domestic violence order which prohibited her from, among other things, remaining in Mr Johnson’s company when she was intoxicated. On the day police attended Ms Roy’s residence, they had no specific information to ground a suspicion that Ms Roy was breaching her domestic violence order. Rather, the police were conducting proactive domestic violence order checks as part of a wider domestic violence prevention operation.

Ms Roy and Mr Johnson lived in a unit within a duplex building within the public housing compound. A perimeter fence surrounded the entire compound, albeit without a locked gate. Access to the unit’s front door, which was situated in an alcove, was via a concrete path. When police attended, one of the officers knocked on the flyscreen door and, seeing Ms Roy and Mr Johnson inside, called Ms Roy to the door for the purpose of a domestic violence order check. As Ms Roy approached the door, the officer noticed her to be lethargic and showing other indicia of intoxication. The officer asked Ms Roy to submit to a handheld breath test, which returned a positive result. Ms Roy was then arrested and taken to the police watch house. There was no evidence that the police entered the unit or interacted with Mr Johnson at all. The entire interaction appears to have taken place on the doorstep, or in the alcove, of the unit’s front door.

Ms Roy was charged with a single count of breaching a domestic violence order. In the Local Court of the Northern Territory, the charge was dismissed on the basis that the police were trespassers and thus that the Prosecution evidence was unlawfully or improperly obtained. The Supreme Court of the Northern Territory dismissed a Prosecution appeal, concluding that ‘[t]o hold otherwise

³ *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333, 342 [32], 343 [37] (Spigelman CJ; Mason P and Grove J agreeing).

⁴ Unless otherwise indicated, this section draws upon *O’Neill v Roy* (2019) 345 FLR 8, 10–11 [2]–[7].

would be an Orwellian intrusion into the fundamental rights of privacy that the common law has been at great pains to protect and would amount to a new exception to the common law.⁵ The Court of Appeal of the Northern Territory allowed a further Prosecution appeal, holding that there was an

implied invitation to these visitors (albeit police officers) to walk up the path leading to the entrance to the dwelling (the threshold of the home) in order to knock on the door and undertake lawful communication with someone within the dwelling.⁶

The High Court granted Ms Roy special leave to appeal, with Edelman J noting at the hearing: ‘there are courts across the world that are dealing with this issue and splitting as to the result and the manner in which it should be dealt with’.⁷

III Common Law Divergences Abroad

In the parties’ written submissions in the High Court appeal, the decisions of ‘courts across the world’ receive relatively brief treatment.⁸ This is not surprising. Each party has more to gain from attempting to frame the local case law as recommending a result in their favour. However, this column starts from the position that the Australian authorities do not determine the issue in *Roy*, and thus the High Court will have to develop the common law of Australia. If that is so, then there are good reasons⁹ to think that the Court might gain assistance from the way in which the apex courts of comparable jurisdictions have dealt with this same issue. Accordingly, this section of the column outlines the thrust of the case law from the United Kingdom (‘UK’), New Zealand (‘NZ’), Canada and the United States of America (‘US’). This outline reveals the scope for reasonable disagreement about the appropriate balance to be struck between public safety, personal privacy and individual property rights.

Of the jurisdictions considered here, the UK is that which most readily implies a licence in favour of a police officer attending an unobstructed front door in order to investigate an occupier. This position was first clearly expressed in *Robson v Hallett*,¹⁰ where it was considered to be of no significance to the scope of the implied licence that the attendees were police officers investigating the occupier for the potential commission of a criminal offence. That such an attendance fell within the implied licence was said to be ‘so simple’ as to not require reference to authority.¹¹ Subsequent cases have given the issue similarly

⁵ Ibid 26 [44].

⁶ *O’Neill v Roy* (2019) 345 FLR 29, 39 [38].

⁷ *Roy v O’Neill* [2020] HCATrans 43, 2.

⁸ *Appellant’s Submissions* (n 2) 7 [25], 19 [49] n 115; *Respondent’s Submissions* (n 2) 17–19 [79]–[86]; *Appellant’s Reply* (n 2) 5 [14].

⁹ The High Court has regularly referred to foreign authority in developing the law of trespass and implied licences. See, eg, *Barker v The Queen* (1983) 153 CLR 338, 343 (Mason J); *Kuru v The Queen* (2008) 236 CLR 1, 15 [43] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

¹⁰ *Robson v Hallett* [1967] 2 QB 939, 951 (Lord Parker CJ; Diplock LJ and Ashworth J agreeing) (‘*Robson*’).

¹¹ Ibid 953 (Diplock LJ; Ashworth J agreeing).

summary treatment,¹² although at least one UK court has acknowledged the ‘theoretical ... force’ of an argument to the contrary.¹³ The upshot is that, while the point of principle appears to be deeply embedded in UK case law, it has not been the subject of elaborate justification.¹⁴

The course of the authorities in NZ is more interesting. A convenient starting point is the 1987 decision of *Howden v Ministry of Transport*,¹⁵ where, after consideration of *Robson*, it was held that there was no implied licence for a police officer to attend upon a person’s driveway in order to conduct a ‘random’ breath test. Acutely aware of the matters of ‘private property’ and ‘privacy’ at stake, Cooke P refused to recognise an implied licence because it could not be clearly maintained that ‘[m]ost New Zealand householders’ would have consented to police attendance in the circumstances.¹⁶ Cooke P’s framing of the question — essentially holding that the attendee bears the onus of persuading the Court that most householders would consent to police attendance in the circumstances — was also influenced by the limited ability of courts, as compared to legislatures, to estimate the majority views of the public.¹⁷

Around the turn of the 21st century, implied licence arguments rose to prominence in a number of NZ judgments,¹⁸ some of them difficult to reconcile with the reasoning of Cooke P in *Howden*. The burden of the NZ authorities appears to be, however, that a licence will be implied for police to attend at a person’s unobstructed front (or back) door where they have dual purposes, one being investigatory and the other being communicative.¹⁹ Thus, in 2010, the Supreme Court implied a licence in favour of an undercover police officer attending the front door of a residence to ask to purchase drugs, notwithstanding that the officer was also covertly recording the interaction.²⁰ Just a year later,

¹² *Lambert v Roberts* [1981] 2 All ER 15, 19 (Donaldson LJ; Kilner Brown J agreeing); *Pamplin v Fraser* [1981] RTR 494, 499–500 (Ackner LJ; McNeill J agreeing); *Fullard v Woking Magistrates’ Court* [2005] EWHC 2922 (Admin, QBD), [18]. The issue was given slightly more consideration in *Wiltshire v Crown Prosecution Service* [2014] EWHC 4659 (Admin), [7]–[16] (Simon J; Beatson LJ agreeing).

¹³ *Snook v Mannion* [1982] RTR 321, 325 (Ormrod LJ; Forbes J agreeing).

¹⁴ Indeed, a search of BAILII and AustLII reveals that *Robson* (n 10) has been cited much more often in Australia than it has in the UK: see British and Irish Legal Information Institute (‘BAILII’) <<https://www.bailii.org/>>; Australasian Legal Information Institute (‘AustLII’) <<http://www.austlii.edu.au/>>.

¹⁵ *Howden v Ministry of Transport* [1987] 2 NZLR 747 (Court of Appeal) (‘*Howden*’). See also *Transport Ministry v Payn* [1977] 2 NZLR 50 (Court of Appeal).

¹⁶ *Howden* (n 15) 751 (Cooke P).

¹⁷ *Ibid.*

¹⁸ See *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 (High Court); *R v Bradley* (1997) 15 CRNZ 363 (Court of Appeal); *R v Ratima* (1999) 17 CRNZ 227 (Court of Appeal); *Attorney-General v Hewitt* [2000] 2 NZLR 110 (High Court); *R v Pou* [2002] 3 NZLR 637 (Court of Appeal); *R v Soma* (2004) 21 CRNZ 23 (Court of Appeal); *R v Meyer and Woods* [2010] NZAR 41 (Court of Appeal); *King v Police* [2010] NZAR 45 (High Court); *O’Connor v Police* [2010] NZAR 50 (High Court) (‘*O’Connor*’); *Police v McDonald* [2010] NZAR 59 (High Court) (‘*McDonald*’); *Hunt v The Queen* [2011] 2 NZLR 499 (Court of Appeal) (‘*Hunt*’); *R v Balsley* [2013] NZCA 258.

¹⁹ *Gerrard-Smith v New Zealand Police* [2016] NZHC 2543, [17]. See also *Warren v Attorney-General* [2019] NZHC 1690, [79]–[84].

