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Australia's Response to Plastic Packaging: Towards a Circular Economy for Plastics

Annastasia Bousgas* and Hope Johnson†

Abstract

Reducing the amount of plastic packaging being produced and disposed of is an urgent and significant challenge for regulators and for society more broadly. In recent years, the circular economy has emerged as a key paradigm for conceptualising solutions to plastic and other kinds of waste. While waste management is focused on dealing with materials once they are wasted, the circular economy paradigm calls for changes to the whole supply chain including how plastics are made and used. Australia, along with other nations, has incorporated the concept into waste laws and policies. This article addresses the challenge of using the reconceptualisation of waste offered by the circular economy paradigm in regulatory responses to plastic packaging. By developing principles that draw on the literature relating to the circular economy and regulatory studies, this article illustrates how to design regulatory interventions that support the creation of a circular economy for plastic packaging. Using these principles, the article evaluates Australia's regulatory framework for plastic packaging. Despite the political and media attention on reducing plastic packaging pollution, this article finds fundamental flaws and gaps in the regulation of plastic packaging and identifies options for improving the current approach consistent with the proposed regulatory design principles.

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I Introduction

Plastic use and pollution is a pressing environmental and public health challenge linked to climate change and catastrophic biodiversity loss.¹ Plastic packaging is a particularly prominent form of plastic use, generating high levels of plastic pollution. In fact, it is estimated that 42% of plastic produced globally is used for packaging.² Unlike plastic used in other sectors, which can be used and re-used for longer periods, plastic packaging is often designed for single-use applications. Moreover, due to its strength, lightweight characteristics and the diverse use of additives and other components in its manufacturing (eg, glues and dyes),³ plastic packaging is especially difficult and costly to dispose of and manage. Finally, plastic packaging cannot be recycled indefinitely, unlike other materials such as steel, as it degrades in material integrity after each recycling process.

Despite effective industry resistance over several decades,⁴ regulatory responses to address plastic pollution have increased domestically and internationally.⁵ Notably, the United Nations is developing a treaty addressing plastic pollution.⁶ The circular economy has emerged — simultaneously with the focus on plastic pollution — as a way of conceptualising and identifying solutions to waste. The circular economy is an approach that moves away from the current linear model of material use whereby materials are produced, used and discarded. It envisages an economy where materials are continually re-used either in their current state or as a material in additional production processes.⁷ Hence, the concept of the circular economy prioritises reducing the amount of material used and designing products for re-use, reparability, upgradability and recyclability.⁸ In Australia, the

¹ Fatemeh Amereh, Mohammad Babaei, Akbar Eslami, Simin Fazelipour and Mohammad Rafiee, 'The Emerging Risk of Exposure to Nano(Micro)Plastics on Endocrine Disturbance and Reproductive Toxicity: From a Hypothetical Scenario to a Global Public Health Challenge' (2020) 261 *Environmental Pollution* 114158.

² Hannah Ritchie, 'FAQs on Plastics', *Our World in Data* (Web Page, 2 September 2018) <<https://ourworldindata.org/faq-on-plastics>>.

³ Ksenia J Groh, Thomas Backhaus, Bethanie Carney-Almroth, Birgit Geueke, Pedro A Inostroza, Anna Lennquist, Heather A Leslie, Maricel Maffini, Daniel Slunge, Leonardo Trasande, A Michael Warhurst and Jane Muncke, 'Overview of Known Plastic Packaging-Associated Chemicals and Their Hazards' (2019) 651 (Part 2) *Science of the Total Environment* 3253.

⁴ Jennifer Clapp, 'The Rising Tide against Plastic Waste: Unpacking Industry Attempts to Influence the Debate' in Stephanie Foote and Elizabeth Mazzolini (eds), *Histories of the Dustheap: Waste, Material Cultures, Social Justice* (MIT Press, 2012) 199.

⁵ Peter Dauvergne, 'The Power of Environmental Norms: Marine Plastic Pollution and the Politics of Microbeads' (2018) 27(4) *Environmental Politics* 579.

⁶ *End Plastic Pollution: Towards an International Legally Binding Instrument*, UNEP Res 5/14, UN Doc UNEP/EA.5/Res.14 (2 March 2022).

⁷ See Martin Geissdoerfer, Paulo Savaget, Nancy MP Bocken and Erik Jan Hultink, 'The Circular Economy: A New Sustainability Paradigm?' (2017) 143 *Journal of Cleaner Production* 757, 759, 766.

⁸ See, eg, Eléonore Maitre-Ekern, 'The Choice of Regulatory Instruments for a Circular Economy' in Klaus Mathis and Bruce Huber (eds), *Environmental Law and Economics* (Springer, 2017) vol 4, 305; 'What Is a Circular Economy?', *Ellen MacArthur Foundation* (Web Page, 2019) <<https://www.ellenmacarthurfoundation.org/circular-economy/concept>>; Anastasia Bousgas, 'Embedding Circular Principles into Plastic Packaging Regulation in Australia: Challenges and

circular economy was first mentioned in the 2018 Senate inquiry into the waste industry,⁹ and in the subsequent *National Waste Policy*,¹⁰ and the *National Waste Policy Action Plan*.¹¹

Corresponding with the increase in political and regulatory attention directed at plastics and the circular economy, legal scholarship on these topics has also increased over the last five years. Most of this scholarship has concentrated on international and transnational responses to plastics, with a focus on designing a treaty for plastic pollution.¹² Other themes in the literature include the introduction of domestic bans on particular kinds of plastic,¹³ the ways in which property and consumer law promote linear uses of materials,¹⁴ and the broader role of law in facilitating the transition to a circular economy across all waste streams.¹⁵ Finally, scholarship on extended producer responsibility schemes encompassing plastics,

Solutions' (LLM Thesis, University of Southern Queensland, 2022); Julian Kirchherr, Denise Reike and Marko Hekkert, 'Conceptualizing the Circular Economy: An Analysis of 114 Definitions' (2017) 127 *Resources, Conservation and Recycling* 221.

⁹ Senate Environment and Communications References Committee, Parliament of Australia, *Never Waste a Crisis: The Waste and Recycling Industry in Australia* (Final Report, June 2018).

¹⁰ Department of Agriculture, Water and Environment (Cth), *National Waste Policy: Less Waste, More Resources — 2018* (2018) ('*National Waste Policy*').

¹¹ Department of Agriculture, Water and Environment (Cth), *National Waste Policy: Action Plan — 2019* (2019) ('*National Waste Policy Action Plan*').

¹² See, eg, Karen Raubenheimer, Alistair McIlgorm and Nilüfer Oral, 'Towards an Improved International Framework to Govern the Life Cycle of Plastics' (2018) 27(3) *Review of European, Comparative and International Environmental Law* 210; Peter Dauvergne, 'Why Is the Global Governance of Plastic Failing the Oceans?' (2018) 51 *Global Environmental Change* 22; Ina Tessnow-von Wysocki and Philippe Le Billon, 'Plastics at Sea: Treaty Design for a Global Solution to Marine Plastic Pollution' (2019) 100 *Environmental Science and Policy* 94; Elizabeth A Kirk, 'The Montreal Protocol or the Paris Agreement as a Model for a Plastics Treaty?' (2020) 114 *AJIL Unbound* 212; Elizabeth A Kirk and Naporn Popattanachai, 'Marine Plastics: Fragmentation, Effectiveness and Legitimacy in International Lawmaking' (2018) 27(3) *Review of European, Comparative and International Environmental Law* 222; Hope Johnson, Zoe Nay, Rowena Maguire, Leonie Barner, Alice Payne and Manuela Taboada, 'Conceptualizing the Transnational Regulation of Plastics: Moving Towards a Preventative and Just Agenda for Plastics' (2021) 11(2) *Transnational Environmental Law* 325.

¹³ See, eg, Doris Knoblauch, Linda Mederake and Ulf Stein, 'Developing Countries in the Lead: What Drives the Diffusion of Plastic Bag Policies?' (2018) 10(6) *Sustainability* 1994; Jennie R Romer and Leslie Mintz Tamminen, 'Plastic Bag Reduction Ordinances: New York City's Proposed Change on All Carryout Bags as a Model for US Cities Plastic Pollution' (2013) 27(2) *Tulane Environmental Law Journal* 237; Nicholas Rivers, Sarah Shenstone-Harris and Nathan Young, 'Using Nudges to Reduce Waste? The Case of Toronto's Plastic Bag Levy' (2017) 188 *Journal of Environmental Management* 153.

¹⁴ See, eg, Sean Thomas, 'Personal Property Law for a Zero-Waste Circular Economy: Using Retention of Title Clauses to Reduce Plastics Waste' (2019) 15(2) *Law, Environment and Development Journal* 176; V Mak and E Terryn, 'Circular Economy and Consumer Protection: The Consumer as a Citizen and the Limits of Empowerment through Consumer Law' (2020) 43(1) *Journal of Consumer Policy* 227.

¹⁵ See, eg, Rosa Maria Ballardini, Janne Kaisto and Jukka Similä, 'Developing Novel Property Concepts in Private Law to Foster the Circular Economy' (2021) 279 *Journal of Cleaner Production* 123747; Thomas J de Rômph and Jacqueline M Cramer, 'How to Improve the EU Legal Framework in View of the Circular Economy' (2020) 38(3) *Journal of Energy and Natural Resources Law* 245; Eléonore Maitre-Ekern, 'Re-Thinking Producer Responsibility for a Sustainable Circular Economy from Extended Producer Responsibility to Pre-Market Producer Responsibility' (2021) 286 *Journal of Cleaner Production* 125454.

primarily focused on the European Union, and the ability of such schemes to support a circular economy has increased.¹⁶

Despite these legal, political and scholarly developments, Australian scholarship on the regulation of plastic packaging, and the use of law to foster support for a circular economy for plastic packaging, is largely lacking.¹⁷ The absence of legal scholarship on the subject is especially noteworthy in light of the significance of plastic pollution and the proliferation of regulatory responses in Australia to waste. Given the scale and complexity of plastic pollution, and the need for innovative regulatory responses, much more work in this area is required.

This article seeks to contribute to the scholarship on designing and reviewing regulation to combat waste more effectively, and to contribute to the limited Australian scholarship on the regulation of plastic. In Part II, we propose principles to guide regulatory design towards a circular economy in the context of plastic packaging. Our principles draw on circular economy and regulatory theory literature, as well as literature related to plastic packaging. In Part III, we provide a broad overview and critique of Australia's approach at the federal level to regulating plastic packaging.¹⁸ Using the principles identified in Part II, in Part IV we critique the current regulatory framework with a specific focus on the *Australian Packaging Covenant*. In Part IV, we identify some changes that could be made to improve Australia's response to plastic packaging. There has not been an in-depth legal academic analysis of the Covenant in over a decade.¹⁹ As the Covenant comes to the end of its fourth iteration and the federal government considers reforms for packaging regulation,²⁰ it is an ideal time to reflect on, and revise, this instrument and — more broadly — Australia's regulation of plastic packaging.

¹⁶ See, eg, Katrien Streenmans, 'Extended Producer Responsibility: An Assessment of Recent Amendments to the European Union Waste Framework Directive' (2019) 15(2) *Law, Environment and Development Journal* 110; Susanna Andreasi Bassi, Alessio Boldrin, Giorgia Faraca, Thomas F Astrup, 'Extended Producer Responsibility: How to Unlock the Environmental and Economic Potential of Plastic Packaging Waste?' (2020) 162 *Resources, Conservation and Recycling* 105030.

¹⁷ In saying this, the authors note the recent work of Hossain et al which outlines Australian waste policies including the *Australian Packaging Covenant* across the waste streams collectively: Rumana Hossain, Md Tasbirul Islam, Anirban Ghose and Veena Sahajwalla, 'Full Circle: Challenges and Prospects for Plastic Waste Management in Australia to Achieve Circular Economy' (2022) 368 *Journal of Cleaner Production* 133127.

¹⁸ Australian Packaging Covenant Organisation ('APCO'), *Australian Packaging Covenant* (1 January 2017) <<https://apco.org.au/the-australian-packaging-covenant>> ('*Australian Packaging Covenant*').

¹⁹ Noting again the contribution made to highlighting some of the shortcomings of the *Australian Packaging Covenant* (n 18) in the recent work of Hossain et al (n 17).

²⁰ 'Australian Packaging Covenant Organisation', *Department of Climate Change, Energy, the Environment and Water* (Web Page, 2022) <<https://www.dcccew.gov.au/environment/protection/waste/plastics-and-packaging/package-covenant>>.

II Preliminary Principles for Regulating Plastic Packaging towards a Circular Economy

A Combining Regulatory Theory and Circular Economy Literature

‘Waste management’ has long been the central concept informing the regulation of plastic pollution. A growing body of waste policy scholarship has, however, identified how waste management contains a fundamental conceptual weakness that undermines its ability to effectively reduce waste.²¹ The weakness is that waste management only focuses on waste once it exists and so emphasises end-of-life responses, such as increasing waste collection, rather than focusing on interventions to prevent waste from coming into existence in the first place.²² To an extent,²³ the circular economy addresses this weakness by bringing as much attention to how products are produced and designed (ie, start-of-life processes) as it does to managing material once it exists (ie, consumption and end-of-life processes). It emphasises adjusting the whole life cycle of materials to avoid the production of waste through improved design and reduced consumption of materials.²⁴

The circular economy is a very broad concept, like sustainable development, and so is capable of being interpreted in stronger or weaker ways, and can be used as a normative basis for a range of interventions.²⁵ Despite the concept’s breadth, circular economy literature commonly identifies the following principles as underpinning the vision for a circular economy: (i) whole-of-life-cycle collaboration among state and non-state actors across supply chains;²⁶ (ii) redesigning products

²¹ Rudolf Messner, Carol Richards and Hope Johnson, ‘The “Prevention Paradox”: Food Waste Prevention and the Quandary of Systemic Surplus Production’ (2020) 37(3) *Agriculture and Human Values* 805; Hervé Corvellec, ‘A Performative Definition of Waste Prevention’ (2016) 52 *Waste Management* 3; Bousgas (n 8); Marie Mourad, ‘Recycling, Recovering and Preventing “Food Waste”: Competing Solutions for Food Systems Sustainability in the United States and France’ (2016) 126 *Journal of Cleaner Production* 461.

²² Carrie Bradshaw, ‘Waste Law and the Value of Food’ (2018) 30(2) *Journal of Environmental Law* 311.

²³ The concept has also been critiqued for supporting perpetual growth, rather than problematising increasing levels of production and consumption; for failing to meaningfully incorporate the interests and voices of marginalised groups; and for extending corporate control over foods: see, eg, Hervé Corvellec, Alison F Stowell and Nils Johansson, ‘Critiques of the Circular Economy’ (2022) 26(2) *Journal of Industrial Ecology* 421.

²⁴ Geissdoerfer et al (n 7).

²⁵ Patrick Schröder, Magnus Bengtsson, Maurie Cohen, Paul Dewick, Joerg Hofstetter and Joseph Sarkis, ‘Degrowth within: Aligning Circular Economy and Strong Sustainability Narratives’ (2019) 146 *Resources, Conservation and Recycling* 190; Martin Calisto Friant, Walter JV Vermeulen and Roberta Salomone, ‘A Typology of Circular Economy Discourses: Navigating the Diverse Visions of a Contested Paradigm’ (2020) 161 *Resources, Conservation and Recycling* 104917.

²⁶ See generally, Mariale Moreno, Carolina De los Rios, Zoe Rowe and Fiona Charnley, ‘A Conceptual Framework for Circular Design’ (2016) 8(9) *Sustainability* 937; Omar Romero-Hernández and Sergio Romero, ‘Maximizing the Value of Waste: From Waste Management to the Circular Economy’ (2018) 60(5) *Thunderbird International Business Review* 757 (referencing the purpose of holistic considerations when discussing design and waste management).

for re-use and recyclability;²⁷ (iii) scaling up business models that involve re-use, retained ownership or the use of waste as an input;²⁸ (iv) changing consumer purchasing decisions;²⁹ (v) returning materials for re-use;³⁰ and (vi) improving waste management processes.

The breadth of the circular economy and its relatively recent emergence mean that detailed understanding of how to regulate for a circular economy is lacking.³¹ In this article, we address this gap by drawing on regulatory theory — especially responsive regulation, and extensions of this theory — to understand how to regulate in ways that enable a circular economy in the context of plastic packaging.

While the circular economy focuses on materials, and regulatory theory focuses on regulation, we found some key overlaps between the two conceptual domains. Both areas of work are based in more complex, systems-based perspectives that seek to move beyond a narrow set of issues and solutions. Likewise, circular economy and regulatory studies acknowledge, albeit with different terminology, the role of various actors in regulating. These roles include setting the norms underlying regulatory interventions; collecting and disseminating information around compliance; and identifying and correcting non-compliance.³² In addition, both regulatory studies and circular economy scholarship emphasise the need for a range of techniques and interventions that work in conjunction, as opposed to discrete measures that work in isolation.³³

Regulatory studies, however, provides a much more in-depth understanding of how various regulatory interventions should work together, which is especially useful in the context of the circular economy's focus on influencing the whole supply

²⁷ See, eg, Walter R Stahel, 'The Circular Economy' (2016) 531(7595) *Nature* 435; Murray, Skene and Haynes (n 1); Ellen MacArthur Foundation, *Towards the Circular Economy: Vol 1* (Report, 2013). If we also consider the prominent theories that underpin the concept of the circular economy — such as cradle to cradle, biomimicry and regenerative design — it is evident that product design, and the choices surrounding product design, is a significant component of the circular economy: see, eg, 'Schools of Thought That Inspired the Circular Economy', *Ellen MacArthur Foundation* (Web Page) <<https://ellenmacarthurfoundation.org/schools-of-thought-that-inspired-the-circular-economy>>; 'What Is a Circular Economy?' (n 8); Marcel C den Hollander, Conny A Bakker and Erik Jan Hultink, 'Product Design in a Circular Economy: Development of a Typology of Key Concepts and Terms' (2017) 21(3) *Journal of Industrial Ecology* 517.

²⁸ Patrick Planing, 'Business Model Innovation in a Circular Economy: Reasons for Non-Acceptance of Circular Business Models' (2015) *Open Journal of Business Model Innovation* 1, 4.

²⁹ See Maitre-Ekern, 'The Choice of Regulatory Instruments for a Circular Economy' (n 8); Planing (n 28) 1; Stephen M Jones, *Advancing a Circular Economy: A Future without Waste?* (Springer, 2021) 5–6.

³⁰ World Economic Forum, *Towards the Circular Economy* (Report, 2013) 39–41 on global reverse networks.

³¹ Consistent with regulatory theory, we understand regulation as the interactions between actors as they seek to influence the components within systems: see, eg, Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103.

³² Neil Gunningham and Darren Sinclair, 'Conclusion' in Neil Gunningham and Peter Grabosky (eds), *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1999) 189; Neil Gunningham and Cameron Holley, 'Next-Generation Environmental Regulation: Law, Regulation, and Governance' (2016) 12(1) *Annual Review of Law and Social Science* 273.

³³ Neil Gunningham and Darren Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection' (1999) 21(1) *Law and Policy* 49.

chain, rather than specific points. Ayres and Braithwaite's theory of responsive regulation — among other concepts from regulatory studies — underscores the need for effective, overall regulatory design comprising regulatory and enforcement mechanisms that interact and have built-in ways of responding and adapting to the specific context.³⁴ The theory seeks to re-embed regulation into social contexts by holding that regulation should be responsive to the relevant social dynamics and context.³⁵ This conceptualisation of regulation emphasises the importance of regulatory design that incorporates an option to scale up actions to more prescriptive measures, backed with heavier sanctioned enforcement mechanisms, until a time when the underlying aim is achieved.³⁶ Statutory enforcement should be the last measure taken, while more voluntary approaches and compliance strategies (such as education) should be pursued first. Yet a real threat of statutory intervention facilitating compliance should be available where initial voluntary approaches fail to meet the public interest being pursued.

Since the development of responsive regulation, scholars have added to its original conception. Among other things they have emphasised the need for an appropriate mix of regulatory instruments and highlighted the role of third parties and interactions between stakeholders in developing rules and holding those entities being regulated (and the regulators) to account.³⁷ Baldwin and Black's extension of responsive regulation emphasises that regulators need to be responsive to a range of factors beyond how much compliance is being achieved.³⁸ Optimal regulatory design would include, for instance, evaluating how much non-compliant activity is not being addressed by the current regime, and building in wide-ranging ways to significantly modify the mix of rules and enforcement mechanisms in response to assessments of how well the regime is working.

In recent years, Parker and Haines have extended regulatory theory with their concept of 'ecological regulation' and Parker's related concept of 'ecological compliance'.³⁹ Ecological regulation acknowledges the way in which responsive regulation re-embedded social dynamics and values into conceptions of regulatory design and implementation. It goes further in conceiving of regulation as something that should be ultimately responsive to ecological actors and should function in an ecological way. This conception of regulation requires a much greater prioritisation

³⁴ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

³⁵ Charlotte Wood, Mary Ivec, Jenny Job and Valerie Braithwaite, 'Applications of Responsive Regulatory Theory in Australia and Overseas' (RegNet Occasional Paper No 15, June 2010).

³⁶ Ayres and Braithwaite (n 34).

³⁷ Gunningham and Sinclair, 'Conclusion' (n 32); Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) ('*The Open Corporation*'); Peter Grabosky, 'Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process' (2013) 7(1) *Regulation and Governance* 114.

³⁸ Robert Baldwin and Julia Black, 'Really Responsive Regulation' (2008) 71(1) *The Modern Law Review* 59.

³⁹ Christine Parker, 'From Responsive Regulation to Ecological Compliance: Meta-Regulation and the Existential Challenge of Corporate Compliance' in Benjamin van Rooij and D Daniel Sokol (eds), *The Cambridge Handbook of Compliance* (Cambridge University Press, 2021) 37; Christine Parker and Fiona Haines, 'An Ecological Approach to Regulatory Studies?' (2018) 45(1) *Journal of Law and Society* 136.

of social and environmental interests, including limits on the extraction of natural resources. It also emphasises the need for more interconnected, diversified regulatory responses that address issues simultaneously as opposed to siloed, reactive regulatory structures that tend to reinforce existing power imbalances.

Notably, these understandings of regulation can help address critiques of the circular economy that may otherwise emerge if the circular economy were the only conceptual basis for a regulatory response to waste. The circular economy is often criticised for being overly focused on changing economic systems, with the social and ecological contexts frequently overlooked.⁴⁰ As a result, it tends to be framed in economic and techno-solutionism terms, whereby changes to the economy and new technologies are seen as the way to address waste-related pollution in isolation.⁴¹ Regulatory theory not only provides a more complex understanding of the regulation necessary for operationalising a circular economy into regulatory structures, it also addresses the conceptual limitations of the circular economy by re-embedding social and ecological contexts and values. The next section develops some principles to build an analytical framework for plastic waste regulation drawing on the circular economy and the concepts discussed from regulatory studies.

B *Circular Economy Regulatory Design Principles*

The following identifies five preliminary regulatory design principles as a basis for creating and analysing regulation in support of a circular economy approach to plastic packaging. These principles draw on circular economy and regulatory studies in combination with the specifics of plastic packaging supply chains. We use the term ‘manufacturer’ in this section to encompass all upstream operations that apply to the production and design of plastic packaging.

Principle 1 – Encourage Meaningful Participation and Collaboration among Regulatory Actors

Both circular economy and regulatory studies emphasise how various actors can and should have roles in setting the norms underlying interventions; collecting and disseminating information around compliance; and identifying and correcting non-compliance.⁴² It then follows that regulation for the circular economy must meaningfully incorporate and encourage participation and collaboration among a wide array of actors from the plastics supply chain. Within the regulatory framework for plastic packaging then, clear forums and avenues for communication among all stakeholders within the life cycle of plastic packaging products are required. The specialised knowledge of different actors should inform the development and

⁴⁰ Schröder et al (n 25); Friant, Vermeulen and Salomone (n 25); Francisco Valenzuela and Steffen Böhm, ‘Against Wasted Politics: A Critique of the Circular Economy’ (2017) 17(1) *Ephemera* 23; Corvellec, Stowell and Johansson (n 23).

⁴¹ Paul James, ‘Re-Embedding the Circular Economy in Circles of Social Life: Beyond the Self-Repairing (and Still-Rapacious) Economy’ (2022) 27(10–11) *Local Environment* 1208.

⁴² Gunningham and Sinclair, ‘Conclusion’ (n 32); Gunningham and Holley (n 32).

revision of regulatory instruments.⁴³ In the context of plastics, upstream manufacturers are the best placed within the life cycle to effect design changes that allow for a continual use of plastics consistent with a circular economy. Yet, their decisions require information and support from other supply chain actors and sectors. For instance, upstream manufacturers need information about local waste management capabilities, as well as incentives and support to adopt new materials or designs in cases where local waste capacity is unable to process certain materials. Turning to another actor, regulatory studies tend to emphasise the unique and important role that civil society can, and often does, play in developing and enforcing regulation.⁴⁴ Likewise, albeit to a lesser extent, the circular economy emphasises the role of civil society alongside government and business (indeed, the circular economy was first conceptualised by civil society organisations). As such, regulation of plastic packaging for a circular economy should have specific avenues for civil society involvement and support.

Principle 2 – Emphasise Product Redesign

In accordance with the circular economy, regulatory responses to plastic packaging need to focus on producing material loops: that is, enabling the ongoing recirculation of material for further production and consumption cycles. Hence, plastic packaging needs to be designed for re-use, reparability and recyclability as well as upgradability, where possible, and remain compatible with waste collection and processing availability in the given local context.⁴⁵ Design choices relating to the use of inks, adhesives or other additives, as well as the inclusions of uncommon polymers or the intermixing of polymers with other materials (paper, etc) can affect the technical and economic viability of recycling plastic packaging.⁴⁶ Additionally, different local-level infrastructure capabilities exist for managing plastic waste, which poses an issue for design decisions specifically, but also for closing loops more generally.

To effectively regulate the redesign of plastics, regulatory theory supports the adoption of a diverse range of interventions beyond, but including, mandatory or voluntary design standards, as opposed to a single instrument approach.⁴⁷ These interventions include bans on particular additives; extended producer responsibility schemes, where manufacturers have to re-use plastic packaging; and provisions to

⁴³ Richard Hughes, 'The EU Circular Economy Package: Life Cycle Thinking to Life Cycle Law?' (2017) 61 *Procedia CIRP* 10, 16.

⁴⁴ Robert V Percival and Zhao Huiyu, 'The Role of Civil Society in Environmental Governance in the United States and China' (2014) 24(1) *Duke Environmental Law and Policy Forum* 141; John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000) 36; Ayres and Braithwaite (n 34) 54–89; Magnus Boström, 'Regulatory Credibility and Authority through Inclusiveness: Standardization Organizations in Cases of Eco-Labeling' (2006) 13(3) *Organization* 345.

⁴⁵ Ellen MacArthur Foundation, *Towards the Circular Economy: Volume 1* (n 27).

⁴⁶ HA Leslie, PEG Leonards, SH Brandsma, J de Boer and N Jonkers, 'Propelling Plastics into the Circular Economy: Weeding out the Toxics First' (2016) 94 *Environment International* 230.

⁴⁷ Gunningham and Sinclair, 'Regulatory Pluralism: Designing Policy Mixes for Environmental Protection' (n 33).

require the publication and sharing of information about the specifics of plastic packaging lines compared to domestic waste infrastructure.

Principle 3 – Develop Capacity to Scale up Responses over Time where Plastic Packaging Production and Waste Remain Stable

Consistent with responsive regulatory theory, the ideal regulatory approach is to start with more informal, persuasive interventions based on voluntary or semi-voluntary frameworks. Where such an approach is unsuccessful, the regime should become more onerous over time, moving towards higher levels of state intervention (ie, towards command and control). The same can be said for enforcement actions. While enforcement mechanisms should at first be based on persuasion and collaboration, they should be scaled up to incorporate civil and even criminal penalties where non-compliance continues. Hence, in addition to the presence of clearly established rules, aims or standards, effective regulation should also contain a sufficient mix of enforcement actions ranging from persuasion and informal approaches through to more coercive responses.⁴⁸ In achieving circular product design, it is generally thought that ‘voluntary and non-committal approaches will ultimately be insufficient’ to achieve the kinds of whole-supply-chain changes required.⁴⁹

The regulatory model for plastic packaging, then, requires effective compliance mechanisms that are able to motivate business actors to comply, while also providing avenues for increasing interventions over time in response to non-compliance or a lack of progress towards the objective of improved circular plastic packaging. Where manufacturers agree, or are compelled, to undertake product redesign, mechanisms will need to be in place to track and monitor progress and influence compliance. Consistent with responsive regulation, where a manufacturer does not undertake the required type or extent of product redesign, enforcement actions should be scaled up over time with the ultimate enforcement action being, for instance, strong financial penalties. Similarly, scaling up of regulation should swiftly follow instances of non-compliance.

Principle 4 – Clearly Prioritise Reductions and Efficiencies in Material Consumption

To be consistent with a circular economy approach and taking into account the need for plastic packaging in medical and related scenarios, a regulatory regime for plastic packaging should have as the main priority reducing the amount of plastic packaging being produced and consumed along supply chains.⁵⁰ Regulation should be designed, therefore, to encourage reduced consumption of virgin material in both production and consumption practices of manufacturers of plastic packaging. This may involve, for instance, regulatory actors finding ways of using less material per

⁴⁸ Christine Parker and Organisation for Economic Co-operation and Development, *Reducing the Risk of Policy Failure: Challenges for Regulatory Compliance* (Report, 2000) 7.

⁴⁹ Aldert Hanemaaijer, Maikel Kishna, Hester Brink, Julia Koch, Anne Gerdien Prins and Trudy Rood, *Netherlands Integral Circular Economy Report 2021: English Summary* (January 2021).

⁵⁰ See, eg, Stahel (n 27).

item, incorporating recycled material, and/or preventing unnecessary use or overuse. Such an approach to regulating plastics is especially consistent with the move towards prioritising ecological interests in regulation, as detailed in Part II(A).

Although generally economics dictate that most manufacturers will already use the minimum required material, in practice this is often offset by additional use of material for aesthetics, convenience, custom or marketing benefits.⁵¹ Over-packaging can also result from a company's investment in certain production processes, leading to a reluctance to make changes in line with best practice developments. Targets for reduced material consumption that are perhaps a mix of voluntary and mandatory could form part of the interventions.

Nevertheless, the act of reducing material consumption to use less plastic per item is not merely about manufacturers swapping one type of plastic with another or using a different type of material such as biomass alternatives. Substituting a particular kind of plastic for another material does not necessarily guarantee more sustainable outcomes. Material reductions should be supported by comprehensive assessments of the environmental impact of substitutes and the ways in which they will be disposed of. Relevant considerations can include the types of chemicals used in the new material and its realistic re-use opportunities. Prioritising material reductions is, therefore, a difficult process requiring a comprehensive assessment of substitutes and a balancing of the impacts of reducing plastic packaging against other public interest goals such as public health. Regardless, this more complex analysis of material flows is consistent with the move in regulatory studies to embed ecological contexts into conceptions of ideal regulatory structures.

Principle 5 – Support Mechanisms That Mobilise Resources for Infrastructure Change and Design Innovations

A regulatory regime for plastic packaging should support investment in research and development that advances new materials, processes and end-of-life processing. Multiple technical difficulties confront plastic redesign for re-use and recyclability,⁵² as well as the development of materials to replace plastics. Regulatory interventions need to mobilise financial resources towards technical and social advancements in plastic design, re-use, recyclability and reduction. Moreover, regulatory interventions should incentivise industries to invest in shifting their current processes and technologies and waste processing infrastructure.

Consistent with ecological regulation, it is important that each technical intervention is assessed against its ultimate contribution to a circular economy — that is, a whole-of-life-cycle approach. For instance, an advancement in plastic redesign to improve recyclability and re-use is inconsistent with a circular economy if the approach ultimately requires the extraction of more resources, or if it

⁵¹ Jefferson Hopewell, Robert Dvorak and Edward Kosior, 'Plastics Recycling: Challenges and Opportunities' (2009) 364(1526) *Philosophical Transactions of the Royal Society B: Biological Sciences* 2115, 2117.

⁵² See, eg, Anna-Sophia Bauer, Manfred Tacker, Ilke Uysal-Unalan, Rui MS Cruz, Theo Varzakas and Victoria Krauter, 'Recyclability and Redesign Challenges in Multilayer Flexible Food Packaging: A Review' (2021) 10(11) *Foods* 2702.

unintentionally encourages an increase in hazardous plastic or plastic that is more difficult to recycle — as has occurred previously.⁵³ This suggests that regulators should be aware of and be willing to continuously review the standards and targets they set to ensure that the redesign of plastic packaging is tracking in favour of circular economy outcomes.

III Australia's Regulation of Plastic Packaging

A Current Regulatory Framework

The regulatory regime for plastic packaging in Australia has five main components: (i) federal waste policy documents; (ii) the federal legislative ban on unsorted plastic exports;⁵⁴ (iii) the *Australian Packaging Covenant* and related regulatory framework which includes involvement with the voluntary, transnational ANZPAC Plastic Pact ('ANZPAC');⁵⁵ (iv) state and territory legislative plastic packaging bans; and (v) state and territory policies on waste and the circular economy.⁵⁶ Most of these instruments and policies have been introduced since 2018 in response to China's ban on plastic waste imports.⁵⁷ As a result of this ban, and the related media, it was revealed that Australia lacked capacity to recycle significant amounts of plastic packaging and was exporting large amounts of plastic waste to China that it would now need to stockpile.

In this article we focus on federal regulation but mention state and territory arrangements where appropriate. It is also worth noting that most plastic is imported into Australia.⁵⁸ Hence, there is an inherent limit on the ability of Australian governments to regulate plastic packaging. Regardless, the federal government can

⁵³ For example, the replacement of polyethylene terephthalate (or PET) for low-density polyethylene ('LDPE') might save on material used, but LDPE is ultimately more difficult to recycle.

⁵⁴ See *Recycling and Waste Reduction Act 2020* (Cth) s 18 ('*Recycling and Waste Reduction Act*').

⁵⁵ The ANZPAC Plastics Pact ('ANZPAC'), launched in May 2021, is the voluntary regional pact of Australia, New Zealand and Pacific Island nations under the wider network of plastic pacts initiated by the Ellen MacArthur Foundation. The global Plastics Pact Network attempts to connect businesses, NGOs and governments behind a series of 2025 targets to eliminate plastic waste: see generally 'The Plastics Pact Network', *Ellen MacArthur Foundation* (Web Page) <<https://ellenmacarthurfoundation.org/the-plastics-pact-network>>. In Australia, ANZPAC is administered by APCO (discussed below in Part III(C)): see ANZPAC, 'Leading Businesses, NGOs and Governments from across the Plastic Supply Chain and the Region Unite behind 2025 Targets to Eliminate Plastic Packaging Waste' (Media Release, 17 May 2021) ('ANZPAC Media Release').

⁵⁶ A transnational scheme has recently been incorporated by APCO as a national project for the plastics industry in Australia. ANZPAC was developed by the Ellen MacArthur Foundation in collaboration with APCO and the Waste and Resources Action Programme ('WRAP') UK as a voluntary scheme for companies to work on improving plastics outcomes on the international stage. This voluntary scheme has four established targets: (i) elimination of unnecessary plastic through redesign; (ii) 100% of plastic to be reusable, recyclable or compostable by 2025 (like the packaging targets); (iii) increased plastic collection for recycling; and (iv) on average 25% of plastic packaging to comprise recycled plastics.

⁵⁷ Juli Tomaras, 'Waste Management and Recycling: Budget Review 2020–21' (Report, Parliamentary Library, Parliament of Australia).

⁵⁸ Department of Agriculture, Water and the Environment (Cth), *2018–19 Australian Plastics Recycling Survey: National Report* (Final Report, 12 March 2020) 4.

still significantly influence how companies in Australia source their packaging, the amount of packaging they use, and the composition of the plastics imported.

The federal government's first — and to date main — response to plastic packaging was the creation in 1999 of the *National Packaging Covenant* (today known as the *Australian Packaging Covenant*). Indeed, this was the federal government's first regulatory response to waste (of any kind), beyond regulating the export of waste, and was initiated by industry in response to concerns that Australia would increase its regulation of waste following legal developments in Europe.⁵⁹ It has remained the primary response to plastic waste at the federal level for 20 years, despite its widely documented issues and the limited national improvements achieved in regard to plastic waste in Australia.⁶⁰ These issues were brought to the public's attention in December 2022 with the failure of a nationwide soft plastics recycling scheme,⁶¹ and again in May 2023 when the federal government decided to 'temporarily' lift its national ban on the exports of some types of plastic waste to alleviate mounting stockpiles.⁶²

Alongside the *Australian Packaging Covenant* (discussed further in Part II(B)) are various policies on plastic packaging that have been introduced since 2018, corresponding with China's ban.⁶³ The introduction of these policies also coincides with the increased introduction at the state and territory level of bans on specific kinds of single-use plastics. In total, at the federal level, there are now four policies related to plastic packaging that have been created since 2018. Table 1 outlines each document and its key provisions as they relate to plastic packaging.

⁵⁹ See Nicole Sommer, 'It's Not My Bag Baby: Responsibility for Packaging and the National Packaging Covenant' (2006) 10(2) *Australasian Journal of Natural Resources Law and Policy* 219, 242–5.

⁶⁰ See National Packaging Covenant Industry Association, Submission to Productivity Commission, *Waste Generation and Resource Efficiency Inquiry* (February 2006) 6; S Kelly, H Lewis, A Atherton and J Downes, *Packaging Sustainability Framework for APC Signatories: Final Report* (UTS Institute for Sustainable Futures, 2017) 1.

⁶¹ A recent example is the folding of the REDcycle program: see, eg, Najma Sambul, Chris Vedelago and Caroline Schelle, 'Thousands of Tonnes of Plastic Bags from Coles, Woolworths Scheme Found in Warehouses', *The Age* (online, 9 December 2022) <<https://www.theage.com.au>>.

⁶² Jake Evans, 'Environment Minister Tanya Plibersek Grants Exemption for Some Household Plastic Waste To Be Exported', *ABC News* (online, 18 May 2023) <<https://www.abc.net.au>>.

⁶³ The Centre for International Economics, *Costs and Benefits of Banning Exports of Waste* (Final Report, 24 February 2020).

Table 1: Federal policies dealing with plastic packaging

Title	Features in regard to plastic
National Waste Policy ⁶⁴	<ul style="list-style-type: none"> • Outlines the direction for waste management in Australia until 2030. • First national policy document incorporating the circular economy as a key concept for informing Australian government responses to waste. • Strategy 10 is '[r]educe the impacts of plastic and packaging on the environment and oceans, reduce plastic pollution, and maximise benefit to the economy and society'). • Contains a narrow definition of a circular economy focused on closing material loops.
National Packaging Targets 2025 ⁶⁵	<ul style="list-style-type: none"> • Agreed to by all state and territory environment ministers in 2018. • Establishes four targets to be achieved by 31 December 2025: <ol style="list-style-type: none"> (i) 100% of packaging to be re-usable, recyclable or compostable; (ii) phasing out of problematic and unnecessary single-use plastic packaging through redesign, innovation and alternatives; (iii) 70% of plastic packaging to be recycled or composted; and (iv) 20% average incorporation of recycled content into the production of plastic packaging. <p>Note: Targets (i) and (ii) are also shared by ANZPAC.⁶⁶</p>
National Waste Policy Action Plan ⁶⁷	<ul style="list-style-type: none"> • Implements the <i>National Waste Policy</i> through seven national targets. • Target 3 is 80% average resource recovery rate from all waste streams (ie, 80% of waste is re-used or recycled), including plastics. • Target 5 is removal of all problematic and unnecessary plastic by 2025. • Creates a list of problematic and unnecessary packaging. • Focuses on beach clean-ups, consumer disposal education and waste disposal levies.
National Plastics Plan ⁶⁸	<ul style="list-style-type: none"> • Outlines five key areas for focus on improved environmental outcomes. • Primarily focuses on recycling and improving consumer information. • Prioritises actions such as uptake of the Australian Recycling Label, investment in consumer education on disposal, and creation of an interactive consumer app to identify recyclability. • Does not clearly link to the circular economy, despite the prominence given to the circular economy in the <i>National Waste Policy</i>.

⁶⁴ *National Waste Policy* (n 10).

⁶⁵ 'Australia's 2025 National Packaging Targets', *APCO* (Web Page) <<https://apco.org.au/national-packaging-targets>>.

⁶⁶ ANZPAC members declare their intention to achieve four targets by 2025. These include the elimination of unnecessary and problematic plastic packaging through redesign, innovation and alternative (reuse) delivery models, and 100% of plastic packaging to be reusable, recyclable or compostable packaging by 2025: see ANZPAC Media Release (n 55).

⁶⁷ *National Waste Policy Action Plan* (n 11).

⁶⁸ Department of Agriculture, Water and the Environment (Cth), *National Plastics Plan 2021* (2021) ('*National Plastics Plan*').