²⁰ *Tararo v The Queen* [2012] 1 NZLR 145, 172 [15] (Blanchard, Tipping, McGrath and William Young JJ) (‘*Tararo*’).

however, the Supreme Court explained that such a licence will only be implied where there is a ‘genuine’ ‘purpose of communicating with the owner or occupier’.²¹ What is especially interesting about the recent NZ authorities is the willingness to engage with explicit considerations of ‘common convenience’,²² ‘welfare of society’²³ and ‘matter[s] of social and legal policy’.²⁴ Direct resort to policy is apparently justified in NZ because the implied licence is now considered a legal ‘fiction’²⁵ and ‘an invention of the common law to reflect the balance between respect for an individual’s right to privacy, and the public interest in enforcement of the criminal law’.²⁶ That being so, NZ courts no longer consider themselves bound, as Cooke P did in *Howden*, by objective inquiries as to what ‘[m]ost New Zealand householders’ would have consented.²⁷ This has led to results which would probably be at odds with the expectations of most NZ householders, including implied licences extending to highly orchestrated police operations.²⁸

In Canada, where implied licences often arise in litigation concerning the right to be free from unreasonable searches and seizures, the position is very different. There, as recently as 2019, a majority of the Supreme Court of Canada has refused to recognise an implied licence for police to attend on a person’s property for the purpose of ‘communication’ where police also have a ‘subsidiary purpose’ of securing evidence against the person.²⁹ Such a subsidiary purpose would amount to ‘speculative criminal investigation, or a “fishing expedition”’.³⁰ The majority in *R v Le* held that the ‘doctrine of implied licence was never intended to protect this sort of intrusive police conduct’.³¹ The provincial courts have also been largely consistent in holding that an investigatory purpose will disqualify police from relying on an implied licence, even where the purpose can also be described as communicative.³²

²¹ *Hamed v The Queen* [2012] 2 NZLR 305, 355 [157] (Blanchard J; Elias CJ and Gault J agreeing). See also 370 [219] (Tipping J), 380–1 [263] (McGrath J agreeing with the conclusion reached by Blanchard J).

²² *Tararo* (n 20) 168 [1] (Elias CJ).

²³ *Ibid* 172 [16] (Blanchard, Tipping, McGrath and William Young JJ) quoting *Toogood v Spyring* (1834) 1 CM & R 181, 193.

²⁴ *Ibid* 172 [15] (Blanchard, Tipping, McGrath and William Young JJ).

²⁵ *Hunt* (n 18) 513 [51] quoting *Pannett v P McGuinness & Co Ltd* [1972] 2 QB 599, 606 (Lord Denning MR).

²⁶ *McDonald* (n 18) 67 [35].

²⁷ *Howden* (n 15) 751 (Cooke P). For the most explicit rejection of Cooke P’s approach see *McDonald* (n 18) 67 [34], approved in *Tararo* (n 20) 171 [12] n 19 (Blanchard, Tipping, McGrath and William Young JJ). See also *Maisey v Police* [2014] NZHC 629, [22]–[23].

²⁸ See, eg, *Hall v The Queen* [2019] 2 NZLR 325.

²⁹ *R v Le* [2019] SCC 34, [126]–[127] (Karakatsanis, Brown and Martin JJ). See also *R v Evans* [1996] 1 SCR 8, 18–19 [16] (Sopinka, Cory and Iacobucci JJ; La Forest J agreeing in the result) (‘*Evans*’); *R v Côté* [2011] 3 SCR 215, 225–6 [12] (McLachlin CJ, Binnie, LeBel, Fish, Abella, Charron, Rothstein and Cromwell JJ), reciting with apparent approval the trial judge’s finding that the police were trespassers in that case.

³⁰ *R v Le* (n 29) [127] (Karakatsanis, Brown and Martin JJ), quoting *R v Le* [2018] 402 CRR (2d) 309, [107] (Lauwers JA).

³¹ *R v Le* (n 29) [127] (Karakatsanis, Brown and Martin JJ).

³² See, eg, *R v Mulligan* [2000] 128 OAC 224, [24], [31] (ONCA) (Sharpe JA; Laskin and Feldman JJA agreeing); *R v Fowler* [2006] NBR (2d) 106, [31] (NBCA) (Richard JA; Drapeau CJ and Turnbull JA agreeing); *R v Rogers* (2016) 4 DLR (4th) 347, [51], [54] (SKCA) (Jackson JA;

In the US, while the Supreme Court is not usually responsible for developing the common law of tort, some of its constitutional jurisprudence requires it to first ask whether a police officer's action is a trespass.³³ In this context, the Court has said that a 'licence may be implied from the habits of the country'³⁴ and 'background social norms'.³⁵ On this objective approach, the Court has recognised an implied licence for police to approach a front door to engage in investigatory *questioning* of an occupant,³⁶ but not to engage in investigatory *observations* of an occupant.³⁷ Thus, it would appear that approaching a person's front door to request them to submit to a breath test would fall within the scope of an implied licence.³⁸

The diversity of views among the jurisdictions surveyed above reveals the competing interests of privacy, property and public safety that are engaged by situations like those in *Roy*. It is unsurprising, then, that a similar diversity of opinion is reflected in the Australian state and territory legislative regimes governing police attendance on private property.

IV Legislative Diversity at Home

Across Australia, a number of state and territory legislative regimes authorise police to attend upon a person's unobstructed private property as far as the front door. These legislative regimes are not uniform: they authorise attendance in different circumstances, for different purposes and are subject to different preconditions.

In the Northern Territory, the *Housing Act 1982* (NT) provides that a police officer may 'enter a yard, garden or other area associated with public housing premises (but not the residence)'³⁹ to ask a person their name, address and, if relevant, age.⁴⁰ However, the officer may only do so if they reasonably believe the person has engaged in proscribed conduct or may be able to help with the investigation of proscribed conduct.⁴¹

Whitmore and Ryan-Froslic JJA agreeing); *R v Parr* (2016) 27 CR (7th) 131, [3], [44], [55], [60] (BCCA) (Fitch J; Saunders and Smith JJ agreeing). Cf *R v Lotozky* (2006) 81 OR (3d) 335 (ONCA), [32], [35]–[36].

³³ See David P Miraldi, 'The Relationship between Trespass and Fourth Amendment Protection After *Katz v. United States*' (1977) 38(3) *Ohio State Law Journal* 709.

³⁴ *McKee v Gratz*, 260 US 127 (1922) 136 (Holmes J), quoted with approval in *Florida v Jardines*, 569 US 1 (2013) 8 (Scalia J; Thomas, Ginsburg, Sotomayor and Kagan JJ agreeing).

³⁵ *Florida v Jardines* (n 34) 9 (Scalia J; Thomas, Ginsburg, Sotomayor and Kagan JJ agreeing).

³⁶ *Kentucky v King*, 563 US 452 (2011) 469–70 (Alito J; Roberts CJ, Scalia, Kennedy, Thomas, Breyer, Sotomayor and Kagan JJ agreeing); *Florida v Jardines* (n 34) 9 n 4 (Scalia J; Thomas, Ginsburg, Sotomayor and Kagan JJ agreeing). Police attendance for the purpose of investigatory questioning has come to be known as a 'knock and talk': see, eg, *United States v Carloss*, 818 F 3d 988 (10th Cir, 2016); *United States v Lundin*, 817 F 3d 1151 (9th Cir, 2016).

³⁷ *Florida v Jardines* (n 34) 9 n 3 (Scalia J; Thomas, Ginsburg, Sotomayor and Kagan JJ agreeing), 12 (Kagan J; Ginsburg and Sotomayor JJ agreeing).

³⁸ *Brennan v Dawson*, 752 Fed Appx 276 (6th Cir, 2018).

³⁹ *Housing Act 1982* (NT) s 28W(2)(a).

⁴⁰ *Ibid* s 28D(2), read with s 5 definition of 'public housing safety officer' and s 28W(2)(a).

⁴¹ *Ibid* s 28D(1).

In Victoria, the *Family Violence Protection Act 2008* (Vic) appears to address circumstances, like those in *Roy*, where multiple people occupy a residence. That statute permits police to enter premises (including a front yard) if police have the ‘implied consent of an occupier of the premises to do so’.⁴² That provision would appear to empower police to approach a person’s front door where one occupant would consent to that attendance but another would not.

In Queensland, the *Police Powers and Responsibilities Act 2000* (Qld) provides that a police officer may, without the consent of the occupier, enter onto the land surrounding a suburban dwelling house ‘to inquire into or investigate a matter’.⁴³ That provision ‘dispenses with the need to rely on the common law implied licence or consent to enter private property for likely welcome purposes, such as approaching and knocking on the front door’.⁴⁴ While that authorisation may be subject to some qualification,⁴⁵ it appears far broader than statutory authorisations in other states or territories.