Overall, the goals featured in these four policies are not embedded into a legislative framework and, as such, remain aspirational and voluntary. The National Packaging Targets come the closest to being incorporated within a regulatory framework for plastics. This is because the *Australian Packaging Covenant* mentions the National Packaging Targets in connection to its industry targets and has attempted to interpret them for the purpose of including them in the *Sustainable Packaging Guidelines* (discussed below in Part III(C)). The similarities between the National Packaging Targets, and the targets set under ANZPAC, also highlight the vital role the Covenant's regulatory arrangement plays for the achievement of circular plastic packaging in Australia and the wider Australia, New Zealand and Pacific Islands region. Nevertheless, we detail in the next section some significant limitations on the link between the National Packaging Targets and the Covenant that also bring into question the potential success of ANZPAC.

The four policies lack coherence, particularly with regard to the inconsistent reference to concepts that underpin their goals. For example, despite the prominence given to the circular economy in the *National Waste Policy*, the circular economy is not a clear objective underpinning the subsequent *National Plastics Plan*. Furthermore, the policies continue to concentrate primarily on areas that have historically been the focus of waste management policies — namely, increasing recycling, working with local governments to improve waste management, and educating consumers about correct disposal practices. For reasons already discussed, managing waste after it comes into existence is only one set of interventions required to work towards a circular economy. The continued focus on these areas means there is a failure to consider factors relevant to circularity for plastics — namely, prevention of waste from coming into existence in the first place, and better design of products for increased re-use and improved recycling outcomes.

The strong focus on recycling across these policies is especially problematic in the context of plastics because, although recycling is an aspect of the circular economy, it features lower on the scale of preferential treatment of post-consumer material. Furthermore, recycling of linear plastics (ie, plastics not designed for circularity) is not an ideal approach for dealing with waste. This is partly because the process of recycling linear plastics is resource intensive, and plastics cannot be recycled indefinitely to form a material loop (ie, constant re-use). There are numerous other technical, social and infrastructure limitations on recycling plastics. These include the significant variation in recycling capabilities across Australian local governments, and a lack of solutions for mixed plastics (ie, different kinds of plastic used in the same package) and soft plastics. Yet the policies do not acknowledge these limits. Finally, it remains cheaper to purchase new rather than recycled plastics.⁶⁹ This means that, without significant market intervention, it will be difficult to meaningfully extend recycling, keeping in mind the physical and

⁶⁹ Colin Staub, 'Low Virgin Plastics Pricing Pinches Recycling Market Further', *Plastics Recycling Update* (Web Page, 6 May 2020) <<https://resource-recycling.com>>; Bryan D Vogt, Kristoffer K Stokes and Sanat K Kumar, 'Why Is Recycling of Postconsumer Plastics So Challenging?' (2021) 3(9) *ACS Applied Polymer Materials* 4325.

technical limitations of recycling plastics that continue to exist even after years spent pursuing recycling programs for this material.

Despite the emphasis on voluntary, aspirational regulatory responses in the various policies introduced, the Australian Government did introduce a ban on exporting unsorted plastic waste,⁷⁰ which shows that a stricter approach to plastic waste is possible. However, the ban did not apply to specific kinds of exports, such as waste-to-energy exports.⁷¹ Also, as mentioned above, the ban has been temporarily lifted for certain kinds of plastics — such as milk cartons, vegetable oil containers and soft drink bottles — to ease increasing national stockpiles.⁷²

Given the limitations of the policies in regard to plastics and the export ban, the *Australian Packaging Covenant* and related regulatory regime provides the most developed response to plastic packaging to date.

B Regulatory Design of the Australian Packaging Covenant

It is important to detail the design of the *Australian Packaging Covenant*, and the broader regime it forms part of, because it is the only regulatory response, besides the export bans, to encompass more than aspirational targets. It also represents a novel regime that is highly complex and has not been detailed or discussed in academic literature for over a decade,⁷³ during which time the regime has altered. Indeed, the complexity of the regime itself becomes part of this article's critique of that regime, making it additionally important to provide detail about how the regime works.

The Covenant itself is one arm of a co-regulatory product stewardship arrangement for packaging. It is a voluntary agreement between members of the packaging industry and all levels of government to improve both the design of plastic packaging, and the waste management activities undertaken by the packaging industry.⁷⁴ The fourth iteration of the Covenant arrangement was scheduled to operate from 2017 to 2022; however, this document, as well as the *Strategic Plan* discussed below in Part III(C)(1), is yet to be updated and as such remains operational. The other arm is the *National Environmental Protection (Used Packaging Materials) Measure 2011* (Cth) ('NEPM').⁷⁵ The NEPM encourages states and territories to enact legislation that creates legally binding obligations which apply in certain limited contexts. These obligations relate to data recording and reporting and to managing a percentage of the end-of-use packaging waste (either a business's own packaging waste or waste caused by similar packaging products).⁷⁶ It also permits local governments to recover the costs of collection,

⁷⁰ *Recycling and Waste Reduction Act* (n 54) s 18.

⁷¹ Joe Brock and Kanupriya Kapoor, 'After Much Praised Waste Export Ban, Australia under Fire for Shipping Plastic Trash as "Fuel"', *Reuters* (online, 28 February 2022) <<https://www.reuters.com>>.

⁷² Evans (n 62).

⁷³ See Sommer (n 59); Hossain et al (n 17).

⁷⁴ *Australian Packaging Covenant* (n 18) 3 (section 1).

⁷⁵ *National Environment Protection (Used Packaging Materials) Measure 2011* (Cth) ('NEPM').

⁷⁶ *Waste Reduction and Recycling Regulation 2011* (Qld) s 411.

sorting and recycling of packaging waste.⁷⁷ Hence, the *NEPM* can (depending on how it has been enacted in each state or territory) operate similarly to a version of extended producer responsibility, whereby industry actors are somewhat financially responsible for end-of-life collection and processing costs of their waste-making packaging.

The Covenant and the *NEPM* are designed to work together, and both are reviewed every five years. The co-regulatory regime (ie, both the Covenant and *NEPM*) applies to any business actor defined as a ‘brand owner’. A ‘brand owner’ is defined as any corporation that consumes ‘packaging or packed products’ and generates an annual turnover of over \$5 million a year.⁷⁸ The scope of actors is therefore extensive, including retailers through to packaging importers, manufacturers and distributors.

Once defined as a ‘brand owner’, a company can avoid direct regulation by the state or territory under the *NEPM* if it elects to sign up to the Covenant and become a member of the Australian Packaging Covenant Organisation (‘APCO’) (referred to as a ‘brand owner member’). A brand owner that fails to undertake its obligations under this option must comply with the *NEPM*, and states and territories can take enforcement action against it.⁷⁹

Within this broader regulatory scheme, therefore, the *NEPM* acts both as an incentive to encourage interaction with the Covenant and as the primary penalty against brand owner members found to be non-compliant with the Covenant’s aims. The *NEPM* uses fines for non-compliance as its key enforcement mechanism.

The inclusion of the *NEPM* in the overall design of Australia’s approach to regulating plastics is important, as it allows for a scaling up of regulatory options where there is non-compliance within the voluntary Covenant approach (favourable to Principle 3). However, the ability of the *NEPM* to uphold its purpose as an incentive for compliance or penalty for non-compliance is questionable for several reasons. Firstly, only six of Australia’s eight jurisdictions have enacted legislation giving effect to the *NEPM*: the Australian Capital Territory, New South Wales, Queensland, Victoria, South Australia and Western Australia. Tasmania has adopted the *NEPM* as a state policy enforceable under legislation, and the Northern Territory has failed to enact legislation that reflects the *NEPM* at all.⁸⁰ In addition to the inconsistent uptake of the *NEPM*, further confusion arises for brand owners regulated under the *NEPM*, with variations to central definitions, brand owner

⁷⁷ *NEPM* (n 75) s 9(6).

⁷⁸ *Ibid* s 3(1).

⁷⁹ *NEPM* (n 75); *Australian Packaging Covenant* (n 18) 26–7 (sch 5); *Environment Protection Act 1997* (ACT); *Protection of the Environment Operations (General) Regulation 2022* (NSW); *Environmental Protection Regulation 2019* (Qld); *State Penalties Enforcement Regulation 2014* (Qld) sch 1; *Environment Protection (National Pollutant Inventory) Policy 2008* (SA); *State Policies and Projects Act 1993* (Tas) s 12A; *Environment Protection Act 2017* (Vic); *Environment Protection (NEPM-NPI) Regulations 1998* (WA). See mpconsulting, *Review of the Co-Regulatory Arrangement under the National Environment Protection (Used Packaging Materials) Measure 2011* (Final Report, 2021) 18.

⁸⁰ mpconsulting (n 79) 17.

obligations (including to provide action plans under the *NEPM*), the application of exemptions, and penalties set out within the various *NEPM*-enacted instruments.⁸¹

Finally, the effectiveness of the *NEPM* relies on consistent and robust monitoring and reporting of non-compliant members by APCO, and on states and territories detecting and enforcing penalties against non-compliant brand owners. Although APCO publishes the names of non-compliant members on its website, it is not clear what actions or inactions are considered ‘non-compliance’ (an issue detailed below in Part III(C)(2)). Further, for the entire operating period of the Covenant arrangement (2017–22), no complaints, investigations or prosecutions were undertaken by any relevant state or territory authority under the *NEPM*.⁸² This suggests that either all *NEPM*-regulated companies are meeting their requirements, or that the state and territory governments are not effectively enforcing the *NEPM*. In 2021, an independent legislative review of the *NEPM* concluded that key elements of the legislation had ‘not been implemented or had not been operationalised effectively’.

These findings highlight the inability of this mechanism to operate effectively as a ‘scaling-up’ regulatory option in support of the Covenant’s operation.⁸³ In 2022, environment ministers announced reforms to the regulation of packaging, including the *NEPM*; however, this reform is not expected to be completed until 2025, during which time the *NEPM* and Covenant remain operational.⁸⁴

C Operation of the Australian Packaging Covenant

APCO, a not-for-profit company and representative of industry, administers the *Australian Packaging Covenant*. It remains the official product stewardship scheme for packaging in Australia, having received accreditation by the Australian Government in 2022.⁸⁵ APCO is responsible for developing strategies, undertaking research activities, reporting to government, and setting levies to fund the scheme’s associated costs.⁸⁶ APCO is also responsible for administering Australia’s obligations under the voluntary, civil society-led program, ANZPAC. All of these duties are overseen by the APCO Board which is made up of an independent chair, brand owners and industry association representatives.⁸⁷ The composition of the APCO Board lends itself to strong industry participation. This may in various ways benefit the scheme, yet it also means the board lacks a balance of independent actors such as members of civil society or academics with relevant expertise. As mentioned

⁸¹ Ibid 22.

⁸² See, eg, National Environment Protection Council annual reports for 2015–16, 2016–17, 2017–18 and 2018–19. In 2021 it was decided that the National Environment Protection Council would commence a review of the *NEPM*.

⁸³ mpconsulting (n 79).

⁸⁴ ‘Australian Packaging Covenant Organisation’ (n 20).

⁸⁵ ‘Australian Packaging Covenant Organisation (APCO) Arrangement’, *Department of Climate Change, Energy, the Environment and Water* (Web Page, 2023) <<https://www.dccceew.gov.au/environment/protection/waste/product-stewardship/products-schemes/apco>>; *Recycling and Waste Reduction Act 2022* (Cth) ch 3.

⁸⁶ APCO is a public company limited by guarantee and registered by the Australian Securities Investments Commission: see *Australian Packaging Covenant* (n 18) 9 (section 4).

⁸⁷ Ibid.

above in Parts II(A) and II(B), optimal regulatory design involves civil society and other actors in the development and enforcement of regulatory rules.

The Covenant itself essentially encompasses two broad spheres of regulatory activity. One centres on whole-of-industry target setting. The other relates to the obligations on individual brand owners.

1 *Industry Targets*

The Covenant requires APCO, on behalf of industry, to develop a strategic plan that sets out whole-of-industry goals. The strategic plan must encompass measurable targets (ie, key performance indicators ('KPIs')) and strategies focused on improving the environmental impact of packaging with a focus on product design and use.⁸⁸ The strategic plan is ultimately approved by environment ministers for a period that coincides with the duration of the Covenant (five years). APCO must also prepare a statement of how the measurable targets are to be implemented (ie, a statement of intent). The strategic plan is devised from 'adequate consultation' undertaken by APCO with all its members and must give weight to domestic and international packaging developments.⁸⁹ It is, therefore, fundamentally open to industry and government to create targets that enable circular economy product design characteristics (relevant to Principles 1 and 2), but there is no obligation to do so.

The *Australian Packaging Covenant: Strategic Plan 2017–2022*, updated in 2019 ('*Strategic Plan*'), encompasses the National Packaging Targets, the policy detailed in Table 1.⁹⁰ Through incorporation of the targets, the *Strategic Plan* appears to have developed a more circular focus for packaging design. For example, it reiterates the specific goals of the National Packaging Targets such as the aim for 70% of plastic packaging to be recycled or composted by 2022, a 20% average incorporation of recycled content into the production of plastic packaging, and the phase-out of 'problematic and unnecessary single-use plastic packaging through redesign, innovation or alternative delivery methods'.⁹¹

While these targets seem significant, they are not carried over into any of the KPIs set under the *Strategic Plan*.⁹² In other words, the *Strategic Plan* mentions these broader goals, but takes them no further. Importantly, there are also no targets in the *Strategic Plan* that focus on physical redesign, despite its importance for addressing plastic pollution and the reported limited capacity of Australia's waste facilities to recycle plastics. In fact, the only KPIs that mention the National Packaging Targets are KPI 2 (which relates to identifying baselines for the National Packaging Targets) and KPI 4 (which aims to have 70% of industry reporting through the Annual Reporting Tool on the implementation of the National Packaging

⁸⁸ Ibid 7.

⁸⁹ Ibid.

⁹⁰ APCO, *Australian Packaging Covenant: Strategic Plan 2017–2022* (Version 2, January 2019) 5 ('*Strategic Plan*').

⁹¹ Ibid 2.

⁹² Ibid 6.

Targets by 2020).⁹³ The next iteration of the Covenant was scheduled for renegotiation after 2022; however, a new iteration is not likely to occur before 2025.⁹⁴ During this time, it would appear that the Covenant, *NEPM* and *Strategic Plan* with its relevant KPIs, remain in effect.

There are no repercussions associated with not achieving the KPIs of the *Strategic Plan* or the National Packaging Targets against APCO as business representative.⁹⁵ Overall, the regime, including the provisions of the National Packaging Targets reiterated in the *Strategic Plan*, set significant ambitions for addressing plastic packaging, but there are limited avenues for APCO as governing body to achieve this aim (such as the power to incentivise or disincentivise certain packaging designs) and questionable mechanisms to adequately monitor progress.

One final issue that exists in this area is the degree of industry power over the process of devising the *Strategic Plan* and related documents. For example, APCO has developed a list of ‘problematic and unnecessary plastic’ that industry will be encouraged to phase out.⁹⁶ This list was developed through ‘extensive consultation between industry and government’,⁹⁷ but without broader or open consultation. The risk is that the list affords preference to what industry is willing to do, as opposed to what needs to occur to remove problematic and unnecessary plastic.

2 Obligations of Brand Owners Who Are APCO Members

In relation to the second sphere of regulatory activity, the Covenant outlines two key obligations on individual brand owner members for implementing the Covenant’s aims. First, brand owners agree to ‘consider’ the *Sustainable Packaging Guidelines* (‘SPG’) against their packaging.⁹⁸ Second, they agree to draft action plans detailing how they will contribute to the Covenant’s aims.⁹⁹

(a) Sustainable Packaging Guidelines

The SPG is a resource promoted by APCO as a ‘central part’ of the co-regulatory framework.¹⁰⁰ The document contains 10 broad principles that could be interpreted as emphasising product redesign.¹⁰¹ Each of the 10 principles is included as a means to ‘assist [brand owners in] the design and manufacture of packaging’ to balance the ‘conflicting demands of the market, consumer protection and the environment’.¹⁰² Under section 10 of the Covenant, brand owners are required to implement design and procurement processes that drive the sustainable design of packaging consistent

⁹³ Ibid.

⁹⁴ ‘Australian Packaging Covenant Organisation’ (n 20).

⁹⁵ Caitlin Cassidy, “‘Drowning’ in Waste: Australia Recycled Just 16% of Plastic Packaging Last Year”, *The Guardian* (online, 19 November 2021) <<https://www.theguardian.com>>.

⁹⁶ APCO, *Single-Use, Problematic and Unnecessary Plastic Packaging* (Report, October 2020).

⁹⁷ Ibid 4.

⁹⁸ *Australian Packaging Covenant* (n 18) 15–16 (section 10).

⁹⁹ Ibid.

¹⁰⁰ ‘Sustainable Packaging Guidelines’, APCO (Web Page)

<<https://apco.org.au/sustainable-packaging-guidelines>>.

¹⁰¹ See APCO, *Sustainable Packaging Guidelines* (Version 3, October 2020) (‘SPG’).

¹⁰² Ibid 3.

with the *SPG*, apply the *SPG* to all new packaging, commit to reviewing all existing consumer packaging within a ‘reasonable timeframe’ in accordance with the *SPG*, and report on the actions they have taken to implement the *SPG*.¹⁰³ Interestingly, despite the *SPG* being promoted as a central part of the co-regulatory arrangement, section 10 of the Covenant states that in instances where brand owner signatories consider and ‘demonstrate’ they can achieve equivalent outcomes to the *SPG* they are permitted to use alternative guidelines. It is not clear how a brand owner demonstrates such equivalent outcomes, nor whether any brand owners operate under alternative guidelines. Regardless, where a brand owner uses alternatives, it is required to report annually on its progress under its guidelines of choice.¹⁰⁴ This adds an additional layer of complexity to APCO’s monitoring and compliance burden.

A failure by brand owners to ‘implement the Guidelines’ is seen as an instance of non-compliance under the Covenant.¹⁰⁵ The *SPG* and section 10 of the Covenant are highly important in the context of moving towards a circular economy, as they are the only aspect of the co-regulatory framework to directly influence plastic packaging product design overall.¹⁰⁶ Yet, both section 10 and the *SPG* contain operational flaws that undermine their potential to influence circular economy design changes for packaging. For example, under section 10, brand owners are required to review their existing packaging within a ‘reasonable timeframe’ against the *SPG*. However, this requirement is vague as it offers no definition of what is considered a ‘reasonable timeframe’. Furthermore, after closer examination of the *SPG* it is evident that brand owners are not required to consider all 10 principles to fulfil their obligations under section 10. In fact, only large businesses (defined as companies with an annual turnover of more than \$750 million) are required to consider all 10 principles, while small- and medium-sized organisations (all other businesses with an annual turnover between \$5 million and \$750 million) are only required to consider Principle 1 (‘Design for recovery’). Principle 1 features the waste hierarchy and asks businesses to consider how well their packaging line coincides with the National Packaging Targets.¹⁰⁷

Another issue with the principles of the *SPG* is that they are very broad and lack any material-specific aims or targets. For example, Principle 2 (‘Optimise material efficiency’) asks businesses to consider whether their packaging could use ‘thinner or lighter material’ to optimise material efficiency. In operation, businesses could fulfil this principle by incorporating more soft plastics into their line of packaging, since soft plastic is a thinner and lighter material. However, this material is less recyclable in Australia (especially after the collapse of REDcycle) than glass or even polyethylene terephthalate (known as PET) which has a higher economic value as a recycled material than other forms of plastic.¹⁰⁸ Finally, the Covenant

¹⁰³ *Australian Packaging Covenant* (n 18) 15–16 (section 10).

¹⁰⁴ *Ibid* 16.

¹⁰⁵ *SPG* (n 101) 26.

¹⁰⁶ This is despite the shared responsibility of manufacturers and the focus of the Covenant being product design. For obligations related to the *SPG* (n 101) under the Covenant, see *Australian Packaging Covenant* (n 18) 15–16 (section 10).

¹⁰⁷ *SPG* (n 101) 8–16.

¹⁰⁸ S&P Global, ‘Recycled Plastics Market Will Feel the Heat from Consumer Demand in 2020’, *S&P Global Platts* (Blog Post, 23 January 2020) <<https://www.spglobal.com>>.

further weakens the validity of the *SPG* by allowing brand owners to consider alternative guidelines in instances where they feel they can achieve equivalent outcomes.¹⁰⁹ This gives brand owners considerable discretion to decide which design principles they will use and also poses an issue for monitoring, particularly if there are multiple guidelines being used by various brand owners.

Taken together, it would appear that despite being the aspect of the co-regulatory framework that is the most focused on product redesign, the *SPG* operates merely as a voluntary guide to support brand owners to improve their packaging design. It is not a means to encourage or compel brand owners to incorporate more circular packaging options.

(b) *Action Plans*

The requirement for individually created action plans is the primary method for influencing individual brand owner members to comply with the Covenant broadly. The action plan specifies what a brand owner intends to do to support the Covenant's aims and obligations.¹¹⁰

There is no established minimum standard set out in the Covenant regarding the types of actions required to be included by brand owners in their action plans. Nor does the Covenant specify time frames for the implementation of action plans. This lack of direction effectively establishes a significant degree of discretion in what members can do to evidence compliance and across what time frame. For example, a brand owner might choose to reduce the number of inks it uses when producing its product packaging for the purpose of improving water use in production (such as the case with Campbell Arnott's TimTams),¹¹¹ while another company might choose to add a logo to its packaging products indicating how to dispose of the product. Both of these actions would sufficiently evidence a contribution to the Covenant's overall aim. Yet, neither option deals with the design of plastic packaging to reduce plastic pollution and enable re-use (Principle 2). For instance, neither option reduces plastic used or makes a product easier to recycle. The lack of prescribed details for action plans ultimately makes it difficult to measure the collective progress of industry in relation to any one goal, and similarly makes it difficult for APCO to strive for collective industry action towards any one goal overall.

A document titled 'Annual Report and Action Plan', produced by a brand owner and assessed by APCO, is publicly released online annually by each brand owner. These documents carry an overall score awarded by APCO to each brand owner on a scale ranging from 'Getting Started' to 'Beyond Best Practice'. The template for these documents also includes space for additional information that the

¹⁰⁹ See *Australian Packaging Covenant* (n 18) 16 (section 10).

¹¹⁰ *Ibid* s 6. Also see, eg, APCO, *APCO New Member Action Plan* (Version 1, June 2023), which asks new members to include in their action plans 'the packaging sustainability commitments [they intend to undertake] to align with the goals of the Covenant'.

¹¹¹ APCO, *Annual Report 2018–19* (Report, 2019) 28 ('*APCO Annual Report 2018–19*').

brand owner included in its APCO annual report relating to initiatives, processes or practices that were implemented to improve its packaging sustainability.¹¹²

While this may assist compliance by creating avenues for third-party actors to assess how individual companies are progressing in regard to plastic packaging, it seems that civil society engagement with these action plans is low. A contributing factor to the lack of public engagement with the plans is that they tend to be vague, so it is hard to know whether they have been complied with, or can easily be complied with. For instance, it is common for action plans to identify steps such as ‘actively participate in initiatives to promote packaging sustainability outside of our organisation’.¹¹³ Furthermore, the action plans do not allow for civil society, or other actors, to track the performance of brand owners in the different categories of improvements to packaging they report making over time. The action plans are also not designed to highlight weak spots in the brand owner’s performance as they are structured around what the brand owner is doing — not what it is *not* doing to address packaging waste.¹¹⁴

Accordingly, the ability of civil society actors to hold regulators and regulated entities to account under the regime is limited, and this is a significant deficiency from the perspective of regulatory studies. It also contrasts with other regulatory regimes targeting supply chains in Australia, such as the modern slavery regime, where civil society has an active role in assessing the public plans put forward by corporations and in reporting on the corporation’s progress.¹¹⁵ Overall, the action plans create the appearance of compliance with formal rules. But underpinning them is a significant amount of discretion and a lack of independent checks regarding their substance and compliance.

D Monitoring and Compliance

APCO monitors progress towards achieving the Covenant’s aim.¹¹⁶ All monitoring activities are undertaken in accordance with the ‘evaluation framework’ agreed between APCO and the Government Officials Group.¹¹⁷ APCO is required to undertake annual reporting assessments, and to meet with the Government Officials Group bi-annually to discuss industry progress with respect to the strategic plan. The Covenant states that the APCO annual reports are to be made available to all signatories as well as to the public,¹¹⁸ which establishes a degree of transparency and accountability. APCO is also required to conduct an independent evaluation of the Covenant’s performance at the end of the five-year term with reference to the strategic plan and using data collected from signatories.

¹¹² See, eg, *2023 Annual Report and Action Plan: H Leffler & Son Pty Ltd* (APCO Report, 2023) 3.

¹¹³ See, eg, *2022 Annual Report and Action Plan: Retail Food Group Limited* (APCO Report, 2022) 3.

¹¹⁴ See, eg, *2023 Annual Report and Action Plan: H Leffler & Son Pty Ltd* (n 112).

¹¹⁵ Fiona McGaughey, Hinrich Voss, Holly Cullen and Matthew C Davis, ‘Corporate Responses to Tackling Modern Slavery: A Comparative Analysis of Australia, France and the United Kingdom’ (2022) 7(2) *Business and Human Rights Journal* 249.

¹¹⁶ *Australian Packaging Covenant* (n 18) 12 (section 7).

¹¹⁷ *Ibid.*

¹¹⁸ *Australian Packaging Covenant* (n 18) 7 (section 3). See also APCO, *Annual Report 2019–20* (Report, January 2021).

All progress reports compiled by APCO are submitted to the Government Officials Group who review the information and determine the progress and success of APCO's actions in achieving the Covenant's aims. The Group then prepares its own report, which is presented to the environment ministers to inform them of the progress of the Covenant.

Despite the Government Officials Group holding significant power with regard to assessing and informing environment ministers on the progress of the Covenant, there is no information publicly available on who are its members.¹¹⁹ Furthermore, there is no evidence available regarding the 'evaluation framework' agreed upon between APCO and the Government Officials Group which is used to monitor the progress of the APCO targets. This makes it difficult to ascertain how an assessment of the Covenant's progress is determined overall.

APCO also monitors each individual brand owner member's obligation to create an action plan and to consider the *SPG*. Under the Covenant, brand owners are required to 'maintain and make available records of implementation of Action Plans' as well as prepare clear documentation evidencing 'their process for reviewing their packaging and the initiatives they undertake to make their packaging more sustainable'.¹²⁰ This documentation is to be supplied to APCO should APCO choose to conduct an audit.¹²¹ While APCO has the right to audit, there is no clear information about how many audits APCO actually conducts, or the process it uses to determine how and which member is audited. This makes it difficult to assess the thoroughness of this compliance mechanism.

Brand owners also undertake their own monitoring and compliance activities and are required to submit an annual report to APCO that 'outlines performance against all of the Action Plan commitments and meets the reporting obligations as published by APCO'.¹²²

Since 2017, the preferred method of annual reporting is through the online APCO Annual Reporting Tool ('ART').¹²³ (APCO also has a target under the *Strategic Plan* to increase its involvement with the ART.) Although the public cannot view the ART, information related to the framework used within this online tool is accessible online. Essentially, brand owners detail their progress against the Packaging Sustainability Framework.¹²⁴ Hence, another set of principles is introduced into an already complex regulatory regime. The Framework is supposed to '[s]upport the implementation of the Covenant by linking [member] action plans

¹¹⁹ *APCO Annual Report 2018–19* (n 111) 15.

¹²⁰ *Australian Packaging Covenant* (n 18) 16 (section 10).

¹²¹ See *ibid* 16 (section 10). APCO has suggested that it has dramatically increased the number of member audits it undertakes, to encourage the uptake of the *SPG* (n 101) by its brand owner members. However, the number of actual audits and the results uncovered by these audits are not accessible, which brings with it a lack of transparency: see 'APCO Conduct Brand Audit for 2025 Recycling Target', *Waste Management Review* (online, 27 June 2018) <<https://wastemanagementreview.com.au>>.

¹²² *Australian Packaging Covenant* (n 18) 16 (section 10).

¹²³ The data collected through this tool is used by APCO in its annual reporting to the Government Officials Group: *APCO Annual Report 2018–19* (n 111) 19.

¹²⁴ Kelly et al (n 60) 26.

and reports to the goals and KPIs in APCO's Strategic Plan and take account of international standards and protocols'.¹²⁵

The Packaging Sustainability Framework, illustrated in Figure 1 below, consists of 13 criteria separated into three categories: 'leadership', 'packaging processes and outcomes' and 'operations'.¹²⁶ The 13 criteria are further divided into seven core criteria (light rectangles) and six recommended criteria (dark ovals). Each criterion has five levels of performance ranging from 'Getting started' to 'Beyond best practice'.¹²⁷ Further complexity arises as there are different versions of the Framework that apply depending on the brand owner's type of business and the amount of income made by them (not shown in Figure 1). For example, brand owners with a total annual turnover of less than \$50 million, and who are not packaging manufacturers or suppliers, need only report on a shortened version of the Framework, and a slightly altered version of the full Framework applies to packaging manufacturer or suppliers with a turnover greater than \$50 million.¹²⁸

Notably, the Packaging Sustainability Framework does not necessarily align with individual action plans, as under the Covenant there is no requirement that brand owners link their action plans to it. There is also no specific confirmation of how well individual action plans are being implemented unless a brand owner is audited. However, a number of the Framework's criteria are compatible with the *SPG*, as represented in Figure 1 by the overlapping loops. This suggests that industry is collecting some data regarding its progress towards the implementation of the *SPG* and, arguably, the National Packaging Targets as interpreted in the *SPG*.¹²⁹ Yet, the creation of another set of criteria — on top of the *SPG*, the individual action plans, and the *Strategic Plan*, with some of these components not overlapping — complicates an already complex system of standards and reporting that may hinder broader engagement with how well the Covenant is working.

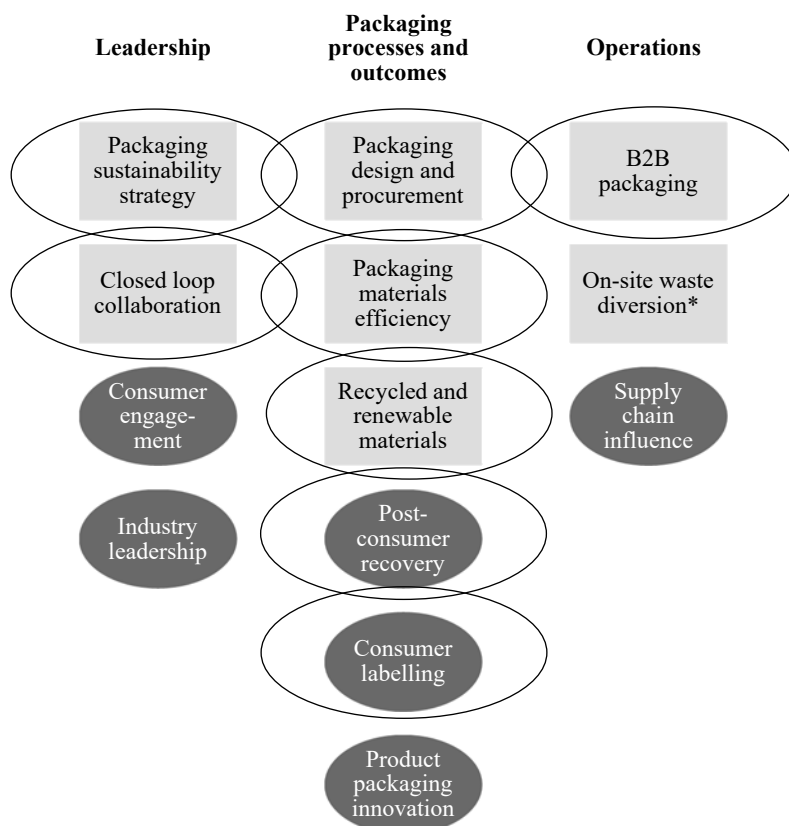
¹²⁵ Ibid.

¹²⁶ The reporting tool was introduced in 2017 to make it simpler for signatories to complete reporting tasks: *ibid* 1.

¹²⁷ *Ibid* 34.

¹²⁸ *Ibid*.

¹²⁹ The Packaging Sustainability Framework criteria are compatible with eight of the 10 *SPG* principles: see *SPG* (n 101) 8–16; Kelly et al (n 60) v.

Figure 1: Overlap of the Packaging Sustainability Framework and the *SPG*¹³⁰

* Note: Within the ‘operations’ category, ‘on-site waste diversion’ is a core criterion for packaging manufacturers or suppliers. For others, it is a recommended criterion.

E *Enforcement and Penalties*

Where brand owner signatories fail to comply with their requirements as stipulated under section 10 of the Covenant, they are liable as outlined in the compliance procedures located in sch 5.¹³¹ Not all obligations listed under section 10 appear to align with what will be considered non-compliant behaviour of brand owners. For example, one brand owner obligation is the need to ‘publish the Action Plan and annual reports on its website in a prominent and readily identifiable way’; however, failing to do so is not considered non-compliance. Ultimately, what is required from brand owners under the Covenant is to implement their submitted action plan and the *SPG* (with no date given), report annually, pay required fees, and maintain

¹³⁰ Figure adapted from Kelly et al (n 60).

¹³¹ *Australian Packaging Covenant* (n 18) 26–7 (sch 5).

documentation outlining the implementation of action plans and the *SPG*. Audits are the mechanism used to monitor for non-compliance with these requirements.

After an audit, if a brand owner is found to be non-compliant, APCO can give notice to the brand owner asking it to ‘show cause’ why it should not be deemed non-compliant with the Covenant’s obligations.¹³² Signatories are subsequently afforded 30 days to respond to this original notice before a second notice is issued in which the signatory is warned of a possible removal from APCO. Failure to remedy its non-compliance (ie, to provide a report) may result in referral to the relevant state or territory by APCO for regulation under the relevant *NEPM*-equivalent legislation.¹³³ Yet, as discussed, the *NEPM* contains limited enforcement provisions and removal from APCO is not published widely, indicating that repercussions for the individual brand owner are minor. Similarly, as mentioned above, there are no penalties for failure to meet targets for APCO under the Covenant; nor is APCO liable to penalties for failure to meet its targets under the *Strategic Plan*.

IV Applying the Circular Economy Regulatory Design Principles to Review the Federal Framework

Overall, Australia’s regulatory approach has some strengths, which can be identified through application of the circular economy regulatory design principles described in Part II(B). Of the instruments examined, the *Australian Packaging Covenant* — administered at a federal level and with a scope encompassing packaging design — has the greatest potential to support material loops in pursuit of a circular economy for plastic packaging (Principle 2). Certainly, the regime allows for a more collaborative regulatory approach, which may improve the effectiveness of the design decisions and the level of compliance (Principle 1). The Covenant also incorporates diverse actors across packaging supply chains rather than focusing on waste management per se, or only focusing on a few actors (Principle 1).

Broadly, a collaborative approach to setting and enforcing regulation is strongly supported by regulatory theory and circular economy conceptualisations as detailed in Part II(A). Potentially, there is also some capacity within the regime to scale up enforcement through the relationship between the Covenant and the *NEPM* (Principle 3). However, there are significant deficiencies both in the design of the regulatory regime itself, and in how well it can work towards a circular economy. This Part details these issues using the principles described above in Part II.

¹³² Ibid.

¹³³ Ibid 26.

Principle 1 – Encourage Meaningful Participation and Collaboration among Regulatory Actors

It is clear that the co-regulatory approach of the Covenant and APCO itself fosters collaboration among industry stakeholders.¹³⁴ Meaningful collaboration with industry is a key design feature of the regime.¹³⁵ There is, however, no formal role given to civil society, academia or other independent stakeholders without a commercial role in plastic packaging — actors who could presumably help develop the strategic plan and monitor compliance with action plans.¹³⁶ The essential role played by civil society and other third parties in regulatory compliance and enforcement is a key theme in regulatory theory, as discussed above in Part II(A). The lack of a role given to external stakeholders and the significant role given to industry undermine the ability of the regime to serve public interest goals relating to plastic packaging.¹³⁷ There are some indications that APCO has taken steps to correct this by extending membership to other actors interested in the success of the Covenant. For example, membership for ‘sustainability professionals’ gives independent experts access to consultations with APCO, APCO-run events including roundtables, and online tools central to APCO and Covenant operation, including the ART.¹³⁸ However, these members do not have the ability to influence the KPIs for industry in the strategic plan, meaning it is still left to industry to determine their own standards.

Even government oversight of the Covenant and related regime appears limited, with only a single report obtained every five years. As mentioned above in Part II(A), regulatory theory holds that governments should monitor and evaluate voluntary and self-regulatory schemes and develop new responses where voluntary approaches are insufficient or ineffective. Without effective government oversight, the regime cannot be responsive to changing conditions such as the level of compliance or the amount of plastic waste being produced.

In addition, some industry actors are excluded from the operation of the regime entirely. Brand owners whose annual turnover is less than \$5 million are

¹³⁴ ‘Collaboration with Governments’, APCO (Web Page) <<https://apco.org.au/collaborating-with-governments>>; ‘Collaboration with Industry’, APCO (Web Page) <<https://apco.org.au/collaborating-with-industry-sectors>>; ‘Collaboration with Strategic Partners’, APCO (Web Page) <<https://apco.org.au/collaborating-with-strategic-partners>>; ‘Collective Action Group’, APCO (Web Page) <<https://apco.org.au/the-collective-action-group>>.

¹³⁵ *Strategic Plan* (n 90) 8.

¹³⁶ There are two examples of limited civil society involvement in the overall federal regime. First, the *National Plastics Plan* (n 68) affords a small role to civil society. Specifically, it details the federal government’s aims to work with the Boomerang Alliance to eliminate single-use plastics on beaches. Second, APCO has developed with Planet Ark a tool known as the Packaging Recyclability Evaluation Portal or PREP. Essentially, it informs industries about the recyclability in Australia of certain types of materials.

¹³⁷ See, eg, Gunningham and Holley (n 32); Parker, *The Open Corporation* (n 37) 38–9; Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2(2) *Regulation and Governance* 137.

¹³⁸ ‘Membership Options’, APCO (Web Page, 2023) <<https://apco.org.au/about-membership>>.

currently exempt from the Covenant.¹³⁹ Hence, a large segment of businesses creating plastic packaging waste need not consider their use of plastic packaging.¹⁴⁰

Finally, the regime itself is highly complex, based on varying rules and instruments each with its own specialised terminology, making it difficult for external stakeholders to understand (or be interested in) what actors are doing under the regime and how well the regime is performing. The complicated nature of the regime makes it difficult for the public to interrogate its nature and effectiveness. The regime's convoluted structure creates the appearance that plastic packaging is being regulated, but when this is examined more closely, large gaps appear in the design and accountability mechanisms that mean corporate actors can avoid having to do anything significant in relation to plastic packaging. Given the fact that plastic pollution has significantly worsened while the Covenant has been in effect, and the weaknesses in the regime detailed above in Part III, it is clear that the performance of the regime and its design needs much greater public scrutiny.¹⁴¹

Principle 2 – Emphasise Product Redesign

Across the entire regulatory regime for plastic packaging, only the Covenant is focused on product redesign in the form of its requirements under the *SPG*. Even then, the *SPG* is broad and vague, and compliance with the guidelines is mostly left to the discretion of brand owners. Additionally, due to the issues noted with the *NEPM*, there are no real repercussions if brand owners do not undertake product redesign (or incentives to undertake such redesign). In effect, the regime makes few demands in relation to product redesign.

The introduction and incorporation of the National Packaging Targets into the Covenant does bring more focus to plastic packaging redesign consistent with a circular economy. However, the National Packaging Targets on their own are aspirational and not clearly defined. Furthermore, implementation of the National Packaging Targets is not linked to the measurable KPIs of the Covenant. Potentially, there is some reporting relating to industry's progress toward meeting the National

¹³⁹ *Australian Packaging Covenant* (n 18) 5 (section 2).

¹⁴⁰ Currently, a large number of packaging waste contributors are not required to interact with the Covenant. Although the exact number of businesses exempted is not clear, about 98.4% of Australian businesses are small and about 65% have an annual turnover of less than \$200,000: Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts: December 2020* (Report, 2020) 8, 15. For compatibility with a circular economy, regulatory schemes should attempt to include as many within the packaging industry as possible. In saying this, it is appreciated that the option to incorporate small earners into the Covenant in operation could affect the ability of the government and APCO to regulate such a large group of businesses. Ultimately, APCO will still need sufficient funds to carry out its operations with regard to the remaining larger waste-contributing companies. Yet it is also clear that, without guidance, few businesses voluntarily elect to pursue sustainable options within their business practices. For example, in a 2017 survey undertaken by the UTS Institute for Sustainable Futures while developing the Packaging Sustainability Framework, it was found that only 35% of small businesses in Australia had a formalised approach to sustainability as part of their business, with the remaining not including any sustainability considerations in their work: see Kelly et al (n 60) 7.

¹⁴¹ See, eg, 'ANZPAC Plastics Pact', APCO (Web Page, 2023) <<https://anzpacplasticspact.org.au>> which reports that only 18% of Australia's plastic packaging avoids landfill.

Packaging Targets under APCO's Annual Reporting Tool, but this does not create clear obligations on industry to work towards meeting these targets.