The existence of the Northern Territory, Victoria and Queensland legislation raises the question of whether and how the Court should account for these legislative regimes in the development of an adjacent common law doctrine. One important, if preliminary, comment is that legislative activity in a particular area of regulation is often considered to be a reason for courts to be cautious in their development of the common law.⁴⁶ For example, in a NZ decision denying the existence of an implied licence for police to breath test a person at their front door, the NZ High Court’s conclusion was ‘reinforced’ by the existence of a ‘special statutory power ... in limited form’.⁴⁷ Similarly, for Brennan J in *Halliday v Nevill*, the fact that Parliament had ‘carefully defined the rights of the police to enter’ was a matter cautioning against ‘too ready an implication of a licence’, especially in light of the sensitive ‘balance between individual privacy and the power of public officials’.⁴⁸ Finally, in Canada, it was said that ‘Parliament is in a better position’ than the courts ‘to obtain evidence’ and ‘to assess’ the competing policy considerations engaged by police attendance on private property.⁴⁹

Outside the Northern Territory, Victoria and Queensland, however, Australian legislatures have largely left the lawfulness of police doorknocking to be governed by the common law.⁵⁰ Should this ‘legislative inertia’⁵¹ be relevant to the development of the common law? If characterised as mere inattention, legislative inertia might be of little relevance. If, however, legislative inertia is

⁴² *Family Violence Protection Act 2008* (Vic) s 157(1)(d) (emphasis added).

⁴³ *Police Powers and Responsibilities Act 2000* (Qld) ss 19(3), (5).

⁴⁴ *R v Hammond* (2016) 258 A Crim R 323, 332 [49].

⁴⁵ *R v Yatta* [2015] QDC 58, [90]–[92].

⁴⁶ Paul Finn, ‘Statutes and the Common Law’ (1992) 22(1) *University of Western Australia Law Review* 7, 22.

⁴⁷ *O’Connor* (n 18) 56 [19].

⁴⁸ *Halliday v Nevill* (1984) 155 CLR 1, 20 (Brennan J).

⁴⁹ *Evans* (n 29) 13 [4] (La Forest J).

⁵⁰ Note, however, that South Australia has made doorknocking an offence in certain circumstances: *Summary Offences Act 1953* (SA) s 50.

⁵¹ Justice Mark Leeming, ‘Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room’ (2013) 36(3) *University of New South Wales (UNSW) Law Journal* 1002, 1022–3.

characterised as a ‘choice to be silent’⁵² — that is, the product of political compromise or deliberation⁵³ — it might warrant judicial modesty in development of the common law for the reasons expressed in the preceding paragraph. Finally, if legislative inertia is based on a particular state or territory legislature’s view of the common law, that ought not to be given much weight by a court looking to develop the single common law of Australia.⁵⁴

This final observation points to a further reason for judicial caution in developing the common law of implied licences, a reason rooted in Australia’s federal structure and the respect for policy diversity entailed in that structure.

V State and Territory Policy Diversity and the Universalising Force of the Single Common Law

Australia’s federal structure was designed, and continues to operate, to accommodate state and territory policy diversity in areas (like policing) that are not the subject of Commonwealth legislative power.⁵⁵ In fact, it has been persuasively argued that one benefit of Australia’s federal structure is that it *facilitates* policy experimentation in such areas.⁵⁶ Against this feature of Australian federalism, however, is the fact that Australia has a single common law.⁵⁷ The doctrine of the single common law has been acknowledged to exert a universalising force over what might otherwise have been diverse and locally-grounded bodies of common law unique to each state or territory.⁵⁸ For present purposes, however, what is important is that the single common law can also render obsolete differences in the statutory law of the states and territories.⁵⁹

⁵² Stephen McLeish, ‘Challenges to the Survival of the Common Law’ (2014) 38(2) *Melbourne University Law Review* 818, 827.

⁵³ See, eg, *Howden*, where Cooke P was sensitive to the fact that the legislature had not statutorily empowered police to attend upon private property to conduct breath tests, apparently because the legislature considered the topic ‘too difficult or sensitive to tackle’: *Howden* (n 15) 750.

⁵⁴ See, by analogy, *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 571 [132] (Gaudron, McHugh and Gummow JJ).

⁵⁵ Even in areas that are subject of non-exclusive Commonwealth legislative power, ss 107–109 of the *Australian Constitution* are capable of accommodating policy diversity as between the states and territories, and a measure of policy diversity (but not inconsistency) as between the states and territories and the Commonwealth.

⁵⁶ Gabrielle Appleby and Brendan Lim, ‘Democratic Experimentalism’ in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 221, 230–3.

⁵⁷ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 112–13 (McHugh J); *Lipohar v The Queen* (1999) 200 CLR 485, 505–7 [43]–[50] (Gaudron, Gummow and Hayne JJ), 551–2 [167] (Kirby J) (*‘Lipohar’*).

⁵⁸ Paul Finn, ‘Statutes and the Common Law: The Continuing Story’ in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52, 59. See also Justice L J Priestley, ‘A Federal Common Law in Australia?’ (1995) 6(3) *Public Law Review* 221, 232–3; James Stellios, ‘The Centralisation of Judicial Power within the Australian Federal System’ (2014) 42(2) *Federal Law Review* 357, 376, 378.

⁵⁹ This is not a topic that has received much academic or judicial attention. For analogous consideration of how judicial developments in constitutional law have a homogenising effect, see Gabrielle Appleby, ‘The High Court and *Kable*: A Study in Federalism and Rights Protection’ (2014) 40(3) *Monash University Law Review* 673, 674, 681, 686–90; Stephen McLeish SC, ‘Nationalisation of the State Court System’ (2013) 24(4) *Public Law Review* 252, 253–60.

This universalising potential of the single common law looms large in *Roy*. If the High Court were to recognise an implied licence for police officers to attend a person's front door for investigative inquiries, that would afford police a much wider authorisation than that provided by, for example, the Northern Territory legislature. In fact, the effect would be to essentially bring all states and territories into line with the Queensland legislation.⁶⁰ That result might appear to be insufficiently respectful not just of the Northern Territory legislature – which has positively authorised only certain police attendances – but also of the other state and territory legislatures that were presumably aware of the Queensland legislative model (enacted in 2000) and chose not to follow it. Of course, if the Court were to develop the common law in this manner, state and territory legislatures would be free to reverse or modify the position by legislation.⁶¹ However, the theoretical possibility of legislative override in this direction should not be overstated, especially given the sociopolitical realities that weigh against legislative action to limit the powers of police.⁶²

The suggestion that the High Court in *Roy* should proceed cognisant of Australia's federal structure, and the diversity of state and territory legislation, should not be controversial. The Court has shown the same sensitivity to federal diversity when it has refused to develop the common law in a particular direction in the absence of a 'consistent pattern of State legislation'.⁶³

VI Conclusion

Can a police officer knock on a person's unobstructed front door in order to investigate them? This column has not proposed an answer to the question at the heart of *Roy*. It may be that any answer depends on matters not explored in this column, such as the principles relating to dual purposes for attendance and multiple occupancy residences. However, insofar as the Court in *Roy* must develop or refine the common law of Australia, it should be mindful of the approaches taken in other jurisdictions and the diversity of Australian state and territory legislative positions.

It is important to appreciate the federalism values at stake in circumstances where an extension of the common law would answer a question uniformly, and nationally, that might otherwise have been answered differently, and locally, by each state and territory legislature. Such circumstances warrant caution in the

Cf Brendan Lim, 'Laboratory Federalism and the *Kable* Principle' (2014) 42(3) *Federal Law Review* 519, 527–37.

⁶⁰ See above nn 43–5 and accompanying text.

⁶¹ *Lipohar* (n 57) 509 [57] (Gaudron, Gummow and Hayne JJ).

⁶² See, generally, William J Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100(3) *Michigan Law Review* 505.

⁶³ *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 303 [94] (Gummow and Kirby JJ); Hayne J agreeing at 306 [105]. See also *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 63 [27] (Gleeson CJ, Gaudron and Gummow JJ); *Baker v The Queen* (2012) 245 CLR 632, 666–7 [113]–[114] (Heydon J); Justice Michelle Gordon, 'Analogical Reasoning by Reference to Statute: What is the Judicial Function?' (2019) 42(1) *University of New South Wales (UNSW) Law Journal* 4, 16–22. Cf *Binsaris v Northern Territory* (2020) 94 ALJR 664, 673–4 [44] (Gageler J).

development of the common law, particularly where, as here,⁶⁴ development of the common law depends on an estimation of what ordinary members of the public would think. As has been said in a different context, ‘we have sophisticated electoral and parliamentary systems which are meant to reflect what [ordinary people] think’.⁶⁵ Where the High Court is in doubt about whether ordinary people would consent to a particular entry onto private property, it is suggested that the safer course is to leave any further qualification of individual property rights to the better equipped, and more accountable, state and territory legislatures.

⁶⁴ The law of implied licences depends on the Court’s estimation, based on ‘the common behaviour of citizens of our community’ (*Munnings v Barrett* [1987] Tas R 80, 87), of whether ‘most ... householders’ would consent to a particular attendance on private property (*Howden* (n 15) 751 (Cooke P)).

⁶⁵ Robert Orr, ‘*Kable v DPP: Taking Judicial Protection Too Far?*’ (1996) 11 *AIAL Forum* 11, 15.

Case Note

Burns v Corbett: Federal Jurisdiction, State Tribunals and Chapter III Courts

Callum Christodoulou*

Abstract

This case note examines the effect of the High Court of Australia decision in *Burns v Corbett* in which a majority of the Court identified an implied limitation in the *Australian Constitution* that prevents state legislatures from vesting state tribunals with jurisdiction to hear ‘federal matters’. In this case note, I seek to highlight the practical and doctrinal impact of this decision on state adjudicative systems. In particular, I examine states’ responses to the decision, as well as contemporary guidance on an issue that is central to the limitation — the identification of s 77(iii) courts.

I Introduction

The Police Magistrate ... whether he intended or not, or whether he knew it or not, was exercising Federal jurisdiction ...¹

Federal jurisdiction — the ‘authority to adjudicate that is derived from the *Constitution* or a Commonwealth law’² — is a vexed issue in Australian public law. Sir Anthony Mason has observed, for example, that ‘[t]he very mention of “federal jurisdiction” is enough to strike terror in the hearts and minds of Australian lawyers who do not fully understand its arcane mysteries.’³ Adding to this complexity is the High Court of Australia’s 2018 decision in *Burns v Corbett*, where a majority of the Court identified an implied limitation in the *Australian Constitution* that prevents state parliaments from vesting state jurisdiction over ‘federal matters’ in state non-court tribunals.⁴

In this case note, I consider the decision in *Burns v Corbett*, as well as the response by state legislatures and judicatures. As will be discussed, the limitation

* BA (Hons I), JD (Syd). I would like to thank Associate Professor Andrew Edgar for his generous supervision while preparing this case note. I would also like to thank Professor Joellen Riley Munton and Daniel Reynolds for helpful comments on an earlier version. Any errors remain my own.

¹ *Hume v Palmer* (1926) 38 CLR 441, 451 (Isaacs J) quoted in Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2nd ed, 2020) 144.

² *Burns v Corbett* (2018) 265 CLR 304, 347 [71] (Gageler J) (*‘Burns v Corbett’*).

³ Sir Anthony Mason, ‘Foreword’ in Geoffrey Lindell, *Cowen and Zines’s Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) v, v.

⁴ *Burns v Corbett* (n 2) 325–6 [2] (Kiefel CJ, Bell and Keane JJ); 346 [68]–[69] (Gageler J).

identified in *Burns v Corbett* was by no means surprising.⁵ Rather, the significance of the case lies largely in the practical impact that will follow for state tribunal systems. In Part II, I outline the federal judicial system, before discussing the decision in *Burns v Corbett*. In Part III, I then discuss the nature and function of state tribunal systems in Australia, the impact of *Burns v Corbett* on these systems, and the legislative responses that have been implemented or considered in response. Finally, in Part IV, I turn to consider the central concept of a ‘s 77(iii) court’, as this has been developed in recent case law. As will be seen, despite the constitutional constraint identified in *Burns v Corbett*, state legislatures stand to benefit from a considerable body of Chapter III (‘ch III’) jurisprudence, which will clarify efforts to preserve existing state tribunal systems.

II The Federal Judicial System and *Burns v Corbett*

A *The Federal Judicial System*

Before turning to the decision in *Burns v Corbett* it will be necessary to briefly outline the federal judicial system, including the concept of federal jurisdiction.

The federal judiciary is established by ch III of the *Australian Constitution*. This judiciary is empowered to exercise federal jurisdiction, a distinctive jurisdiction comprised of nine subject matters (or ‘heads of jurisdiction’⁶) outlined in ss 75 and 76 of the *Australian Constitution* (‘federal matters’). These federal matters refer to ‘particular claims, parties or a combination of both’,⁷ and together comprise the entire scope of federal jurisdiction. Section 76(i), for example, refers to matters ‘arising under this Constitution’, while s 76(ii) refers to matters ‘arising under any laws made by the Parliament’, and s 75(iii) to matters ‘in which the Commonwealth ... is a party’. Significantly, s 77 empowers the Commonwealth Parliament to vest federal jurisdiction in the High Court, federal courts, and state courts (subject to certain constraints). Relevant for the purposes of this case note, s 77 provides that ‘[w]ith respect to any of the matters mentioned in [ss 75 and 76] the Parliament may make laws:

[...]

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States [s 77(ii)];

(iii) investing any court of a State with federal jurisdiction [s 77(iii)].’

Section 77(ii) recognises that, at the time of Federation, jurisdiction over several of the matters listed in ss 75 and 76 was exercisable by the courts of the former colonies (now states).⁸ The effect of section 77(ii) is to give the Commonwealth Parliament the power to override such jurisdiction, ensuring that

⁵ Ibid 363–4 [118] (Gageler J).

⁶ Will Bateman, ‘Federal Jurisdiction in State Courts: An Elaboration and Critique’ (2012) 23(4) *Public Law Review* 246, 247.

⁷ Ibid.

⁸ *Burns v Corbett* (n 2) 393 [206] (Edelman J).

only federal courts (or state courts vested with federal jurisdiction under s 77(iii))⁹ could exercise jurisdiction over federal matters. Section 77(iii) in turn gives Parliament the power to vest any ‘court of a State’ with federal jurisdiction, thus enabling the reinvestment of jurisdiction over federal matters (*qua* federal jurisdiction) into state courts, where colonial jurisdiction (and after that, state jurisdiction) had formerly operated.¹⁰ Soon after Federation, Parliament exercised both of these powers by enacting ss 38, 39(1) and 39(2) of the *Judiciary Act 1903* (Cth) (‘*Judiciary Act*’). As such, by the operation of ss 75–7 of the *Australian Constitution* and ss 38–9 of the *Judiciary Act*, a federal judicial system was established, utilising state courts in the determination of federal matters.

Despite the technicality of the provisions enabling state courts to exercise federal jurisdiction, the simultaneous exclusion and reinvestment of jurisdiction has meant that the practical impact has historically been minimal for state courts. The formalism of ch III does, however, become problematic in its application for state tribunals. As can be seen from the provisions quoted above, though s 77(ii) empowers the Commonwealth Parliament to make federal jurisdiction exclusive of jurisdiction that belongs to or is invested in the *courts* of the states, it does not specifically address the position of state tribunals. On a strict textual reading, therefore, s 77(ii) would not appear to empower the Commonwealth Parliament to restrict the jurisdiction of state tribunals. Furthermore, as s 77(iii) only empowers the Parliament to vest *courts* of a state with federal jurisdiction, the Federal Parliament also appears to lack the legislative authority to vest this jurisdiction in non-court tribunals. An outcome of such a strict textual reading, therefore, would be that the state legislatures could continue to vest state tribunals with *state* jurisdiction to hear federal matters, and the Commonwealth legislature would be powerless to preclude this — either by direct exclusion under s 77(ii), or by inconsistency under ss 77(iii) and 109. While a number of lower courts had resolved this issue negatively,¹¹ *Burns v Corbett* represents the first occasion on which the High Court has authoritatively determined the matter.

B *Burns v Corbett*

The facts behind *Burns v Corbett* can be stated briefly. In 2013 and 2014 Mr Gary Burns, a resident of New South Wales (‘NSW’), made separate complaints under the *Anti-Discrimination Act 1977* (NSW) to the Anti-Discrimination Board of NSW regarding certain comments made by Ms Therese Corbett and by Mr Bernard Gaynor, residents of Victoria and Queensland respectively. The proceedings were referred to the Administrative Decisions Tribunal of NSW (since superseded by the NSW Civil and Administrative Tribunal (‘NCAT’)), and the NCAT respectively. In the course of both proceedings an issue as to jurisdiction emerged — namely

⁹ Note that this aspect of the constitutional scheme has only authoritatively been established since *Burns v Corbett*.

¹⁰ See *Burns v Corbett* (n 2) 347–8 [72] (Gageler J).