A useful starting point to address this criterion would be to change the individual action plans provided by brand owners so that they have to be linked to the principles of the *SPG* and provide specific information about what kinds of plastic was reduced and what design decisions were made to improve re-use. Brand owners should be obligated to make targeted, material-specific aims consistent with the capacity of Australia's recycling facilities.

Principle 3 – Develop Capacity to Scale up Responses over Time where Plastic Packaging Production and Waste Remain Stable

The Covenant arrangement distinctly shows a lack of responsiveness to how the issue of plastic packaging has evolved and increased in significance. For instance, an estimated 13% of plastic packaging in Australia is recycled or re-used,¹⁴² which would indicate a significant failure by the Covenant to influence plastic packaging over the last two decades.¹⁴³ Over the Covenant's lifespan, the regime has not been significantly reformed or scaled up to increase the requirements on companies or authorities to respond to non-compliance. Without the backing of an effective, mandatory legislative scheme to support the Covenant, the regulatory regime is severely deficient in its ability to motivate compliance.¹⁴⁴

A related major identified deficiency in the Covenant, and the power of APCO generally, is that the Covenant does not establish a range of penalties, or other consequences, for use by APCO against non-compliant members. Schedule 5 of the Covenant sets out the proceedings that can be implemented against non-compliant industry signatories. However, these proceedings largely involve letter writing, with a worst-case scenario ultimately leading to a non-compliant brand owner being referred to the states and territories for regulation under their equivalent of the *NEPM*, which tend to lack monitoring and enforcement. Relatedly, and as already discussed, companies can opt out of the Covenant entirely and adopt their own voluntary approach without any clear oversight by APCO or another regulator.

The introduction of bans on single-use plastics in various states and territories¹⁴⁵ is both an example of regulation for material reduction and an indicator that the federal regime for plastics has failed to reduce plastic and so states and territories have led the way in scaling up regulatory responses. Certainly, evidence suggests that these bans have resulted in a direct reduction in the specific plastic

¹⁴² Department of Agriculture, Water and the Environment (Cth), *National Plastics Plan Summary* (October 2021).

¹⁴³ *Ibid.*

¹⁴⁴ H Schandl, S King, A Walton, AH Kaksonen, S Tapsuwan S and TM Baynes, *Circular Economy Roadmap for Plastics, Glass, Paper and Tyres* (CSIRO, 2020).

¹⁴⁵ See, eg, *Plastic Reduction and Circular Economy Act 2021* (NSW); *Waste Reduction and Recycling Act 2011* (Qld) pt A; *Single-Use and Other Plastic Products (Waste Avoidance) Act 2020* (SA); *Environment Protection Amendment (Banning Single-Use Plastic Items) Regulations 2022* (Vic).

products specifically banned.¹⁴⁶ However, whether this results in material reduction is debatable, as it could be that simply different kinds of plastic or materials are being used that are more or equally resource-intensive to produce and dispose of.¹⁴⁷ Research concerned with the effects of plastic bans continues.¹⁴⁸

Principle 4 – Clearly Prioritise Reductions and Efficiencies in Material Consumption

Nothing within the federal regime adequately or directly prioritises material reduction (ie, simply not using plastic). Although the *SPG* contains individual principles for reduction and material efficiency, for example Principle 2 ('Optimise material efficiency') and Principle 5 ('Use recycled materials'), these are reserved for consideration only by large companies (those with an annual turnover of more than \$750 million). The government has pledged \$1.1 million to APCO to develop a consistent national approach to consumer education on reducing, reusing, and recycling packaging national.¹⁴⁹ Yet, clear limits on plastics production and consumption are absent. The introduction of specific targets for material reduction across each packaging material type in the APCO strategic plan and the *SPG* would also be a useful starting point. There are calls for the international treaty regarding plastics currently being negotiated to contain a global cap on plastic production. Such a cap could provide an impetus for more focus on how to regulate for plastic reduction (ie, producing and consuming less plastic).¹⁵⁰

Principle 5 – Support Mechanisms That Mobilise Resources for Infrastructure Change and Design Innovations

Some notable contributions to infrastructure change and design innovation exist within the overall regime.¹⁵¹ APCO uses some of the fees paid by its brand owner members to invest in projects relating to packaging, including on-the-ground clean-up programs, infrastructure improvements and pilot design programs.¹⁵² There are also broad policy goals under the *National Recycling Guidelines* which may help redirect resources. However, the outcomes of these projects seem limited and ad hoc, as they have not resulted in a change in product design standards or significantly improved waste management infrastructure.

¹⁴⁶ See, eg, '1.5 Billion Single Use Plastic Bags Eliminated since July', *National Retail Association* (Web Page, 3 December 2018) <<https://www.nra.net.au>>.

¹⁴⁷ Rebecca LC Taylor, 'Bag Leakage: The Effect of Disposable Carryout Bag Regulations on Unregulated Bags' (2019) 93 (January) *Journal of Environmental Economics and Management* 254.

¹⁴⁸ See, eg, Andrew Macintosh, Amelia Simpson, Teresa Neeman and Kirilly Dickson, 'Plastic Bag Bans: Lessons from the Australian Capital Territory' (2020) 154 *Resources, Conservation and Recycling* 104638.

¹⁴⁹ 'National Consumer Education Campaign', *APCO* (Web Page) <<https://apco.org.au>>.

¹⁵⁰ Melanie Bergmann, Bethanie Carney Almroth, Susanne M Brander, Tridibesh Dey, Danielle S Green, Sedat Gundogdu, Anja Krieger, Martin Wagner and Tony R Walker, 'A Global Plastic Treaty Must Cap Production' (2022) 376(6592) *Science* 469.

¹⁵¹ *National Plastics Plan* (n 68) 6.

¹⁵² *Strategic Plan* (n 90).

A revised Covenant could encompass a formalised product stewardship scheme or preferably an extended producer responsibility scheme, with APCO or a newly created body taking on the role of a producer responsibility organisation. This would involve extending the responsibility of the packaging industry for the costs of plastic waste management, with the market thus better internalising the costs of plastic use. Funds collected by APCO or a new administering body could ultimately go towards various product redesign initiatives. Eco-modulation of fees (where a reduction of fees is afforded to companies using favourable packaging designs such as re-use products) could also be incorporated, to reward members of the packaging industry who demonstrate their uptake of closed-loop recyclable products, the incorporation of recycled content into their products, and/or the incorporation of circular business models.

V Conclusion

Plastic pollution, and especially plastic packaging pollution, is one of the most pressing public health and environmental issues facing Australia and the world. This article provides a preliminary investigation into how best to design regulation in Australia to address plastic packaging waste. It develops, for the first time, principles for regulatory best practice in this space drawing on the concept of a circular economy combined with regulatory theory. Using these principles, this article assesses Australia's federal regulatory response to plastic packaging. It finds that, despite the elaborate and long-running regime for plastic packaging, which has the *Australian Packaging Covenant* at its centre, the federal response to plastic packaging is significantly flawed. The regime contains large ambiguities and loopholes that mean industry actors can, if they choose, mostly avoid having to address plastic packaging in any meaningful way. It also lacks effective transparency and accountability mechanisms — including, but not limited to, its exclusion of external stakeholders, especially civil society.

In recent years, states and territories have carried the burden of scaling up governmental responses to plastic packaging through single-use plastic bans. However, these bans have only been effective over the product they directly prohibit and have not impacted plastic packaging more widely. Future research in this area could adjust, elaborate and expand on the regulatory design principles proposed in Part II(B), and also investigate in more depth the potential issues with the different state and territory responses to plastic packaging and the related environmental claims regarding biodegradability common on particular plastic packaging.

Non-Enforcement of Minimum Wage Laws and the Shifting Protective Subject of Labour Law in Australia: A New Province for Law and Order?

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Abstract

This article explains the trajectory of minimum wage laws in Australia, from their initial characterisation as ‘sacrosanct’ following the *Harvester* judgment to their current status as routinely violated, in terms of changes in the protective function of labour law in Australia. Through a comparative historical analysis, we argue that state actors have consistently used minimum wage laws to make moral interventions in labour relationships to protect the viability of particular employment relations actors, although the focus of those interventions has shifted from employees towards employers. Reconnecting the ‘how’ of wage minima enforcement with the ‘who’ and ‘why’ of labour law protection also contributes to explaining long-term continuities in the functional exclusion of particular employee groups from protection, namely non-citizens and workers in non-unionised industries, despite the prima facie universalism of current wage laws.

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I Introduction

The widespread non-enforcement of statutory wage minima is one example of the multitude of ways in which Australian labour law appears poorly attuned to the realities of work today. It joins a constellation of phenomena including algorithmic management,¹ a shrinking class of workers entitled to leave arrangements,² systemic low pay in so-called ‘essential’ employment sectors,³ limited opportunities for worker voice and precarious work arrangements⁴ that pose ongoing pressures on workers’ physical wellbeing and psychological health, and community cohesion. Faced with similar crises in the United Kingdom and Europe, legal scholars have endeavoured to reconceptualise laws and systems to better address current realities.⁵ The question of how Australian labour laws constitutionalise — that is, how they protect and prioritise particular lives, values and rules over others⁶ — is a timely one given recent judicial confirmation⁷ of a ‘deferential’ rather than ‘protective purpose’ approach to employment contract interpretation in Australia.⁸ It is of international significance, too, given the distinctive and precocious adoption of legally enforceable wage minima as a central element of Australasian systems of employment regulation.⁹

Despite the *prima facie* universal entitlement to protection for all employees working in Australia, employer non-compliance with minimum wage obligations is

¹ Alex Veen, Tom Barratt and Caleb Goods, ‘Platform-Capital’s “Appetite” for Control: A Labour Process Analysis of Food-Delivery Work in Australia’ (2020) 34(3) *Work, Employment and Society* 388.

² Andrew Stewart, Shae McCrystal, Joellen Riley Munton, Tess Hardy and Adriana Orifici, ‘The (Omni)bus that Broke Down: Changes to Casual Employment and the Remnants of the Coalition’s Industrial Relations Agenda’ (2021) 34(3) *Australian Journal of Labour Law* 132.

³ Talara Lee, Laura Good, Briony Lipton and Rae Cooper, ‘Women, Work and Industrial Relations in Australia in 2021’ (2022) 64(3) *Journal of Industrial Relations* 347.

⁴ Chris F Wright and Stephen Clibborn, ‘A Guest-Worker State? The Declining Power and Agency of Migrant Labour in Australia’ (2020) 31(1) *The Economic and Labour Relations Review* 34.

⁵ Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2014) (*The Labour Constitution*); Alan Eustace, ‘The Electrical Contractors Case: Irish Supreme Court Illuminates Collective Bargaining and Delegated Legislation’ (2022) 85(4) *Modern Law Review* 1029; Alan Bogg, Cathryn Costello, ACL Davies and Jeremias Prassl, *The Autonomy of Labour Law* (Hart Publishing, 2015); Ruth Dukes and Wolfgang Streeck, ‘Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work’ (2020) 47(4) *Journal of Law and Society* 612.

⁶ Dukes, *The Labour Constitution* (n 5) 62.

⁷ *WorkPac Pty Ltd v Rossato* (2021) 271 CLR 456. This decision confirms the distinctiveness of Australian jurisprudence concerning contractual autonomy in comparison to the United Kingdom: see Alan Bogg, ‘The Common Law Constitution at Work: *R (on the Application of UNISON) v Lord Chancellor*’ (2018) 81(3) *Modern Law Review* 509. See also the High Court’s decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89; *ZG Operations Australia Pty Ltd v Jamsek* (2022) 96 ALJR 144.

⁸ The decision in *WorkPac Pty Ltd v Rossato* (n 7) confirmed the argument advanced in Pauline Bomball, ‘Contractual Autonomy, Public Policy and the Protective Domain of Labour Law’ (2020) 44(2) *Melbourne University Law Review* 502, 505, 507.

⁹ Peter Waring and John Burgess, ‘Continuity and Change in the Australian Minimum Wage Setting System: The Legacy of the Commission’ (2011) 53(5) *Journal of Industrial Relations* 681, 682–3.

extensive and has become particularly acute in recent decades.¹⁰ While large-scale studies have not yet reliably quantified wage underpayment,¹¹ they suggest, together with smaller-scale quantitative and qualitative research,¹² that underpayment of wages is widespread in low-wage industries where temporary migrant workers make up a significant proportion of the workforce. This non-enforcement of minimum wage laws has potentially significant social, economic and legal consequences in Australia, a jurisdiction with a highly ‘target[ed]’ welfare system,¹³ including consequences for income inequality, business’ level playing field, and the integrity of wage setting institutions.

The burgeoning scholarship on minimum wage law non-compliance has taken a largely de-territorialised and ahistorical approach to understanding its causes and solutions.¹⁴ The ‘enforcement gap’ — between minimum legal wages and wages

¹⁰ Miles Goodwin and Glenda Maconachie, ‘Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952–95’ (2007) 49(4) *Journal of Industrial Relations* 523; Stephen Clibborn and Chris F Wright, ‘Employer Theft of Temporary Migrant Workers’ Wages in Australia: Why Has the State Failed to Act?’ (2018) 29(2) *Economic and Labour Relations Review* 207.

¹¹ Methodological limitations with existing large-scale studies include: limited sample selection and estimated applicable minimum wages (Laurie Berg and Basina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, 21 November 2017); Migrant Workers Centre, *Lives in Limbo: The Experiences of Migrant Workers Navigating Australia’s Unsettling Migration System* (Report, 30 November 2021)); reliance on participant estimates of wage comparisons (Hall and Partners, *Experiences of Temporary Residents: Report Conducted for the Department of Immigration and Border Protection* (Report, 19 August 2016)); and data gathered from the small proportion of underpayment incidents that become court cases (Anna Boucher, ‘Measuring Migrant Worker Rights Violations in Practice: The Example of Temporary Skilled Visas in Australia’ (2019) 61(2) *Journal of Industrial Relations* 277).

¹² See, eg, Chris Nyland, Helen Forbes-Mewett, Simon Marginson, Gaby Ramia, Erlenawati Sawir and Sharon Smith, ‘International Student-Workers in Australia: A New Vulnerable Workforce’ (2009) 22(1) *Journal of Education and Work* 1; Elsa Underhill and Malcolm Rimmer, ‘Layered Vulnerability: Temporary Migrants in Australian Horticulture’ (2016) 58(5) *Journal of Industrial Relations* 608; Stephen Clibborn, ‘Multiple Frames of Reference: Why International Student Workers in Australia Tolerate Underpayment’ (2021) 42(2) *Economic and Industrial Democracy* 336 (‘Multiple Frames of Reference’); Joanna Howe, Stephen Clibborn, Alexander Reilly, Diane van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (Report, January 2019). These findings are consistent with data from Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (Report, October 2016); and the findings of Senate inquiries, including: Senate Standing Committee on Education and Employment, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016); Senate Select Committee on Temporary Migration, *Report of the Select Committee on Temporary Migration* (Report, September 2021); Senate Economic References Committee, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees’ Remuneration* (Report, March 2022).

¹³ Francis Castles, ‘The Wage Earners’ Welfare State Revisited: Refurbishing the Established Model of Australian Social Protection, 1983–93’ (1994) 29(2) *Australian Journal of Social Issues* 120, 133.

¹⁴ Exceptions include Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Law Book Co, 1994); Miles Goodwin and Glenda Maconachie, ‘Minimum Labour Standards Enforcement in Australia: Caught in the Crossfire?’ (2011) 22(2) *Economic and Labour Relations Review* 55; Tess Hardy and John Howe, ‘Partners in Enforcement? The New Balance between Government and Trade Union Enforcement of Employment Standards in Australia’ (2009) 23(3) *Australian Journal of Labour Law* 306; Breen Creighton, ‘Enforcement in the Federal Industrial Relations System: An Australian Paradox’ (1991) 4(3) *Australian Journal of Labour Law* 197 (‘Enforcement in the Federal Industrial Relations System’); Margaret Lee, ‘Regulating Enforcement of Workers’ Entitlements in Australia: The New Dimension of Individualisation’ (2006) 17(1) *Labour & Industry* 41.

actually paid — is commonly framed as an international technical challenge, underwritten by regulatory deficiencies that are common to many jurisdictions, including individualised complaints systems, inadequately resourced inspectorates, flawed wage recovery mechanisms and deterrence challenges. Participatory approaches to enforcement have been widely observed to be beneficial in closing the gap.¹⁵

By contrast, in this article we seek to reconnect the ‘how’ of minimum wage enforcement to the ‘who’ and ‘why’ of labour law protection. The fact that expectations of minimum wage enforceability have varied over time in Australia is perhaps most starkly exemplified by Justice Higgins’ characterisation of the living wage principle as ‘sacrosanct’, a standard that was both ‘beyond the reach of bargaining’ and applied with an expectation of strict observance by the parties.¹⁶ The sacrosanct nature of wage minima admitted no discretion to overlook underpayment on the basis of an employers’ financial context: ‘[I]f a man cannot maintain his enterprise without cutting down the wages which are proper to be paid to his employees’, Higgins stated, ‘it would be better that he abandon the enterprise’.¹⁷ By contrast, approaches to minimum wage law compliance today, with their emphasis on the imperative for state actors to enforce the law selectively and strategically, are premised on an acknowledgement that strict and universal compliance is not possible. Existing scholarship has only minimally reflected on this stark divergence in approach to minimum wage law enforceability in Australia and has not attempted to explain it. In situating minimum wages in terms of the broader history of who, how and why labour law ‘protects’ in Australia, we offer new context for understanding today’s apparent crisis of enforceability. We adopt this historically grounded approach, focussed on two critical periods, to interrogate how particular configurations of law, discourse and practice shape the practical application of minimum wage laws.

Our analysis situates patterns of enforcement within two distinct paradigms of protective purpose that connect the wellbeing of individual employees and households to wider social prosperity. The first conceives of worker security and household reproduction as synonymous with social prosperity; the second frames it as a set of interests that are in opposition to the economy. In both paradigms, we show that the content and enforcement of Australian wage minima were powerfully shaped by patterns of contestation by employers, although the focus of such contestation has shifted from rejection of the legitimacy of minimum wages per se to a concern with ‘complexity’. We further argue that state actors have always used minimum wage laws to make moral interventions in labour relationships to protect the viability of particular employment relations actors, although the focus of those interventions has substantively shifted from employees towards employers. Finally, we explain that wage minima have always excluded some employees, particularly non-citizens and non-unionised workforces, but now do so on a changed basis, from explicit non-recognition of rights to functional non-enforcement of rights.

¹⁵ Leah Vosko, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto University Press, 2020).

¹⁶ *The Barrier Branch of the Amalgamated Miners’ Association of Broken Hill v The Broken Hill Proprietary Co Ltd* (1909) 3 CAR 1, 32 (‘Broken Hill Case’).

¹⁷ *Ibid.*

Understanding the nature of wage minima enforcement as a dimension of the shifted protective subject of Australian labour law illustrates the limitations of conceptions of labour law as having a fundamental purpose which is essentially the same across time and place, and universally concerned with responding to the vulnerabilities of employees.¹⁸ We argue that enforcement paradigms are expressive of labour law paradigms which in turn express and shape historically specific conceptions of both vulnerability and the sources of social value.

II The Current Australian Minimum Wage Statutory and Policy Framework

Australia's minimum pay standards, applicable to employees, are contained in national minimum wage orders and modern awards, under a system governed by the *Fair Work Act 2009* (Cth) ('*Fair Work Act*').¹⁹ When setting and varying the national minimum wage and industry- and job-specific modern award pay rates, the Fair Work Commission ('FWC') is obliged to consider the *Fair Work Act*'s 'minimum wages objective' and 'modern awards objective' respectively. The current Australian employment relations framework only partially justifies the existence of wage minima with reference to worker protection. The minimum wages objective requires the FWC to establish and maintain a safety net of fair minimum wages, taking into account: (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; (b) promoting social inclusion through increased workforce participation; (c) relative living standards and needs of the low paid; (d) the principle of equal remuneration for work of equal or comparable value; and (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.²⁰ The *Fair Work Act*'s modern awards objective requires the FWC to take into account a number of additional factors in providing a fair and relevant minimum safety net of terms and conditions, including the need to promote flexible modern work practices and the efficient and productive performance of work; the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.²¹ In setting wage minima, the Act endeavours, inter alia, to 'promote the social inclusion' of workers

¹⁸ Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 27.

¹⁹ While notionally a national system, modern awards and national minimum wage orders apply only to national system employees, as defined in *Fair Work Act 2009* (Cth) s 13 ('*Fair Work Act*'). This is estimated to be about 85% of all employees: Productivity Commission, *Workplace Relations Framework: Inquiry Report* (Report, 21 December 2015) 78. Employees who are not national system employees are covered by state industrial systems.