¹¹ *Attorney-General (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385, 395–6 [55]–[56]; *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148, 161–3 [53]–[62] (Perry J) (‘*Qantas v Lustig*’); *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, 136–8 [217]–[223] (Kenny J) (‘*Cth v ADT*’).

whether the NCAT had jurisdiction to hear and determine a dispute arising under the *Anti-Discrimination Act* between a resident of NSW and a resident of another state. The basis for this challenge was that the matter engaged the diversity jurisdiction (s 75(iv)) of the *Australian Constitution*, being a matter ‘between residents of different States’. As neither party had challenged the assumption that the NCAT (i) was not a court, and (ii) *was* exercising judicial power in determining the complaint, the following constitutional issue was squarely raised: was the state legislation¹² that empowered the NCAT to hear and determine a federal matter invalid or inoperative to the extent that it purported to do so?

In both the NSW Court of Appeal (‘NSWCA’) and the High Court it was unanimously held that state parliaments do *not* have the power to vest such jurisdiction. While the decision was anticipated by a number of earlier appellate and federal court decisions,¹³ and by academic writers,¹⁴ it was notable that a number of different approaches were adopted by the Justices presiding over the proceedings. In the NSWCA, for example, Leeming JA (with whom Bathurst CJ and Beazley P agreed) held that nothing in the *Australian Constitution* directly removed the power from state parliaments.¹⁵ Rather, it was the enactment of the *Judiciary Act* (a Commonwealth Act), which, by operation of s 109 of the *Australian Constitution*, would render any conferral of jurisdiction by state legislation inoperative. In short, Leeming JA’s reasons were based on the view that Commonwealth statute, not constitutional implication, was the basis for limits on state legislative competence.

In the High Court, Nettle, Gordon and Edelman JJ (in separate judgments) adopted reasons substantially similar to that of Leeming JA, finding that the relevant provisions in state legislation were inoperative due to inconsistency with Commonwealth law.¹⁶ By contrast, the majority (comprised of Kiefel CJ, Bell, Keane, and Gageler JJ) based their decision on a limitation implied in the *Australian Constitution*. In a joint judgment, Kiefel CJ, Bell and Keane JJ concluded that, even though sub-ss 77(ii)–(iii) merely *empowered* the Commonwealth Parliament to exclude and to vest federal jurisdiction, considerations of text, history and purpose led to the conclusion that ‘adjudicative authority in respect of the matters listed in ss 75 and 76 of the *Constitution* may be exercised only as Ch III contemplates and not otherwise’.¹⁷ That is, in contemplating that federal jurisdiction *may* be vested under s 77 of the *Australian Constitution*, inferentially, the *Constitution* also established that jurisdiction may *not* be vested otherwise.¹⁸ In separate reasons,

¹² *Civil and Administrative Tribunal Act 2013* (NSW) (‘NCAT Act’).

¹³ See above n 11.

¹⁴ Geoffrey Lindell, *Cowen and Zines’s Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 311–4; Geoffrey Kennett, ‘Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals’ (2009) 20(2) *Public Law Review* 152; David Rowe, ‘State Tribunals within and without the Integrated Federal Judicial System’ (2014) 25(1) *Public Law Review* 48; Graeme Hill, ‘State Administrative Tribunals and the Constitutional Definition of “Court”’ (2006) 13(2) *Australian Journal of Administrative Law* 103. For a contrary view: Gim Del Villar and Felicity Nagorcka, ‘“Confusion Hath Now Made His Masterpiece”: Federal Jurisdiction, State Tribunals and Constitutional Questions’ (2014) 88(9) *Australian Law Journal* 648.

¹⁵ *Burns v Corbett* (2017) 96 NSWLR 247, 263 [63]–[64] (Leeming JA).

¹⁶ *Burns v Corbett* (n 2) 374 [145]–[146] (Nettle J); 391 [199] (Gordon J); 413 [259] (Edelman J).

¹⁷ *Ibid* 335 [43] (Kiefel CJ, Bell and Keane JJ).

¹⁸ *Ibid* 336–7 [45].

Gageler J held that an implied limitation arose by necessity. As will become relevant in later discussion, Gageler J noted that a particular feature of the ‘autochthonous expedient’¹⁹ was the contemplation that state courts exercising state jurisdiction would ‘have and maintain the minimum characteristics of independence and impartiality required of a Ch III Court’.²⁰ His Honour reasoned that, if state parliaments retained the power to vest state tribunals with state jurisdiction over federal matters, the entire scheme of ch III could be easily bypassed ‘by the simple expedient of conferring equivalent State jurisdiction on a State tribunal’.²¹ As a consequence of the majority decision, state legislation that purported to vest state jurisdiction was invalid (rather than inoperative) to the extent that it attempted to so invest. In practical application, the jurisdiction-conferring sections of the *Civil and Administrative Tribunal Act 2013* (NSW) (*‘NCAT Act’*) were read down to exclude jurisdiction over matters engaging s 75(iv) of the *Australian Constitution*.

As a result of *Burns v Corbett*, it is now established that there exists an implied limitation in the *Australian Constitution*, which prevents state parliaments from investing State non-court tribunals with judicial power over matters identified in ss 75 and 76 of the *Australian Constitution* (*‘Burns v Corbett limitation’*).²² In Part III, I turn to consider the immediate impact of the *Burns v Corbett* limitation, as well as its broader consequences for state adjudicative systems. In doing so, it is relevant to bear in mind that the outcome in *Burns v Corbett* was by no means controversial. Rather, as Lindell has noted most accurately, ‘[i]t is much easier to accept the disability... than it is to be clear about understanding the consequences that flow from that disability’.²³

III State Tribunal Systems and the Impact of *Burns v Corbett*

A The State Tribunal System

As may be appreciated, the *Burns v Corbett* limitation has the potential to significantly impact state tribunal systems. Before considering this impact in greater detail, however, it is relevant first to outline briefly the state tribunal system, as well as the important role that this plays in Australia’s broader dispute resolution framework.

Statutory tribunals exist at both the federal and state level, serving a range of different functions. At the state and territory level, there has been a consistent trend in the last 20 years for the amalgamation of specialist tribunals into ‘super-

¹⁹ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²⁰ *Burns v Corbett* (n 2) 356 [96].

²¹ *Ibid* 357 [99].

²² Note that Stellios has argued that it is likely that the *Burns v Corbett* limitation extends also to territory tribunals: James Stellios, *The Federal Judicature* (LexisNexis Butterworths, 2nd ed, 2020) 594.

²³ Lindell (n 14) 314.

tribunals'.²⁴ With the exception of Tasmania,²⁵ all states and territories have established such a tribunal,²⁶ vested variously with jurisdiction over administrative, civil, professional disciplinary, human rights and guardianship matters.²⁷ Such developments have been said to reflect 'a reform agenda to provide cheaper, quicker and more efficient access to justice'.²⁸

State tribunals play a useful 'court-substitute'²⁹ function in state systems, particularly due to the fact that no strict separation of powers applies at the state level.³⁰ As Bacon notes, 'the function of these tribunals is to resolve citizen-citizen disputes, many of which have personally significant implications for the parties involved'.³¹ The advantage of vesting jurisdiction in tribunals is that such bodies are designed to facilitate the quick and cheap resolution of disputes. Legislation establishing the NCAT, for example, cites accessibility, efficiency, economy, fairness and accountability, as key aims of the Tribunal.³² As Creyke has noted, this quasi-court function is made possible by a more flexible procedure than is typically vested in courts, citing three particular provisions in tribunal legislation that facilitate this:

The first is that tribunals are not bound by the rules of evidence and can decide what procedure they will adopt at their discretion; the second is that tribunals are intended to be inquisitorial as appropriate in their conduct of matters; and the third requires that tribunals operate in a manner which is 'fair, just, economical, informal and quick'.³³

Yet despite such informality, tribunals often approximate court processes and are bound by judicial norms including natural justice.³⁴ In so doing, they deliver a high standard of dispute resolution, in a manner that is more expeditious than the traditional court system.

The size of tribunals' caseloads is significant. In 2014, the Productivity Commission reported that tribunals in Australia collectively resolve 395,000 disputes per year.³⁵ In NSW alone, the NCAT finalised 67,833 applications in 2018–19, with

²⁴ Linda Pearson, 'The Vision Splendid: Australian Tribunals in the 21st Century' in Anthony J Connolly and Daniel Stewart (eds), *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (Federation Press, 2015) 161, 162; Rachel Bacon, *Amalgamating Tribunals: A Recipe for Optimal Reform* (PhD Thesis, University of Sydney, 2004) 5–7.

²⁵ Though note that the Tasmanian Parliament passed the Tasmanian Civil and Administrative Tribunal Bill 2020 (Tas) on 15 October 2020, which provides that the Tasmanian Civil and Administrative Tribunal is established on 1 July 2021 (or a later day as fixed by proclamation): ss 4, 8. See also Tasmania, *Parliamentary Debates*, Legislative Council, 15 October 2020, 443.

²⁶ Anna Olijnyk and Gabrielle Appleby, 'Constitutional Influences on State and Territory Lawmaking: An Empirical Analysis' (2018) 46(2) *Federal Law Review* 231, 250.