²⁰ *Fair Work Act* (n 19) s 284(1). On 6 December 2022, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ('*Secure Jobs, Better Pay Act*') received royal assent. It added s 284(1)(aa) to the minimum wages objective, including 'the need to achieve gender equality'.

²¹ *Fair Work Act* (n 19) s 134(1). The *Secure Jobs, Better Pay Act* (n 20) amended s 134 to add to the modern award objective, inter alia: (aa) 'the need to improve access to secure work across the economy'; and (ab) 'the need to achieve gender equality in the workplace'.

through ‘increased workforce participation’, and generally intervene in the interest of a narrow class of workers, ‘the low paid’.²²

The *Fair Work Act* provides for civil penalties in the event an employer breaches a national minimum wage order or a pay provision in a modern award. A court may order that an individual pay up to \$16,500 per contravention and a corporation up to \$82,500 per contravention.²³ Amendments to the *Fair Work Act* that commenced in 2017²⁴ introduced a new, special category of higher maximum civil penalties available in the case of ‘serious contraventions’, for which penalties are up to \$165,000 per contravention for individuals and \$825,000 per contravention for corporations.²⁵ In 2020 the federal government introduced to Parliament, and later withdrew, further increases to maximum fines together with criminal sanctions for the most serious cases of employer contraventions.²⁶ The Albanese Labor Government has a policy to ‘make wage theft a crime at a national level’.²⁷

The Commonwealth labour enforcement agency, the Fair Work Ombudsman (‘FWO’), is tasked with enforcing minimum wages created under the *Fair Work Act*. Individual workers, whether represented by a lawyer or union, or unrepresented, may still recover unpaid wage debts, but the FWO is assumed to carry the main compliance responsibility. Since the *Wage Theft Act 2020* (Vic) was enacted, Wage Inspectorate Victoria has also exercised power to investigate and prosecute breaches of that Act relating to underpayment of wages.²⁸ The FWO commenced operation in 2009, based on its predecessor, the Workplace Ombudsman, that was created in 2007. Prior to these, the Industrial Relations Bureau (1977–83), the Arbitration Inspectorate (1927–97), the Office of Workplace Services (1997–2007) and, in the colonial period, inspectors appointed pursuant to Factories and Shops legislation, acted as enforcement agencies.²⁹ The FWO’s statutory functions include promoting ‘harmonious, productive and cooperative workplace relations’ and compliance with the national minimum wage and modern award pay minima.³⁰ It is to perform these functions including by providing education, assistance and advice to employees and employers. The FWO is also to monitor compliance; inquire into, and investigate

²² *Fair Work Act* (n 19) s 284(1).

²³ *Ibid* ss 539, 546.

²⁴ *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

²⁵ *Fair Work Act* (n 19) s 557A. The penalties for both contravention and serious contravention are calculated and indexed by reference to penalty units in *Crimes Act 1914* (Cth) s 4AA.

²⁶ *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020* (Cth); Stewart et al (n 2).

²⁷ ‘Secure Australian Jobs’, *Labor* (Web Page, 8 August 2023) <<https://www.alp.org.au/policies/secure-australian-jobs>>.

²⁸ The *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld) also introduced criminal sanctions related to some breaches of the *Fair Work Act* (n 19), with the Queensland Police Service to fulfil the prosecution role.

²⁹ Bennett (n 14) 145–64; Richard Mitchell, ‘Australian Industrial Relations and Labour Law Policy: A Post-War Review’ (1980) 52(1) *The Australian Quarterly* 40; Goodwin and Maconachie (n 14) 61. State government agencies served a comparable purpose, prior to the nationalisation of Australia’s workplace relation system for privately employed workers with the 2006 commencement of the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) amendments to the *Workplace Relations Act 1996* (Cth) (‘*Workplace Relations Act*’).

³⁰ *Fair Work Act* (n 19) ss 682(1)(a)(i)–(ii).

breaches; and commence court proceedings and take other steps to enforce wage laws.³¹

III Literature Review and Theoretical Approach

Extant literature has tended to focus on characteristics of particular populations and the influences of institutions and business structures in explaining why minimum wage laws are not enforced. It is well established that various populations of vulnerable workers, particularly temporary and new migrants, are most commonly affected. This is associated with factors such as a lack of information about their rights,³² reluctance or fear associated with seeking to enforce rights³³ or maintaining reference to home country or migrant peer working conditions.³⁴ Institutional influences such as exclusive migration policies,³⁵ the decline of union presence³⁶ and under-funded enforcement agencies have all been identified as contributing to persistent and growing employer non-compliance. Studies have also identified the roles of certain business structures, with employer non-compliance more likely in fractured, or 'fissured', work structures such as franchises and subcontracting arrangements³⁷ and in small businesses which have less access to relevant expertise and lower prevalence of unions and bargaining coverage.³⁸ In this context, there has been much attention in legal scholarship to identifying barriers to individuals 'accessing justice'³⁹ and to the methods and effectiveness of state enforcement.⁴⁰

³¹ Ibid ss 682(1)(b)–(f).

³² Gideon Yaniv, 'Complaining About Noncompliance with Minimum Wage Laws' (1994) 14(3) *International Review of Law and Economics* 351; Charlotte Alexander and Arthi Prasad, 'Bottom-Up Workplace Law Enforcement: An Empirical Analysis' (2014) 89(3) *Indiana Law Journal* 1069.

³³ Elizabeth Fussell, 'The Deportation Threat Dynamic and Victimization of Latino Migrants: Wage Theft and Robbery' (2011) 52(4) *The Sociological Quarterly* 593; Joanna Howe, 'A Legally Constructed Underclass of Workers? The Deportability and Limited Work Rights of International Students in Australia and the United Kingdom' (2019) 48(3) *Industrial Law Journal* 416; Justin Pen, 'Justice for Temporary Migrant Workers: Lessons from the "7-Eleven Cases"' (2018) 43(1) *Alternative Law Journal* 24.

³⁴ Michael Piore, *Birds of Passage: Migrant Labor and Industrial Societies* (Cambridge University Press, 1979); Roger Waldinger and Michael Lichter, *How the Other Half Works: Immigration and the Social Organization of Labor* (University of California Press, 2003); Clibborn, 'Multiple Frames of Reference' (n 12).

³⁵ Wright and Clibborn (n 4).

³⁶ Hardy and Howe (n 14).

³⁷ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

³⁸ William Brown, Simon Deakin, David Nash and Sarah Oxenbridge, 'The Employment Contract: From Collective Procedures to Individual Rights' (2000) 38(4) *British Journal of Industrial Relations* 611; Jérôme Gautié and John Schmitt, *Low-Wage Work in the Wealthy World* (Russell Sage Foundation, 2010).

³⁹ David Weil and Amanda Pyles, 'Why Complain? Complaints, Compliance, and the Problem of Enforcement in the US Workplace' (2006) 27(1) *Comparative Labor Law & Policy Journal* 59; Yaniv (n 32); Stephen Lee, 'Policing Wage Theft in the Day Labor Market' (2014) 4(2) *University of California Irvine Law Review* 655; Bassina Farbenblum and Laurie Berg, *Migrant Workers' Access to Justice for Wage Theft: A Global Study of Promising Initiatives* (Report, 7 December 2021).

⁴⁰ Daniel Galvin, 'Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance' (2016) 14(2) *Perspectives on Politics* 324; Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement' (2021) 37(2–3) *International Journal of Comparative Labour Law and Industrial Relations* 133.

Historical studies of minimum wage enforcement have tended to concentrate on variations in the operations of statutory labour inspectorates, in a manner detached from consideration of changes to the overall protective purpose of labour law. Labour inspectorates in Australia dated from the 1830s, when inspectors were appointed to monitor factories, investigate breaches and undertake prosecutions.⁴¹ Colonial-era inspectors were forced to primarily adopt voluntary approaches to labour law compliance due to widespread employee reluctance to give evidence of breaches of Factory and Shops legislation for fear of dismissal, limited penalties for non-complying employers, and the inability of inspectors to compel employers to pay wage arrears.⁴² In the 20th century, after nearly 50 years of near-exclusive registered union-led enforcement between 1906–52 (aside from a single temporary inspector operating between 1934 and 1940),⁴³ the Industrial Relations Bureau similarly adopted voluntary compliance measures, albeit in service to a very different industrial relations system to the 19th century. The Industrial Relations Bureau's challenges have been analysed using largely present-centred concepts: resource constraints,⁴⁴ compliance 'barriers',⁴⁵ and the notion of a continuum between 'deterrence' and 'compliance' models of enforcement.⁴⁶ In chronicling the limitations of different enforcement regimes (including co-regulatory models that involve unions), existing scholarship has emphasised the unchanging elements of the challenge of enforcing wage minima. Less explored has been the question of how mechanisms of enforcement are expressions of, and contributors toward, historically distinctive paradigms of labour law, in which the explicit and implicit subjects of protection and recognition have altered over time.

A variety of rationales have been advanced for minimum wages in Australia: the needs of workers, employer capacity to pay, wage indexation to economic indicia relating to factors other than the needs of workers, collectivism and industrial action, and wages as a 'safety net'.⁴⁷ While these have been chronicled in considerable detail,⁴⁸ their analyses have remained largely detached from accounts of enforcement and the processes of cultural legitimation that bound together mechanisms of legal protection and statutory purpose. One exception may be found in Creighton's observation, made in relation to industrial action rather than wage underpayment, of the stark disjuncture in the conciliation and arbitration system between its strident proscription of industrial action and the widespread tolerance of it in practice. As Creighton noted, the provisions of the *Conciliation and Arbitration*

⁴¹ Michael Quinlan and Peter Sheldon, 'The Enforcement of Minimum Labour Standards in an Era of Neo-Liberal Globalisation' (2011) 22(2) *The Economic and Labour Relations Review* 13.

⁴² Goodwin and Maconachie (n 14) 61. See also Reg Hamilton and Matt Nichol, 'Minimum Wage Regulation in Australia in the Wake of the Pandemic: The Future of the Five Wage Concepts' (2021) 31(4) *Labour and Industry* 407.

⁴³ Goodwin and Maconachie (n 14) 63.

⁴⁴ Ibid.

⁴⁵ Hamilton and Nichol (n 42) 407.

⁴⁶ Goodwin and Maconachie (n 14) 57.

⁴⁷ Hamilton and Nichol (n 42); Joshua Healy, Andreas Pekarek and Ray Fells, 'The Belated Return of an Australian Living Wage: Reworking "A Fair Go" for the 21st Century' in Tony Dobbins and Peter Prowse (eds), *The Living Wage: Advancing a Global Movement* (Routledge, 2022) 162.

⁴⁸ Hamilton and Nichol (n 42); Keith Hancock, 'The Needs of the Low Paid' (1998) 40(1) *Journal of Industrial Relations* 42; Joe Isaac and Stuart Macintyre, *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004).

Act 1904 (Cth) ('the 1904 Act') which made it an offence for any person or organisation 'on account of any industrial dispute, [to] do anything in the nature of a lockout or strike' were 'almost entirely unused in practice' and repealed in 1930.⁴⁹ Instead, the primary tools used for enforcement were bans clauses and de-registration of unions.⁵⁰ Taking a longer historical perspective, Schofield-Georgeson recently argued that there has been a general historical trajectory from 'collective, informal and egalitarian' approaches to enforcement in early 20th century Australia to 'individualised, technical, punitive and rarely enforced laws' at the century's end, using quantitative methods that necessarily foreclose the possibility of detailed analysis of the dynamics of any particular period.⁵¹

Rather than view non-compliance with wage minima as a longstanding policy puzzle with relatively unchanging determinants, this article instead endeavours to analyse enforcement as an expression of changes in the purpose of labour law in Australia over time, using debates concerning minimum wage laws as a focal point for a historical analysis. We adopt a labour law 'in context' approach, which seeks to describe the ways particular laws reflect and constitute social relations in specific jurisdictions and historical settings.⁵² This approach does not presuppose a fundamental purpose to labour law, as Guy Davidov proposes in his characterisation of labour law as an attempt to address the variety of vulnerabilities, subordination and dependency that are created for employees by the employment relationship.⁵³ We instead build on Ruth Dukes' argument in her response to Davidov, which emphasises the importance of descriptive analysis of the purpose of labour law in defined contexts, that seeks to represent the terms of labour law on its own terms in each period.⁵⁴

Following Dukes', as well as Deakin and Wilkinson's approach to analysing the standard employment relationship, our analysis engages with the process through which the idea of the minimum wage acquired legitimacy at particular moments in Australian society. Wage minima, like the standard employment relationship, should not, we argue, be analysed as relatively unchanging 'core' components of labour

⁴⁹ Breen Creighton, 'One Hundred Years of the Conciliation and Arbitration Power' (2000) 24(3) *Melbourne University Law Review* 840, 851.

⁵⁰ Ibid. See also Creighton, 'Enforcement in the Federal Industrial Relations System' (n 14); Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010).

⁵¹ Eugene Schofield-Georgeson, 'The Emergence of Coercive Federal Australian Labour Law, 1901–2020' (2022) 64(1) *Journal of Industrial Relations* 52, 52.

⁵² Ruth Dukes, 'Identifying the Purposes of Labor Law: Discussion of Guy Davidov's *A Purposive Approach to Labour Law*' (2017) 16(1) *Jerusalem Review of Legal Studies* 52 ('Identifying the Purposes of Labor Law'). See also Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford University Press, 2005) 35. This approach is consistent with the 'Cambridge School' of intellectual history, which insists on the importance of placing key texts within their intellectual and linguistic contexts and excavating their 'stakes' and significance as interventions in particular political and intellectual contexts: see Quentin Skinner, *Visions of Politics: Volume 1* (Cambridge University Press, 2002) vii; Simon Deakin, 'Juridical Ontology: The Evolution of Legal Form' (2015) 40(1) *Historical Social Research* 170.

⁵³ Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) 27.

⁵⁴ Dukes, 'Identifying the Purposes of Labor Law' (n 52) 66.

law,⁵⁵ but as historically situated concepts which presuppose particular structures of the household and of the enterprise and shape them in turn.⁵⁶

To analyse the underlying and changing social, cultural and economic foundations of Australia's minimum wage laws, we selected two periods of Australian labour law for comparison as broadly representative of the sacrosanct approach to minimum wage enforcement, on the one hand (1907–21), and an approach where a degree of non-compliance is tolerated (2009 to the present) on the other. In each case, we asked four questions that illuminate the context in which assertions of minimum wage non-enforceability were advanced: Whose lives were understood to be the subject of protection? What was the rationale for wage minima? How did employers respond to wage minima? How were minimum wage laws enforced?

The first period we analyse spans 1907 to 1921, from the decision in *Ex parte HV McKay* ('*Harvester*'),⁵⁷ which gave rise to the first Australia-wide enforceable minimum wage, to the retirement of HB Higgins as President of the Commonwealth Court of Conciliation and Arbitration. While the majority of workers in this period were covered by state arbitration and wages boards, concerted attention to the federal arbitral system can be justified by the extent of its informal influence over state systems during this period.⁵⁸ The *Harvester* decision constituted a moment in which an idea that existed in multiple iterations theoretically and legally⁵⁹ was embodied in a principle that, although not formally encoded in the *1904 Act*, became integrated into the national wage-setting framework, as well as into international law.⁶⁰ The *Harvester* wage anticipated Otto Kahn-Freund's conceptualisation of labour law as 'a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'.⁶¹ This imbalance, Kahn-Freund argued, could not be addressed through the mere conferral of rights or

⁵⁵ Davidov (n 53) 85.

⁵⁶ Deakin and Williamson (n 52) 309.

⁵⁷ *Ex parte HV McKay* (1907) 2 CAR 1 ('*Harvester*'). The *Harvester* decision, given by Higgins J, President of the Commonwealth Court of Conciliation and Arbitration, determined the test to be applied to ascertain fair and reasonable conditions as to the remuneration of labour, under the *Excise Tariff Act 1906* (Cth). While the *Excise Tariff Act* was later ruled unconstitutional, the *Harvester* decision set the tone for wage fixation under the *Conciliation and Arbitration Act 1904* (Cth) ('*1904 Act*').

⁵⁸ MB Hammond, 'Judicial Interpretation of the Minimum Wage in Australia' (1913) 3(2) *American Economic Review* 259, 280.

⁵⁹ Including in the 1891 Papal Encyclical, wages boards, a Queensland Parliamentary Bill of 1890, and NSW tribunal findings from 1905: Isaac and Macintyre (n 48). The *Harvester* decision (n 57) was subsequently overturned.

⁶⁰ Article 427 of the *Peace Treaty of Versailles 1919* called on the parties to promote 'the payment to the employed of a wage adequate to maintain a reasonable standard of life as this is understood in their time and country' in recognition of the 'supreme international importance' of 'the well-being, physical, moral and intellectual, of industrial wage-earners'. The International Labour Organization became squarely concerned with achieving compliance with art 427: Hancock (n 48) 43. For discussion of the statutory precursors to the arbitration system more generally, see Mitchell (n 29) 74–103.

⁶¹ Paul Davies and Mark Freedland (eds), *Kahn-Freund's Labour and the Law* (Sweet & Maxwell, 3rd ed, 1983) 18.

regulation of factory conditions, but rather required ‘the spontaneous *creation of social power* on the worker’s side to balance that of management’.⁶²

In setting a wage floor anchored in worker need as part of a system that required collective worker organisation for its application and enforcement, Justice Higgins’ living wage embodied both elements of Kahn-Freund’s concept of labour law: it sought to counteract the inequality of bargaining power inherent to employment relationships with reference to the requirements for the maintenance of workers’ lives, and did so through rights that were not ‘bare’ but had to be enforced through the social power inherent to union activity. An ethos of sanctity and strict enforceability permeated Higgins’ articulation of the living wage, and survived the declaration of the unconstitutional status of the *Excise Tariff Act 1906* (Cth).⁶³ In 1909 he confirmed that the living wage was ‘a thing sacrosanct, beyond the reach of bargaining’, to be paid regardless of the employer’s financial position or profitability.⁶⁴ If it could not, Higgins determined, ‘it would be better that he [the employer] abandon the enterprise’.⁶⁵ A strict application of the living wage resulted in sections of BHP suspending mining operations for two years in order to avoid having to pay the prescribed rate.⁶⁶ Wage-setting rationales such as ‘sound economic doctrine’ and ‘balancing the favourable and adverse effects of higher wages’ were added to the living wage rationale in the 1930s.⁶⁷ However, the living wage principle continued to inform Commonwealth and state tribunals in setting the basic wage (and thus minimum rates for all wage-earners) into the mid-1950s, as well as being understood as ‘part of the social fabric’ of the nation.⁶⁸ The primary sources drawn upon for this article include key judicial decisions in the period, relevant contemporary parliamentary debates, publications by Higgins, court transcripts and newspapers, a select number of awards and agreements that were made between 1907 and 1921, together with scholarly analyses of federal and state wage-setting and enforcement systems published in the period.⁶⁹

The second period, from 2009 to 2022 was chosen because it spans the current ‘Fair Work’ regulatory regime until the end of the nine-year period of Coalition federal government at the May 2022 general election.⁷⁰ Naturally, many formal parts of that regulatory system, and policy settings shaping the current regime, pre-date the commencement of the *Fair Work Act*. These include the decline of regulatory support for union involvement in minimum wage setting and

⁶² Ibid (emphasis added).

⁶³ *Harvester* (n 57); *R v Barger* (1908) 6 CLR 41.

⁶⁴ *Broken Hill Case* (n 16) 32.

⁶⁵ Ibid.

⁶⁶ Graeme Osborne, ‘Town and Company: The Broken Hill Industrial Dispute of 1908–09’ [1973] (24) *Labour History* 26, 46.

⁶⁷ Keith Hancock and Sue Richardson, ‘Economic and Social Effects’ in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004) 139, 153.

⁶⁸ Stuart Macintyre and Richard Mitchell, *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 13; Robert Hawke, ‘The Commonwealth Arbitration Court: Legal Tribunal or Economic Legislature?’ (1956) 3(3) *University of Western Australia Law Review* 422, 458.

⁶⁹ Goodwin and Maconachie (n 14) 63.

⁷⁰ While our formal analysis ends at the May 2022 federal general election, we include some observation of policy initiatives in the early time of the Albanese Labor Government.

enforcement, replaced with the expectation of a Commonwealth enforcement agency as primary enforcer of minimum wage laws,⁷¹ the rise of temporary migration in Australia since the mid-1990s⁷² and the shift to a ‘command and control’ approach to setting and enforcing minimum wages since 2006.⁷³ This period also coincides with an observed significant rise in employer non-compliance with minimum wage laws in Australia.⁷⁴ Sources for this case study include submissions to and reports of government inquiries, media reports of public debates, media releases and publications by unions, employers and state actors, decisions and publications of the FWC and the Federal Court of Australia, and speeches by government ministers related to key legislation and policies.