²⁷ Robin Creyke, 'Tribunals and Merits Review' in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 393, 403.

²⁸ Stellios (n 22) 585.

²⁹ Bacon (n 24) 15.

³⁰ *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 89–90 [124]–[125] ('*Condon*').

³¹ Bacon (n 244) 46.

³² *NCAT Act* (n 12) s 3.

³³ Creyke (n 27) 410.

³⁴ *Ibid.*

³⁵ Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 2014) vol 1, 345 ('*Productivity Commission Report*').

54,474 of these being within the consumer and commercial division³⁶ — one of the key divisions exercising judicial functions.

In addition to the benefits of efficiency and volume, the utilisation of tribunals as court-substitute bodies has a number of other access-to-justice advantages. In particular, tribunals are designed to facilitate access for self-represented litigants. As the Productivity Commission noted:

The inquisitorial powers of tribunal members are thought to assist self-represented litigants because members can ask questions and seek information that a self-represented litigant may not know to present. This can be used to address any imbalance of power between parties ...³⁷

This is further facilitated by limits to legal representation in some tribunals,³⁸ duties placed upon tribunals to assist self-represented litigants,³⁹ and limits on the award of costs.⁴⁰

As can be seen therefore, considerations of simplicity, economy, efficiency, access and professionalism combine to make the state tribunal system a valuable forum for dispute resolution in Australia.

B Impact of *Burns v Corbett*

In light of the advantages of state tribunals vested with expansive powers, it is clear that governments have a strong interest in maintaining the effectiveness of this system. As discussed in Part II, however, the *Burns v Corbett* limitation imposes a restriction on state legislative power that is likely to affect a significant number of matters. The practical impact of the limitation may be appreciated, for example, by recognising that the NCAT alone will be barred from hearing hundreds of matters each year that engage the diversity jurisdiction (the jurisdiction in dispute in *Burns v Corbett*).⁴¹ Yet this jurisdiction is only one species of federal matter — this impediment will be replicated across all state tribunal systems, and all federal matters.⁴² Furthermore, while legislative intervention is possible to create avenues for the resolution of federal matters in state courts, this will necessarily involve adjudication in an alternative and more formal forum. In this regard (and noting the ostensibly protective function of s 75(iv) of the *Australian Constitution*), Basten JA has recently observed:

There is some irony in the fact that an indirect effect of s 75(iv) of the *Constitution* may be to deprive the interstate resident of access to a tribunal

³⁶ NSW Civil and Administrative Tribunal ('NCAT'), *NCAT Annual Report 2018–2019* (2019) 27.

³⁷ *Productivity Commission Report* (n 35) vol 1, 350.

³⁸ *Ibid* vol 1, 352.

³⁹ *Ibid* vol 1, 352–3.

⁴⁰ *Ibid* vol 1, 352.

⁴¹ *Attorney-General (NSW) v Gatsby* (2018) 361 ALR 570, 627 [275] (Basten JA) ('*Gatsby*') citing *Johnson v Dibbin; Gatsby v Gatsby* [2018] NSWCATAP 45, [5].

⁴² Though, as Hill has recently observed, the matters most affected by the *Burns v Corbett* limitation are likely to be those arising under *Constitution* sub-ss 75(iii)–(iv) and sub-ss 76(i)–(ii): Graeme Hill, 'State Tribunals and the Federal Judicial System' in Greg Weeks and Matthew Groves (eds), *Administrative Redress in and out of the Courts* (Federation Press, 2019) 195, 204–12.

more likely to provide a quick, cheap and just, but informal process, than a traditional court.⁴³

This difficulty is further compounded by the fact that federal matters are not easily contained, and can arise at different points in litigation. Supporting this view, the Attorney-General of Queensland stated in submissions in *Burns v Corbett*:

[T]he subject matters in ss 75 and 76 are not discrete topics for adjudication and resolution ... Rather, they cut across and may arise in potentially any topic for adjudication. State legislatures cannot avoid them when conferring judicial powers on tribunals; they are a latent potentiality in the exercise of any judicial power in Australia.⁴⁴

Case law shows, for example, that federal jurisdiction may arise where a defence is founded on Commonwealth law,⁴⁵ or where the Commonwealth is joined as a party.⁴⁶ Indeed, as Justice Leeming has observed extra-curially, '[i]n many cases, the parties, and for that matter the court, may be oblivious to the source of the court's authority to decide their dispute'.⁴⁷ Given the 'ubiquity of federal jurisdiction',⁴⁸ therefore, the *Burns v Corbett* limitation poses a significant technical challenge for existing state tribunals.

C *States' Responses*

In light of the above, a number of responses to the *Burns v Corbett* limitation have been canvassed in academic literature. These include, for example:

- to reconstitute state tribunals as courts or hybrid bodies capable of investment with federal jurisdiction;⁴⁹
- to establish reference provisions for federal matters to be heard in state courts;⁵⁰ or
- to remove court registration provisions for tribunal orders made in federal matters, such that those orders will not constitute an exercise of judicial power.⁵¹

In many cases, the simplest and least disruptive approach is likely to be that adopted by the NSW legislature.⁵² This solution involved the amendment of the NCAT's constitutive legislation to allow for the Local Court or District Court to hear

⁴³ *Gaynor v Local Court of New South Wales* (2020) 378 ALR 366, 390 [102] ('*Gaynor*').

⁴⁴ Attorney-General (Qld), 'Submissions for the Attorney-General for the State of Queensland (Intervening)', Submission in *Burns v Corbett*, Case No S183/2017, 24 August 2017, 10 [38] quoted in Anna Olijnyk and Stephen McDonald, 'State Tribunals, Judicial Power and the Constitution: Some Practical Responses' (2018) 29(2) *Public Law Review* 97, 106.

⁴⁵ *Qantas v Lustig* (n 11).

⁴⁶ *Arnold v Minister Administering the Water Management Act 2000* (2008) 73 NSWLR 196; *Meringnage v Interstate Enterprises Pty Ltd* (2020) 60 VR 361 ('*Meringnage*').

⁴⁷ Leeming (n 1) 144.

⁴⁸ *Ibid.*

⁴⁹ Olijnyk and McDonald (n 44) 107–8, 109–10. Note that Hill has recently observed that states are more likely to wish to *avoid* establishing their super-tribunals as courts, due to the limitations imposed by the *Kable* principle: Hill (n 42) 203.

⁵⁰ Olijnyk and McDonald (n 44) 109; Hill (n 42) 213–14.

⁵¹ Hill (n 42) 214–15; Lindell (n 14) 315.

⁵² See *NCAT Act* (n 12) pt 3A. See also similar provisions in *South Australian Civil and Administrative Tribunal Act 2013* (SA) pt 3A.

an application or appeal in circumstances where the Tribunal would otherwise have had jurisdiction *but for* the engagement of federal jurisdiction.⁵³ In determining whether federal jurisdiction has been engaged, the operative questions will be whether the subject matter of the dispute falls within ss 75 or 76 of the *Australian Constitution*, and, if so, whether the relevant power or function called upon involves the exercise of federal judicial power.⁵⁴ Where this is the case, state jurisdiction will have ceased to vest in the tribunal by virtue of the *Burns v Corbett* limitation, and federal jurisdiction will have vested in the relevant court by operation of s 39(2) of the *Judiciary Act*.⁵⁵

In considering the utility of this approach, important questions will remain as to *which* powers and functions vested in a given tribunal will involve the exercise of judicial power.⁵⁶ Further, in certain matters, factual or legal arguments may arise as to whether the dispute can properly be characterised as a federal matter.⁵⁷ As Hill has noted, the proposed solution is also unlikely to provide assistance where specific rights and liabilities ‘are inextricably bound up with the venue in which those rights and liabilities are enforced’.⁵⁸ On balance, however, the NSW legislature’s response remains attractive for its apparent simplicity and capacity to preserve existing institutions and practices.

An issue that arises logically prior to any of the canvassed responses, however, is the more fundamental question of which state tribunals (if any) are ‘courts’ for the purposes of s 77(iii) of the *Australian Constitution* (‘s 77(iii) courts’). In this regard, it is significant that a number of state supreme courts and courts of appeal have had occasion to consider this issue subsequent to the decision in *Burns v Corbett*. As a result, it is now reasonably settled that the super-tribunals for Victoria,⁵⁹ NSW,⁶⁰ WA,⁶¹ and South Australia⁶² are not s 77(iii) courts. These tribunals are not, therefore, subject to investment with federal jurisdiction. Based on an older decision in *Owen v Menzies*,⁶³ it is also established that the QCAT is a court for the purposes of s 77(iii).⁶⁴ In light of such recent activity, the remainder of this case note will consider the substantially uniform approach that now appears to be applicable to questions of this kind.