IV Findings

A Early 20th Century

1 *The Lives Protected by the Harvester Living Wage*

A crucial context for understanding Justice Higgins’ insistence on the *Harvester* wage’s sacrosanct status was the question of whose lives it was designed to protect. The *Harvester* living wage provided for the ‘normal needs of the average employee, regarded as a human being living in a civilised community’, and applied to employers ‘whether the profits are small or great’.⁷⁵ Despite the ostensibly inclusive terminology of ‘employee’ in this 1907 formulation, the identity of *Harvester*’s protective subjective was male, adult and white.⁷⁶

Non-whites were excluded from standard labour protections in multiple ways. The *Immigration Restriction Act 1901* (Cth) (*‘Immigration Restriction Act’*) barred non-whites from entry to Australia. For Indigenous people, the labour protections of the arbitration system were layered upon the older colonial regimes of protection which positioned them as wards, subject to comprehensive levels of state surveillance and control.⁷⁷ State actors controlled Indigenous peoples’ ability to enter and leave employment relationships and negotiate wages.⁷⁸ Employers were

⁷¹ Hardy and Howe (n 14).

⁷² Wright and Clibborn (n 4).

⁷³ Sean Cooney, John Howe and Jill Murray, ‘Time and Money under WorkChoices: Understanding the New Workplace Relations Act as a Scheme of Regulation’ (2006) 29(1) *UNSW Law Journal* 215, 215.

⁷⁴ Clibborn and Wright (n 10).

⁷⁵ *Harvester* (n 57) 3.

⁷⁶ Gillian Whitehouse, ‘Justice and Equity: Women and Indigenous Workers’ in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004) 207.

⁷⁷ Samuel Furphy and Amanda Nettelbeck, *Aboriginal Protection and Its Intermediaries in Britain’s Antipodean Colonies* (Routledge, 2020) 4. As these authors explain, ‘protectors took on a variety of roles, as quasi-missionaries, frontier magistrates, police officers, prison inspectors, court advocates, land brokers, providers of rations, medicine, or humanitarian assistance, or some combination of the above’: at 9.

⁷⁸ In Queensland, for instance, the Chief Protector and local protectors had the role of negotiating the employment contracts of all Aboriginal workers ‘under the Act’, leaving no reasonable means by

required to have permits to employ Indigenous people.⁷⁹ Indigenous people were commonly explicitly excluded from statutory definitions of ‘employee’ and differential minimum wages existed that were based on race.⁸⁰ In 1944, the Industrial Court explained that ‘it would be inadvisable and even cruel to pay [Indigenous workers] for the work they can do at the same wage standards found appropriate for civilised ‘whites’.⁸¹ This position was not overturned until 1966.⁸²

Men and women were protected by the *Harvester* wage on different bases. While men’s physical, moral and mental life was secured by a legally enforced minimum wage that protected them *within* the employment relationship, women’s lives were understood as being kept safe by laws that protected them *from* employment. In keeping with Victorian ideals which equated ‘true womanhood’ with maternal, moral and spiritual qualities, the locus of self-development for women was emphatically domestic, a realm entirely apart from the masculine sphere of industry, politics and commerce.⁸³ The setting of a female basic wage at 54% of the male wage, by design inadequate to support a family,⁸⁴ entrenched cultural norms of motherhood and dependency on a male breadwinner.⁸⁵ The concern to protect white adult men within employment relationships in federal legislation was consistent with special measures in state wages boards that ensured that minimum wage regulation would not displace ‘old and naturally slow’ men from employment.⁸⁶ State motherhood endowments, payable to women independently of their relationships with men, reinforced this social domestic ordering.⁸⁷ The living wage was also conceived as an intergenerational measure to protect the lives of young and unborn children, within a racialised conception of the nation.⁸⁸ Higgins justified the wage as an instrument for ensuring the health of children, since ‘their constitutions and the future of the race must not suffer by privation’.⁸⁹ Imagined intergenerational prosperity was further secured, in this vision, through the gender-differentiated wage which would ensure that ‘thrifty’ working class households were

which Aboriginal workers could improve their conditions or even quit without the protectors’ consent: *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) ss 12, 13, 15; Loretta de Plevitz, ‘Falling Through the Safety Net: Minimum Entitlements Legislation for Aboriginal Workers in the Queensland Pastoral Industry 1919–1968’ (1997) 13 *Australian Journal of Law and Society* 1, 4.

⁷⁹ Whitehouse (n 76) 210.

⁸⁰ *Re Industrial Peace Act of 1912* (1916) 1 Queensland Industrial Gazette 354, 355.

⁸¹ *Australian Workers Union v Abbey* (1944) 53 CAR 212, 215.

⁸² Commonwealth Conciliation and Arbitration Commission, *The Cattle Station Industry (Northern Territory) Award 1951* (1966) 71 CAR 319, 656, 666–9.

⁸³ Kerreen Reiger, *The Disenchantment of the Home: Modernizing the Australian Family 1880–1940* (Oxford University Press, 1985) 20.

⁸⁴ Edna Ryan and Anne Conlon, *Gentle Invaders: Australian Women at Work 1788–1974* (Thomas Nelson, 1975); *Rural Workers Union v Australian Dried Fruits Association (Mildura)* (1912) 6 CAR 61 (Higgins J) (*‘Rural Workers Union’*).

⁸⁵ Ryan and Conlon (n 84); *Rural Workers Union* (n 84).

⁸⁶ MB Hammond, ‘Wages Boards in Australia IV: Social and Economic Results of Wages Boards’ (1915) 29(3) *Quarterly Journal of Economics* 563, 583.

⁸⁷ Marilyn Lake, ‘Feminists Creating Citizens’ in Wayne Hudson and Geoffrey Bolton (eds), *Creating Australia: Changing Australian History* (Allen & Unwin, 1997) 97.

⁸⁸ Alison Bashford, *Imperial Hygiene* (Palgrave Macmillan, 2004) 137–63.

⁸⁹ Henry Bournes Higgins, ‘A New Province for Law and Order: II’ (1919) 32(3) *Harvard Law Review* 189, 204.

not forced to bring in money through the ‘pathetic’ practice of women having to leave the home to work or accept out-work such as laundry in order to survive.⁹⁰

Finally, while the living wage was formulated as a universal principle with theoretical relevance to all workers in Australia, as a practical matter it only applied to employees protected by awards at the federal level, by virtue of the High Court’s finding that ‘common rule’ awards operating across an occupation or industry were not supported by s 51(xxxv) of the *Constitution*.⁹¹ This exclusion of non-employed workers, however, was not fully replicated in the state systems.⁹² Federal awards were few in number: just 239 were created between 1907 and 1921.⁹³ The federal system also categorically excluded agricultural, viticultural, horticultural and dairying workers and domestic servants, who were excluded from the definition of ‘industry’ under s 4 of the *1904 Act*.

2 The Rationale for Harvester Living Wage Protection

The *Harvester* living wage was burdened by multiple ‘protective’ objectives. Justice Higgins argued it was a measure to protect working-class minds and bodies, separate gendered spheres of production and reproduction, and public peace and uninterrupted industry, within an overall social order that was profoundly racialised. These rationales were consistent with Prime Minister Alfred Deakin’s emphasis on the imperative to protect the weak and cement an ethos of social justice.⁹⁴

Higgins elaborated on the purposes of the living wage in successive decisions and publications, but succinctly summarised the core justifications in 1909:

[U]nless great multitudes of people are to be irretrievably injured *in themselves and in their families*, unless *society is to be perpetually in industrial unrest*, it is necessary to keep this living wage sacrosanct, beyond the reach of bargaining.⁹⁵

Three protective targets may be discerned in this formulation: (a) the material and interior life of the worker; (b) the household; and (c) society. The *Harvester* living wage thus had both a wider conceptual reach than present wage minima, and included the ambition to simultaneously protect the ‘inner’ life of individuals and the ‘outer’ life of society via the income of the working household, which stood as symbolic of both. The breadth of the *Harvester* wage’s protective ambition reflected

⁹⁰ *Broken Hill Case* (n 16) 26 (Higgins J).

⁹¹ *Australian Boot Trade Employees Federation v Whybrow & Co* (1910) 11 CLR 311 (*‘Whybrow’*). It should be noted, too, that until 1983, s 51(xxxv) of the *Constitution* was also interpreted to preclude federal award coverage of workers not employed in an ‘industry’; this limit was found to exclude from federal coverage many workers including clerical officers employed by state governments, firefighters and university teachers: Michael Kirby and Breen Creighton, ‘The Law of Conciliation and Arbitration’ in Joe Isaac and Stuart Macintyre (eds), *The New Province for Law and Order: 100 Years of Australian Conciliation and Arbitration* (Cambridge University Press, 2004) 98.

⁹² The *Industrial Disputes Act 1908* (NSW) (*Industrial Disputes Act*), for example, did not exclude from its ambit persons working under a contract for labour only: at s 4.

⁹³ Goodwin and Maconachie (n 14) 63.

⁹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 July 1903. For a discussion of the multiple public interest rationales advanced for the conciliation and arbitration system, see Richard Naughton, *The Shaping of Labour Law Legislation: Underlying Elements of Australia’s Workplace Relations System* (LexisNexis Butterworths, 2017) 55–122.

⁹⁵ *Broken Hill Case* (n 16) 32 (emphasis added).

an organic conception of society, a worldview which insisted on the necessary interdependence of social formations at different scales. If households were not secure and could not reliably reproduce themselves, according to this view, neither could civil society, industry or the nation.⁹⁶ The rationale and scope of the *Harvester* wage differed, too, from minimum wage limits set by state wages boards, which were indexed to rates paid by 'reputable employers of average capacity' rather than standards required for 'civilised life'.⁹⁷

Higgins' sense of the inextricable connection between workers' capacity for physical renewal and other vital processes was mirrored in the rationale he advanced for the living wage as a mechanism for securing the mental wellbeing of men and women. This idea reflected a social liberal conceptualisation of humanity as *homo duplex*, possessed of both physical and mental/spiritual life which could only be fully developed in and through society.⁹⁸ Accordingly, the 'life' protected by the *Harvester* wage had an interior dimension, and was a measure understood as crucial to developing and nurturing workers' dignity, integrity and sense of citizenship as well as their physical wellbeing. These 'mental health and development' aims were primary, rather than secondary objectives of labour regulation; as one contemporary scholar put it, 'the whole machinery of arbitration operates to foster the development of personality'.⁹⁹ Achieving the desired internal narratives of self-improvement and improved civic capability required 'relief from materialistic anxiety', since, as Higgins put it, once there was reasonable certainty that 'essential material needs will be met by honest work, you release infinite stores of human energy for higher efforts, for nobler ideals'.¹⁰⁰ Absent provision for 'improving' resources, such as journal subscriptions, union dues, charity, church fees and sickness benefits, working class men faced inner 'deterioration and degradation'¹⁰¹ from the twin threats of industrial conflict and the temptations of the 'single life'.¹⁰²

For Higgins, protecting the inner lives of white male and female workers through minimum wage floors underpinned the urgent project of securing a peaceful, orderly and 'civilised' society. Industrial militancy could only be staunched by addressing the 'causes of the discontent'¹⁰³ by ensuring that working-class men had

⁹⁶ Marian Sawer, *The Ethical State? Social Liberalism in Australia* (Melbourne University Press, 2003) (*The Ethical State?*); Michael Roe, *Nine Australian Progressives: Vitalism in Bourgeois Social Thought 1890–1960* (University of Queensland Press, 1984); Marilyn Lake, *Progressive New World: How Settler Colonialism and Transpacific Exchange Shaped American Reform* (Harvard University Press, 2019); Mark Hearn, 'Securing the Man: Narratives of Gender and Nation in the Verdicts of Henry Bournes Higgins' (2006) 37(127) *Australian Historical Studies* 1.

⁹⁷ Hammond (n 58) 263.

⁹⁸ Peter Haeusler, 'Progressivism and the Janus Face of "Efficient Citizenship": Meredith Atkinson and Australian Democracy' (1996) 42(1) *Australian Journal of Politics and History* 24, 26.

⁹⁹ Clarence Northcott, quoted in Marian Sawer, 'The Ethical State: Social Liberalism and the Critique of Contract' (2000) 31(114) *Australian Historical Studies* 67, 85 ('The Ethical State').

¹⁰⁰ Henry Bournes Higgins, 'A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration' (1915) 29(1) *Harvard Law Review* 13, 39.

¹⁰¹ Henry Bournes Higgins, 'A New Province for Law and Order: III' (1920) 34(2) *Harvard Law Review* 105, 136.

¹⁰² *Royal Commission on the Basic Wage* (Report and Evidence, 1920) 28.

¹⁰³ *Federated Gas Employees Industrial Union v Metropolitan Gas Co* (1921) 15 CAR 838, 873 (Powers J).

‘the essentials of food, shelter, clothing’ in line with community standards.¹⁰⁴ Industrial disorder would come to be described as a social ill equivalent in weight to the suffering caused by the Great War, according to Higgins.¹⁰⁵ A living wage and arbitration were understood as instruments for pacifying industrial conflict and providing opportunities for enhanced civic responsibility through the experience of negotiation and compromise that attached to active union involvement. The gendered division of labour was also understood as socially unifying. From their ‘appropriate’ station in the home, women could ‘soothe’ passions, discouraging men from industrial action and appealing to them to ‘Try the Courts first’.¹⁰⁶ The *Harvester* living wage was thus applied to a well-defined protective subject — the unskilled white male — on the basis of a theory which equated his wellbeing to the health of his household, workplace and wider society.

The wellbeing of employee households was thus understood as a synecdoche of societal and economic stability and productivity, rather than a category of interest that stood in opposition to the latter and required ‘balancing’ against it. Individual enterprises were not understood as requiring protection within this conception of minimum wage regulation. As a contemporary observer put it: ‘[T]o hold that an industry in general, is incapable of an increase of wages is, however, quite a different matter from saying that a particular establishment cannot stand an increase of wages.’¹⁰⁷ Rather, the ‘affordability’ of minimum wages was framed in terms of their impact on *industries* as a whole.¹⁰⁸ No exceptions were made based on employer size; rather, the categories of enterprise understood to be most vulnerable to economic non-viability as a consequence of the minimum wage were ‘the least resourceful in any trade’.¹⁰⁹

3 *Employer Opposition as a Context for the Formulation of Minimum Wage Laws*

Justice Higgins’ repeated insistence that the wage was sacrosanct and applied regardless of levels of employer profit was an indication of the scale and extent of systematic employer resistance to the institutionalised subordination of contractual autonomy represented by the living wage. The *Harvester* standard, like the other government-led interventions in public health, social welfare, education and urban planning at the time, represented a fundamental challenge to the social ordering premised on laissez-faire liberalism.¹¹⁰ As Higgins explained in 1916, the nation state, in his view, was

a community of human beings organised on the basis of mutual service. Its essence is that its members surrender their title to act exactly as they please and *subordinate themselves to laws designed to promote the general happiness and welfare*. Law defines the rights and duties of individuals to one another and to the community as a whole. It substitutes right and justice and

¹⁰⁴ Higgins, ‘A New Province for Law and Order: II’ (n 89) 148.

¹⁰⁵ Ibid 13.

¹⁰⁶ Hearn (n 96) 21.

¹⁰⁷ Hammond (n 58) 281.

¹⁰⁸ *Broken Hill Case* (n 16) 32 (Higgins J).

¹⁰⁹ Hammond (n 86) 603.

¹¹⁰ For an analysis of the far-reaching impact of the circle of social liberals who exercised a formative role in Australian nation-building (including Higgins), see Sawyer, ‘The Ethical State’ (n 99) 78.

the principle of service, for competition and brute force as the basis of social life.¹¹¹

This view was predicated on an explicit rejection of employer prerogative, individualism, contract and competition, which were social mechanisms that Higgins viewed as arcane relics of a discredited, 19th century social order.¹¹² A sense of fundamental ideological division in world views was apparent in early Conciliation and Arbitration Court hearings, with Higgins evincing contempt for employer arguments that presented economic theories of supply and demand as if they were ‘more inexorable and inevitable’ than ‘the law of gravitation’.¹¹³ Notwithstanding successful constitutional challenges in the 1930s, the ambitions of the architects of the arbitration framework to provide a comprehensive remedial system for employees in the event of underpayment were upheld by the High Court for over two decades. In 1914, for instance, the High Court confirmed that common law contract remedies were unavailable to parties covered by the arbitration framework, since the system was a ‘new scheme of public policy’ in which the right and remedy are ‘inseparable’.¹¹⁴

The asserted sanctity of the living wage should thus be understood as related to the nature and extent of employer opposition to it and the apparatus of arbitration of which it was a part. At the employer association level, opposition was intense, fundamental and sustained. The slogan ‘freedom of contract’ was ‘emblazoned on the scroll of every Employers Association’ prior to the passage of the *1904 Act*.¹¹⁵ Subsequently, employers called for a return to a ‘clear, open, economic ring’ in relation to employment governance,¹¹⁶ and prosecuted political campaigns against state interference and all forms of joint regulation with unions.¹¹⁷ Employer associations also pressed legal challenges to arbitration (backed by a reserve fund of £5,000 established by the Central Council of Employers), the *Harvester* decision and subsequent decisions.¹¹⁸ Employers discredited arbitration on the basis that it represented an illegitimate interference with their felt entitlement as businessmen and property owners, ‘taking business entirely out of the hands of the man who owns it’ and ‘put[ting] it under the control of a trio of men, one of whom is a lawyer and the others of whom are content to receive salaries of £700 for their complete occupation’.¹¹⁹ While insisting on the sacrosanct nature of the living wage, Higgins reminded employers that the system enabled them to retain the freedom to choose their employees, new machines, and methods and to make the most of the advantages of locality and their superior knowledge.¹²⁰ Higgins acknowledged that award wages

¹¹¹ Sawyer, *The Ethical State?* (n 96) 85 (emphasis added).

¹¹² Ibid 83.

¹¹³ *Federated Engine Drivers and Firemen's Association of Australasia v The Broken Hill Proprietary Co Ltd* (1911) 5 CAR 9.

¹¹⁴ *Josephson v Walker* (1914) 18 CLR 691, 702–3.

¹¹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 1903 (William Sawers).

¹¹⁶ David Plowman, ‘Forced March: The Employers and Arbitration’ in Stuart Macintyre and Richard Mitchell, *Foundations of Arbitration: The Origins and Effects of State Compulsory Arbitration 1890–1914* (Oxford University Press, 1989) 251.

¹¹⁷ Macintyre and Mitchell (n 68) 16.

¹¹⁸ *Whybrow* (n 91); Plowman (n 116) 138–47.

¹¹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 1903 (Bruce Smith).

¹²⁰ Higgins, ‘A New Province for Law and Order: II’ (n 89) 21.

could be complicated to calculate correctly, and sympathised with employers who potentially faced the 'ruinous' prospect of an accumulation of stale claims for non-deliberate underpayments over years. Such challenges were adequately addressed, Higgins argued, by measures which capped the time period available to employees to obtain arrears at six years.¹²¹ Further, Higgins argued that the living wage constituted an *advantage* to employers, not merely in terms of reducing industrial conflict but also as an instrument for securing the supply of willing labour in the context of rural labour shortages,¹²² and in preventing the growth of 'parasitic enterprises'.¹²³ Some individual employers agreed, such as Harris Weinstock, a 1909 manufacturing employer who observed, in response to Victorian wages board minima, that the measure transformed Victorian manufacturing, ensuring that every employer 'starts out on an even basis' and was required to 'exercise his managerial ability along other lines than that of "squeezing" labour'.¹²⁴

4 *Enforcement of Minimum Wage Laws*

Minimum wages were enforced under the arbitration system using collective, rather than individual mechanisms, that, through their reliance on and stimulation of constant union participation, served to reinforce the decentring of contract law as the conceptual foundation for industrial relations. Until 1928, federal powers of enforcement were limited to the registrar of the court and the union representing the member affected by the breach.¹²⁵ These mechanisms replaced the 19th century *laissez faire* system which relied on a combination of employee-initiated litigation for breach of contract, prosecutions by inadequately resourced labour inspectorates pursuant to Factory and Shops legislation,¹²⁶ and cultural pressures of 'moral suasion' and philanthropic disapproval generated by the public revelation of 'evils' inflicted against women and children in Royal Commissions and public hearings.¹²⁷ These measures were, by the mid-1880s, widely viewed as unsatisfactory in comparison to laws that entrenched a general minimum entitlement for employees.¹²⁸ State systems did often include criminal penalties, including imprisonment for periods not exceeding three months for award breaches that were 'wilful acts',¹²⁹ however it was widely recognised that unions, together with public sentiment supporting wage minima, were crucial to effective enforcement. As one observer put it,

even a large force of inspectors could not learn of all the supposed violations if they were not brought to their attention by some responsible agency or organization. This the trade union undertakes to do ... it is doubtful if a full

¹²¹ *Josephson v Walker* (n 114).