⁵³ See *NCAT Act* (n 12) s 34B(2).

⁵⁴ On a tribunal’s inherent power (and duty) to consider whether a claim exceeds its jurisdictional limitations, see *Gaynor* (n 43) 396–8 [129]–[136] (Leeming JA).

⁵⁵ On this point, see *Gaynor* (n 43) 379–82 [41]–[57] (Bell P); 399–400 [143]–[144] (Leeming JA).

⁵⁶ See *GS v MS* (2019) 344 FLR 386; *Attorney-General (SA) v Raschke* (2019) 133 SASR 215 (‘*Raschke*’).

⁵⁷ See *Almahy v Jones* [2020] NSWCATAP 69.

⁵⁸ Hill (n 42) 213.

⁵⁹ *Meringnage* (n 46) 393 [98] (Tate, Niall and Emerton JJA).

⁶⁰ *Gatsby* (n 41) 604 [192] (Bathurst CJ; Beazley P agreeing at 606 [197], McColl JA agreeing at 606 [198], Leeming JA agreeing at 627 [279]), 613 [228] (Basten JA, Leeming JA agreeing at 627 [279]).

⁶¹ *GS v MS* (n 56) 392 [23] (Quinlan CJ).

⁶² *Raschke v Firinauskas* [2018] SACAT 19, [89]; *Raschke* (n 56) 218 [7].

⁶³ *Owen v Menzies* [2013] 2 Qd R 327 (Court of Appeal), 338 [20] (Chief Justice; Muir JA agreeing at 357 [101]), 346 [52] (McMurdo P).

⁶⁴ Though note that this decision has been criticised in Hill (n 42) 203, and distinguished in *Meringnage* (n 46) 389–90 [86] (Tate, Niall and Emerton JJA) and *Gatsby* (n 41) 604 [191] (Bathurst CJ).

IV Tribunals as ‘Courts of the States’

A Context of the Inquiry

As suggested, the identification of s 77(iii) courts is an essential component of the *Burns v Corbett* limitation — only those tribunals that are not courts will be subject to the prohibition. Though the process of identification is now substantially resolved for state super-tribunals, recent case law does provide helpful guidance as states continue to develop their tribunal systems. In this regard, it is necessary to first acknowledge that the meaning of the word ‘court’ does not transcend its context — its meaning ‘in a statute depends upon the terms of the Act and its statutory context, including its subject-matter and purpose’.⁶⁵ Furthermore, in the constitutional context, Gummow, Hayne and Crennan JJ have held, ‘[i]t is neither possible nor profitable to attempt to make some all-embracing statement of the defining characteristics of a court’.⁶⁶ Necessarily, therefore, a methodology for identification must develop by way of accretion, as each tribunal is considered on its own terms.

The question of whether particular state tribunals were s 77(iii) courts arose on a number of occasions in the early 2000s. In determining this issue, lower courts placed varying emphases on particular institutional features of the tribunals in question, such variance leading a number of academic commentators to argue that competing methodologies had come to exist.⁶⁷ One approach, for example, involved the various features of a tribunal being balanced in terms of their propensity to support or deny the proposition that the tribunal was a court (a so-called ‘balance sheet’ approach).⁶⁸ By contrast, in *Trust Company of Australia Ltd v Skiwing Pty Ltd*, Spigelman CJ held that the integrated judicial system established under the *Australian Constitution* required that a s 77(iii) court must be characterised as a ‘court of law’.⁶⁹ His Honour held that one aspect of such a court is that it ‘is comprised, probably exclusively although it is sufficient to say predominantly, of judges’.⁷⁰

The focus of this inquiry appears to have shifted, however, following the High Court’s decision in *Forge v Australian Securities and Investments Commission*.⁷¹ In that matter, an argument had been made that NSW legislation empowering the Governor to appoint acting judges to the NSW Supreme Court was invalid due to the limitation identified in *Kable v Director of Public Prosecutions (NSW)*.⁷² In clarifying the *Kable* principle, a majority of the Court identified

⁶⁵ *Cth v ADT* (n 11) 139 [225] (Kenny J).

⁶⁶ *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [64] (‘*Forge*’).

⁶⁷ See especially Hill (n 14) 104–5; Duncan Kerr, ‘State Tribunals and Chapter III of the *Australian Constitution*’ (2007) 31(2) *Melbourne University Law Review* 622, 625.

⁶⁸ See, eg, *Orellana-Fuentes v Standard Knitting Mills Pty Ltd* (2003) 57 NSWLR 282; *Commonwealth v Wood* (2006) 148 FCR 276.

⁶⁹ *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77, 87 [52] (Hodgson and Bryson JJA agreeing).

⁷⁰ *Ibid.*

⁷¹ *Forge* (n 66).

⁷² *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (‘*Kable*’).

independence and impartiality as fundamental characteristics of a ch III court. Gummow, Hayne and Crennan JJ held, for example, that

An important element ... in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.⁷³

Of significance to the present discussion is that, as Stellios has observed, the High Court's reasons in *Forge* identified the *Kable* principle primarily as an implication of the text (rather than the structure of ch III):

While independence and impartiality had been seen in *North Australian Aboriginal Legal Services Inc v Bradley* as constitutionally required for State courts to exercise Commonwealth judicial power under Ch III, in *Forge* they were seen as essential characteristics of those State 'courts'. What seemed in *Kable* and *Bradley* to be anchored in a structural implication from Ch III, became in *Forge* anchored in the word 'court'.⁷⁴

As will be seen below, this intersection of the *Kable* principle with the word 'court' in *Forge* has had important consequences for the identification of s 77(iii) courts in the context of state tribunals. In essence, the result is the recognition of 'minimum requirements'⁷⁵ according to which a tribunal's status will be weighed.

B *The Current Approach*

Subsequent to the High Court's decision in *Forge*, a number of courts have again considered the status of various state tribunals. Palpable in such cases has been the influence of *Forge*. In *Commonwealth v Anti-Discrimination Tribunal (Tas)*,⁷⁶ for example, Kenny J cited *Forge* for the proposition that 'independence and impartiality is the irreducible minimum for a court of a State within s 77(iii) of the Constitution'.⁷⁷ Most recently, these issues have again been considered in two separate matters brought before the NSWCA in *Attorney-General (NSW) v Gatsby*⁷⁸ and the Victorian Court of Appeal in *Meringnage v Interstate Enterprises Pty Ltd*.⁷⁹ In both matters, the Court unanimously determined that the NCAT and the Victorian Civil and Administrative Tribunal ('VCAT') (respectively) are not courts within the meaning of s 77(iii). Based on these judgments (and in light of *Forge*), the current approach for identifying s 77(iii) courts is outlined below.

The process of determining the constitutional status of an adjudicative body will involve the consideration of the body's organisational features in light of 'history, constitutional convention, and institutional and governmental relationships'.⁸⁰

⁷³ *Forge* (n 66) 76 [64]. See also *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

⁷⁴ Stellios (n 22) 518.

⁷⁵ *Forge* (n 66) 67 [41] (Gleeson CJ).

⁷⁶ *Cth v ADT* (n 11).

⁷⁷ *Ibid* 139 [227].

⁷⁸ *Gatsby* (n 41).

⁷⁹ *Meringnage* (n 46).

⁸⁰ *Cth v ADT* (n 11) 143 [239], relied on in *Meringnage* (n 46) 387 [79].

Broadly, there will be three categories of features that the Court will be likely to consider:⁸¹

- (1) whether the organisational features of the tribunal as a whole ensure a sufficient degree of impartiality and independence from the executive and the legislature;
- (2) the intention of Parliament, as disclosed in the body's constitutive legislation; and
- (3) the powers and functions vested in that body.

Each of these categories is considered in greater detail below.

(1) *Impartiality and Independence*

As has been suggested, independence and impartiality have emerged as the hallmarks of a s 77(iii) court. As Hayne, Crennan, Kiefel and Bell JJ have held, '[t]hey are notions that connote separation from the other branches of government, at least in the sense that the State courts must be and remain free from external influence'.⁸² Yet, despite such a clear grounding in principle, no definitive threshold exists to identify whether a body is sufficiently independent and impartial to be classified as a s 77(iii) court. As Kenny J held in *Cth v ADT*:

Whether or not particular institutional arrangements will ensure the requirements for independence and impartiality are met will depend on the interrelationship of numerous provisions, constitutional conventions, and the history that attaches to them.⁸³

Notwithstanding such inherent uncertainty, however, impartiality and independence have frequently been considered by reference to a number of key indicia relating, primarily, to the provisions for tribunal membership. These include:

- the security of tenure of tribunal members (including the procedures for their removal or reappointment);⁸⁴
- the security of remuneration of tribunal members;⁸⁵
- whether tribunal members are engaged on a full- or part-time basis;⁸⁶ and

⁸¹ For a slightly different list, see Hill (n 42) 200.

⁸² *Condon* (n 30) 89 [125].

⁸³ *Cth v ADT* (n 11) 140 [229]. Note that one issue that arguably has not received sufficient attention is Gummow, Hayne, and Crennan JJ's observation that '[h]istory reveals that judicial independence and impartiality may be ensured by a number of different mechanisms, not all of which are seen, or need to be seen, to be applied to every kind of court.': *Forge* (n 66) 82 [84]. In particular, their Honours noted that independence and impartiality in inferior courts was 'for many years sought to be achieved and enforced chiefly by the availability and application of the Supreme Court's supervisory and appellate jurisdictions and the application of the apprehension of bias principle in particular cases': *Forge* (n 66) 82–3 [84]. This would appear to indicate that, should a more historical analysis be employed in determining the constitutional status of tribunals, a broader range of considerations would arise. See, however, *Stellios* (n 22) 578–81.

⁸⁴ *Gatsby* (n 41) 603 [187]; *Cth v ADT* (n 11) 141 [233] (Kenny J); *Director of Housing v Sudi* (2011) 33 VR 559, 594 [201] (Weinberg JA); *Meringnage* (n 46) 387–8 [80]–[81] (Tate, Niall and Emerton JJA).

⁸⁵ *Cth v ADT* (n 11) 145 [246].

⁸⁶ *Meringnage* (n 46) 390 [88].

- the proportion of tribunal members who also hold judicial offices.⁸⁷

In *Gatsby*, for example, Bathurst CJ referred to the fact that the NCAT is not composed ‘predominantly’⁸⁸ of judges, and that tribunal members do not enjoy security of tenure ‘comparable to that held by judges under the *Act of Settlement 1701* (UK)’.⁸⁹ Similarly, in *Meringnage*, the Court considered that the most significant feature counting against the VCAT’s status as a court was the lack of security of tenure of tribunal members, arising due to a prevalence of fixed-term appointments, combined with a procedure for reappointment conditional entirely on executive discretion.⁹⁰

(2) *Intention of Parliament*

The intention of Parliament, as disclosed in a tribunal’s constitutive legislation, has also frequently been cited by courts in determining the constitutional status of tribunals. Most significant in this regard is the designation as a ‘court of record’.⁹¹ In *Owen v Menzies*, for example, this feature was principally relied upon by the Chief Justice in finding that the QCAT was a court.⁹² This was so, despite the fact that tribunal members could be removed with relative ease by the executive.⁹³

Relevant also in this regard have been provisions that preclude a tribunal from making a determination that is inconsistent with an opinion of the Supreme Court in response to a question of law referred by that tribunal.⁹⁴ As Leeming JA suggested in *Gatsby*, such a provision implies that the tribunal in question is not a Court, because the provision would otherwise be otiose by virtue of the rules of precedent, which bind lower courts in the curial hierarchy.⁹⁵ Similarly, Leeming JA also held in *Gatsby* that state legislation that was designed to accommodate the *Burns v Corbett* limitation by vesting diversity jurisdiction in an ‘authorised court’ constitutes ‘the clearest legislative statement that NCAT is not a court for the purposes of s 77(iii)’.⁹⁶ Significantly, therefore, it can be seen that the course adopted by the NSW legislature enabled a clear determination of the issue of whether the

⁸⁷ *Gatsby* (n 41) 603 [186] (Bathurst CJ); *Meringnage* (n 46) 389 [86] (Tate, Niall and Emerton JJA).

⁸⁸ *Gatsby* (n 41) 603 [186].

⁸⁹ *Ibid* 603 [187].

⁹⁰ *Meringnage* (n 46) 387–8 [80]–[81].

⁹¹ See *Gatsby* (n 41) 603 [185]. The consequence of such a designation is that a tribunal will have the power to punish for contempt, and that its records will be conclusive evidence of what is recorded therein: *Lane v Morrison* (2009) 239 CLR 230, 243 [32] (French CJ and Gummow J). See also Enid Campbell, ‘Inferior and Superior Courts and Courts of Record’ (1997) 6(4) *Journal of Judicial Administration* 249, 254–7.

⁹² *Owen v Menzies* (n 63) 334 [10], 338 [19].

⁹³ Lindell (n 14) 278. See also Kirby J in *K-Generation Pty Ltd v Liquor Licensing Court*, suggesting that such a designation ‘warrants this Court’s taking the State Parliament’s description at face value’: (2009) 237 CLR 501, 562 [219] (*K-Generation*). Note, however, the particular features of the tribunal in question in *K-Generation* (as discussed in *Meringnage* (n 46) 390 [87]) that further supported its status as a court.

⁹⁴ See, eg, *NCAT Act* (n 12) s 54(4).

⁹⁵ *Gatsby* (n 41) 630 [292], endorsed in *Meringnage* (n 46) 393 [97].

⁹⁶ *Gatsby* (n 41) 631 [299].

tribunal was a court, while, at the same time, providing a practical solution to the *Burns v Corbett* limitation.

(3) *Powers and Functions*

The powers and functions vested in a given tribunal have also been held to be of some limited relevance to the question of the tribunal's constitutional status. In *Meringnage*, for example, the Court suggested that 'a primary function of substantial merits review' in its review jurisdiction was inconsistent with the proposition that the VCAT was a state court.⁹⁷ Significantly, however, reference to the powers of a tribunal are of limited utility for two reasons. First, as no strict separation of powers exists at state level, the nature of the powers vested in a given tribunal are unlikely to necessarily be indicative of its status.⁹⁸ Second, in some cases it may be that the very classification of a given power (as judicial or non-judicial) will turn on the nature of the tribunal itself.⁹⁹

C *One Issue of Principle*

Notwithstanding the assistance provided by *Forge*, one of the conceptual difficulties with the present approach to identifying s 77(iii) courts is its intersection with the *Kable* doctrine. As Stellios has observed, complications may arise where independence and impartiality are taken *both* to limit State legislatures' capacity to confer powers on their courts *and*, at the same time, to define the very existence of those courts as such.¹⁰⁰ To the extent that certain tribunals exist close to the threshold of a s 77(iii) court, therefore, their status and functions are apt to remain inherently unstable.

In response to this difficulty, Stellios has referred to the High Court's decision in *K-Generation Pty Ltd v Liquor Licensing Court*,¹⁰¹ where the status and functions of the Licensing Court of South Australia came into question. There, Gummow, Hayne, Heydon, Crennan and Kiefel JJ identified that 'the nature of the jurisdiction conferred upon the Licensing Court... is a matter conceptually distinct from [its] structure and organisation'.¹⁰² As Stellios suggests, this distinction may be utilised to reconcile the competing roles played by independence and impartiality in respect of s 77(iii) courts.¹⁰³ That is, although the powers and functions of an adjudicative body cannot be disregarded entirely, an emphasis on structure, rather than function, may be appropriate in identifying s 77(iii) courts. As can be seen, this approach effectively makes explicit the reasoning reflected in the case law and accommodates the two limitations involved when considering a tribunal's powers,

⁹⁷ *Meringnage* (n 46) 393 [96] (Tate, Niall and Emerton JJA). See also *Qantas v Lustig* (n 11) 165 [70] (Perry J).

⁹⁸ See *Gatsby* (n 41) 632 [306] (Leeming JA); Hill (n 42) 200.

⁹⁹ *R v Davison* (1954) 90 CLR 353, 368–9 (Dixon CJ and McTiernan J). See *Gatsby* (n 41) 587 [95] where Bathurst CJ suggested that it may be more logical to assess the status of a tribunal before determining the nature of a power in question.

¹⁰⁰ Stellios (n 22) 520–1. See Rowe (n 14) 62–3 for helpful discussion on this point.

¹⁰¹ *K-Generation* (n 93).

¹⁰² *Ibid* 539 [132].

¹⁰³ Stellios (n 22) 521.

as discussed above. Such an emphasis may also have the benefit of insulating courts from considerations that could otherwise entrench a more robust separation of powers in the states.

V Conclusion

In this case note I have considered the issues that the constitutional limitation identified in *Burns v Corbett* might pose for state tribunal systems. As has been argued, states' responses to the High Court's decision have been, and will continue to be, important in ensuring that state tribunals function effectively and within their constitutional constraints. In this regard, it is fortunate that state legislatures stand to benefit from a considerable body of ch III jurisprudence to guide legislative choice. The discussion above has demonstrated the extent to which this is true for determining the status of a given tribunal. Though constitutional constraints may be unavoidable, it is hoped that further clarity of principle may, at least, serve to facilitate the continued development of states' tribunal systems.