¹²² *Rural Workers Union* (n 84) 78 (Higgins J).

¹²³ *Broken Hill Case* (n 16) 32 (Higgins J).

¹²⁴ *Hammond* (n 86) 624.

¹²⁵ *Bennett* (n 14) 136. As Bennett observes, no inspectors were actually appointed until 1934.

¹²⁶ *Quinlan and Sheldon* (n 41) 13.

¹²⁷ *Royal Commission on Employees in Shops: Report on the Operation of the Victorian Factory Act 1874* (Report, 1884) 5.

¹²⁸ Stuart Macintyre, *Winners and Losers: The Pursuit of Social Justice in Australian History* (Routledge, 1985) 47–9.

¹²⁹ See, eg, *Industrial Disputes Act* (n 92) s 43.

compliance with a wages board determination is anywhere secured without an organisation of the workers to see to its enforcement.¹³⁰

The new system hinged on compulsory entitlement and recognition for registered trade unions and employer associations with the capacity to activate processes of conciliation and arbitration themselves.¹³¹ Unions' pre-eminent role in award enforcement was a facet of their fundamental role in the system: as entities with unilateral access to conciliation and arbitration who could effectively force employers to the bargaining table.¹³² Powers of entry and inspection were integral to the meaningful exercise of rights and responsibilities by these actors. The *1904 Act* granted wide powers in this respect, allowing every person authorised in writing by the President or Registrar the ability to enter any building or premises in respect of which any industry was carried on, any award had been made or 'any offence against the Act' suspected, and inspect and view the work, material, machinery or appliances for the purposes named in the authority.¹³³ Following any instance of non-compliance, regardless of the seriousness of the act and whether it was deliberate or accidental, unions had the capacity to bring a 'dispute' (which could be a 'paper dispute' involving no physical manifestation of industrial action), which enlivened the Court's jurisdiction to resolve the matter. Such resolution would usually be by conciliation and occasionally by arbitration, followed by a rapid return to work.¹³⁴ Even though industrial action undertaken pursuant to this process was technically unlawful (potentially involving the commission of industrial torts, breach of contract and/or the breach of express terms of the legislation and/or awards), legal sanctions were very rarely brought in relation to these activities in practice.¹³⁵ Enforcement of the tribunal's determination was inherently 'strict', in the sense that either party, if they were dissatisfied with the way an award was being applied, could trigger a dispute to the tribunal that would then be quickly resolved. Unions' ability to access workplaces to represent employees and inspect books without the need to demonstrate a suspected breach of conditions meant that they exercised a preventative influence in relation to employer non-compliance that is difficult to represent empirically, although contemporary historical sources confirm the significance of this informal role.¹³⁶ According to an observer of the wages board system writing in 1915, 'the influence of the trades unions in securing information concerning violations of the law and reporting these violations to the factory inspectors has been one of the most important aides in securing stricter compliance

¹³⁰ Hammond (n 86) 607–8.

¹³¹ Creighton (n 49) 844. The encouragement of representative bodies for employers and employees was a stated object of the *1904 Act* (n 57), s 2(vi) of which made it a priority to 'encourage the organisation of representative bodies of employers and employees'.

¹³² Mark Bray and Andrew Stewart, 'From the Arbitration System to the Fair Work Act: The Changing Approach in Australia to Voice and Representation at Work' (2013) 34(1) *Adelaide Law Review* 21, 25.

¹³³ *1904 Act* (n 57) s 41.

¹³⁴ Creighton (n 49) 855.

¹³⁵ *Ibid.*

¹³⁶ Under the *Workplace Relations Act* (n 29), union rights of entry, inspection and interview could only be exercised for the purposes of investigating specific breaches of terms of the Act or an instrument: Ingrid Landau, Sean Cooney, Tess Hardy and John Howe, *Trade Unions and the Enforcement of Minimum Employment Standards in Australia* (Report, 2014) 15.

with the law.¹³⁷ This writer's observation of three exceptional situations where he perceived that the law was routinely not enforced — Chinese furniture manufacturing, workplaces in remote regions such as Tasmania where there was a 'lack of public concern for workers sweating' and in instances where a worker's categorisation as an apprentice or improver was contested — invites the inference that unionised workplaces in urban areas were less likely to be afflicted by systematic patterns of non-compliance in relation to adult workers.¹³⁸

B Early 21st Century

1 *The Lives Protected by Contemporary Wage Minima*

Today's wage minima are only partially justified in terms of worker protection.¹³⁹ The national minimum wage and modern award wages are intended to provide a 'safety net of fair minimum wages'¹⁴⁰ in support of collective bargaining rather than a 'living wage', within the *Fair Work Act*'s general objective of creating a 'balanced framework for cooperative and productive workplace relations'.¹⁴¹ Wage minima apply broadly, with all national system employees being covered by the national minimum wage or a modern award. The 'safety net' concept was first introduced in the objects provisions of the 1993 amendments to the *Industrial Relations Act 1988* (Cth) to express the function of the award system.¹⁴²

In setting the current safety net, the FWC must take into account a wide range of matters.¹⁴³ While one of those matters comprising the minimum wages objective — 'the relative living standards and needs of the low paid' — may be understood as partial recognition of the living wage principle, s 284(1) of the *Fair Work Act* profoundly departs from the Higgins' formulation in its implication that the 'performance and competitiveness of the national economy' is an objective at odds with, rather than integrally congruent with, strong social protections for workers. The FWC is required to consider matters that relate to particular characteristics of the national economy: 'productivity, business competitiveness and viability, inflation and employment growth' (s 284(1)(a)) and 'employment growth, inflation and the sustainability, performance and competitiveness of the national economy' (s 134(1)(h)). The Act also enshrines the imperative to promote particular practices

¹³⁷ Hammond (n 86) 619.

¹³⁸ The dynamics of non-payment of wage minima to Chinese furniture manufacturing workers between 1880 and 1930 are discussed in Peter Gibson, 'Australia's Bankrupt Chinese Furniture Manufacturers, 1880–1930' (2018) 58(1) *Australian Economic History Review* 87.

¹³⁹ Federal minimum wage laws have only ever applied to employees, excluding other types of workers such as independent contractors. An exception to this is found in cl F.5.8 in sch F of the Textile, Clothing, Footwear and Associated Industries Award 2020 which provides that award minima apply to certain self-employed outworkers. Further, the Albanese Labor Government has committed to 'extend[ing] the powers of the Fair Work Commission to include "employee-like" forms of work, allowing it to make orders for minimum standards for new forms of work, such as gig work': see Australian Government, 'Jobs and Skills Summit: Outcomes' (1–2 September 2022) 6.

¹⁴⁰ *Fair Work Act* (n 19) s 284.

¹⁴¹ *Ibid* s 3.

¹⁴² Section 7 of the *Industrial Relations Reform Act 1993* (Cth) introduced new objects to pt VI of the *Industrial Relations Act 1988* (Cth), including a reference to a safety net in s 88A(b).

¹⁴³ See the minimum wage objective in *Fair Work Act* (n 19) s 284(1) and the modern awards objective in s 134(1).

such as ‘the need to promote flexible modern work practices and the efficient and productive performance of work’ (s 134(1)(d)) and to consider ‘the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden’ (s 134(1)(f)). These clauses invert the positive nexus drawn by Higgins between employment regulation and business productivity and efficiency, constructing them instead as inherently opposed objectives. They also invite inquiry into the impact of wage minima at a level that is smaller than the Higgins’ scale of an entire industry and is instead concerned with the conduct and viability of ‘business’, a term that does not exclude approaches that emphasise smaller aggregations of individual enterprises.¹⁴⁴

There is no requirement for the FWC to consider the needs of workers in general, much less their households, in an unqualified way in setting wage minima. Workers who do not fall within the circumscribed categories of ‘the low paid’, junior employees, trainees and/or employees with a disability do not receive mandated consideration in terms of their general needs and interests. The *Fair Work Act* requires the FWC to consider narrower dimensions of worker need and to do so in prescribed ways. The need for ‘social inclusion’ is to be addressed through ‘workforce participation’. The performance of work during unsocial and non-standard hours is framed as a disutility requiring ‘additional remuneration’ as compensation rather than, as previously, matters where employees stood in a position of vulnerability to employers, in need of protection from potentially ‘unreasonable or unjust demands’.¹⁴⁵ The character and determinants of ‘business competitiveness and viability’, are open-ended considerations under the terms of s 284(1)(a), with no prescription as to the bases the FWC can consider for what enables a business to be competitive and viable. The FWC draws extensively on expert evidence and research reports to calculate adjustments to the National Minimum Wage, which accord a significant role to economic quantitative and material indicators, such as productivity, digital activity, hours worked, labour turnover, inflation, the consumer price index, underemployment, household spending, financial wellbeing, pay gap statistics, and apprentice and trainee outcomes.¹⁴⁶

Some race-based exclusions from minimum wage law protection potentially remain in practice — despite the 1958 repeal of the *Immigration Restriction Act*, the illegality of discrimination against migrants based on their race since the *Racial Discrimination Act 1975* (Cth)¹⁴⁷ and the absence of legislated exclusions from state-mandated minimum wages based on race. Despite the FWO’s declarations that the

¹⁴⁴ In the *Four Yearly Review of Modern Awards, Penalty Rates* [2017] FWCFB 1001, the Full Bench of the FWC noted that impacts of award reductions need not apply ‘uniformly’ across all businesses in the hospitality and retail sector and ‘would depend on the circumstances applying to individual businesses’: at 32.

¹⁴⁵ *Fair Work Act* (n 19) s 134(1)(da). Cf *Judgement re Five Day Working Week* (1945) 54 CAR 34.

¹⁴⁶ Fair Work Commission, *Research Reference List: Annual Wage Review 2021–22* (Report, 6 June 2022).

¹⁴⁷ However, as Tham et al argued, it is unclear whether this extends to protection against discrimination based on migrant status: Joo-Cheong Tham, Iain Campbell and Martina Boese, ‘Why is Labour Protection for Temporary Migrant Workers So Fraught? A Perspective from Australia’ in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: Regulatory Challenges* (Hart Publishing, 2016) 173, 181.

Fair Work Act applies to all employees regardless of visa status,¹⁴⁸ temporary migrants who worked in breach of their visa conditions, or remained in Australia after their visa expired, could be excluded by common law doctrine.¹⁴⁹ The reports of several government inquiries recommended that the Commonwealth Parliament remedy this situation by confirming in legislation that minimum wage laws apply equally to all employees regardless of migration status.¹⁵⁰ However, while one such private member's Bill was introduced to Parliament in 2016,¹⁵¹ this exclusion of some migrant workers from minimum wage protection was not remedied until the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth) was passed in June 2023.¹⁵² Many temporary migrant workers are also practically excluded from the benefit of minimum wages through the operation of migration policies that reduce their labour market power by creating dependence on employers — restricting their ability to exit or to report non-compliant employers.¹⁵³ For instance, working holiday makers seeking to extend their visas to a second year by working for 88 days in a primary industry such as horticulture, require documentation from employers such as pay slips, and are commonly underpaid,¹⁵⁴ and workers on Temporary Skill Shortage visas (previously 457 visas) rely on their employers' continuing sponsorship for both ongoing employment and the right to remain in the country.¹⁵⁵ Further, Indigenous workers have been identified as particularly vulnerable to underpayment of minimum wages due to factors such as understanding of rights, access to services and discrimination.¹⁵⁶

While state-mandated minimum wages are no longer differentiated on the basis of gender and are calculated on an individual, rather than 'household' basis, practical gender-based disparities persist. As modern awards prescribe minimum wages, intended as a safety net for collective bargaining, rather than setting 'paid rates', actual wages depend on enterprise-level bargaining above the safety net. Australia's labour market has become horizontally segregated on gender lines, with wages paid in female-dominated industries being lower than those paid in male-dominated industries.¹⁵⁷ Further, women have been identified as at greater risk of

¹⁴⁸ Fair Work Ombudsman, 'Gold Coast Restaurant Operators Penalised \$225,500' (Media Release, 7 December 2021).

¹⁴⁹ Stephen Clibborn, 'Why Undocumented Workers Should have Workplace Rights' (2015) 26(3) *The Economic and Labour Relations Review* 465.

¹⁵⁰ Productivity Commission (n 19) Recommendation 29.4; Senate Standing Committee on Education and Employment (n 12) Recommendation 23; Attorney-General's Department (Cth), 'Report of the Migrant Workers Taskforce' (7 March 2016) Recommendation 3.

¹⁵¹ Fair Work Amendment (Protecting Australian Workers) Bill 2016 (Cth).

¹⁵² The *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth) inserted in the *Fair Work Act* (n 19) s 40B, which states, 'For the purposes of this Act, any effect of the *Migration Act 1958*, or an instrument made under that Act, on the validity of a contract of employment, or the validity of a contract for services, is to be disregarded.' Note also *Industrial Relations Act 1979* (WA) s 84AA — inserted by the *Industrial Relations Legislation Amendment Act 2021* (WA) — which allows the Industrial Magistrate's Court to deal with an illegal employment contract as if it was valid, in relation to a contravention of a Western Australian State award.

¹⁵³ Wright and Clibborn (n 4).

¹⁵⁴ Howe et al (n 12).

¹⁵⁵ Boucher (n 11).

¹⁵⁶ Senate Economic References Committee (n 12) 32.

¹⁵⁷ Meraiah Foley and Rae Cooper, 'Workplace Gender Equality in the Post-Pandemic Era: Where To Next?' (2021) 63(4) *Journal of Industrial Relations* 463, 465.

unlawful underpayment due to a range of factors including their over-representation in casual and other insecure work.¹⁵⁸

2 *The Rationale for Contemporary Wage Minima*

The rationale for the minimum wage under the Fair Work system advanced by the Rudd Government in 2007 was to provide part of a guaranteed ‘safety net of decent, relevant and enforceable minimum wages and conditions for working Australians’,¹⁵⁹ and the *Fair Work Act* aimed ‘to achieve productivity and fairness through enterprise-level collective bargaining underpinned by the guaranteed safety net’.¹⁶⁰ That is, it was not a living wage, but a mandated minimum standard underpinning a system of enterprise bargaining to be undertaken in good faith. In contrast to the overtly moralising language and objectives of the *Harvester* wage, which aimed at protecting and improving the character of the male working-class breadwinner, the ‘safety net’ concept is instead passive and asocial. It relies on an idea of labour law which ‘catches’ a subset of workers in particularly needy circumstances, rather than contributing to the rebalancing of power between employers and employees that arises from the employment relationship itself. As noted above, the current minimum wage safety net requires the FWC to simultaneously consider human needs on a qualified basis (such as ‘social inclusion’), and economic indicia (‘the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth’).¹⁶¹ The imperative to simultaneously consider social and economic matters is not recent, dating back to the addition of employer ‘capacity to pay’ to basic wage calculations in the 1930s. The current composition of matters in s 284(1)(a) of the *Fair Work Act* also stands in continuity with the equivalent section of the *Workplace Relations Act 1996* (Cth), which required the Australian Industrial Relations Commission in performing its functions (including setting the minimum wage) to take into account ‘the public interest’ and have regard to

the state of the national economy and the likely effects on the national economy of any order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.¹⁶²

In applying the statutory objectives, the FWC has noted that they ‘are very broadly expressed and do not necessarily exhaust the matters which the [Expert] Panel might properly consider to be relevant’.¹⁶³ Applying them involves an ‘evaluative exercise’, negotiating some overlap and tension between them and

¹⁵⁸ Senate Standing Committee on Education and Employment (n 12).

¹⁵⁹ Kevin Rudd and Julia Gillard, *Forward with Fairness: Labor’s Plan for Fairer and More Productive Workplaces* (Australian Labor Party, 2007) 6.

¹⁶⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2008, 11190 (Julia Gillard, Acting Prime Minister).

¹⁶¹ *Fair Work Act* (n 19) s 284(1)(a).

¹⁶² *Workplaces Relations Act* (n 29) s 103(1)(b). That Act set as one of its principal objects the provision of ‘an economically sustainable safety net of minimum wages and conditions’ (s 3(c)) thus explicitly qualifying the protective scope of the safety net on an economic basis. For a comprehensive analysis of the public interest concept in Australian labour law history, see Naughton (n 94).

¹⁶³ *Annual Wage Review 2021–22* [2022] FWCB 3500 [22].

attaching ‘no particular primacy’ to any. The FWC rejected ‘a mechanistic or decision-rule approach to wage fixation’ as the weighting given to each statutory objective is dependent on particular social and economic contexts.¹⁶⁴ It has resisted attempts by the Australian Council of Trade Unions to revisit ‘living wage’ considerations of workers’ needs, in favour of maintaining a ‘balancing act’ focused on proof that the economy has unutilised capacity to pay.¹⁶⁵ Further, because the FWC’s annual wage reviews do not take account of widespread employer non-compliance in certain industries, they are disconnected from the reality in those industries. As Healy and colleagues argue, this approach risks sapping the FWC’s credibility in wage setting.¹⁶⁶

Despite the multiple social and economic objects for minimum wage laws in the current Act, some elected federal state actors have placed strong emphasis on economic considerations, and in particular on the narrow objective of employment creation. In his second reading of the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 (‘2020 IR Bill’), then Attorney-General, Christian Porter, stated that the Bill’s aim was ‘to help Australia’s recovery from COVID-19 by supporting productivity, jobs and economic growth’ with ‘one simple goal, that being to create jobs’.¹⁶⁷ Reforms introduced to this end focused on increasing the quantity of jobs, in support of business needs, rather than the quality of jobs in support of minimum wages for workers.¹⁶⁸ The 2020 IR Bill sought to address the problem of employer non-compliance with minimum wage laws by including increased maximum fines and criminal sanctions for the most egregious instances of ‘wage theft’. However, despite bipartisan support for those parts of the Bill, the Government withdrew them.¹⁶⁹ In contrast, the Albanese Labor Government has maintained a policy to increase wages. Its main intervention in 2022 was reform of the Fair Work collective bargaining system in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth). The Act did not include the new government’s promised criminal sanctions for ‘wage theft’, which were delayed to an anticipated additional tranche of amendments to the *Fair Work Act* in 2023. Instead, it introduced minor reforms aimed at addressing employer non-compliance such as making unlawful the advertising of jobs at below-minimum wages.¹⁷⁰ The new government also submitted to the FWC’s 2021–22 Annual Wage Review, in the context of 5.1% inflation, that the FWC should ensure ‘that the real wages of Australia’s low-paid workers do not go backwards’.¹⁷¹

Despite the technical framing of wage minima considerations under the *Fair Work Act*, a sense of moral distinction between ‘good’ and ‘bad’ employers, and a notion that it is proper for minimum wage laws to protect and foster the former and sanction the latter has become apparent in recent commentary by Commonwealth

¹⁶⁴ Ibid [5]–[8].

¹⁶⁵ Healy et al (n 47) 164.

¹⁶⁶ Ibid 175.

¹⁶⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 December 2020, 11016.

¹⁶⁸ Stephen Clibborn, ‘Australian Industrial Relations in 2020: COVID-19, Crisis and Opportunity’ (2021) 63(3) *Journal of Industrial Relations* 291 (‘Australian Industrial Relations in 2020’).

¹⁶⁹ Stewart et al (n 2).

¹⁷⁰ *Secure Jobs, Better Pay Act* (n 20) pt 25.

¹⁷¹ Australian Government, *New Australian Government Submission to the Fair Work Commission Annual Wage Review 2022* (3 June 2022) 2.

and state actors reflecting on enforcement matters. The federal Attorney-General's Department drew this distinction in its 2019 discussion paper seeking submissions on 'strengthening penalties for non-compliance':

[T]he overwhelming majority of employers who are trying to do the right thing are competing against those that underpay or exploit workers. The Government considers it unacceptable that there is a persistence of underpayment and exploitation behaviours by a small number of employers.¹⁷²

In the State of Victoria, where criminal sanctions were introduced to address employer non-compliance, exclusions apply to employers who make 'honest mistakes' or 'exercise due diligence in paying wages and employee entitlements'.¹⁷³

At the time of writing, it remains too early to assess whether the new federal Labor government will take a different approach. Its one published policy for addressing employer non-compliance with minimum wage laws appears to maintain the focus on punishing 'bad' employers for 'wage theft' with criminal sanctions.¹⁷⁴ There are also indications of continued distinguishing of 'good' small business owners in the defence of horticulture farmers by the Minister for Employment and Workplace Relations, Tony Burke, who claimed that

some of the worst examples of wage theft were coming from that exact sector, not because of the farmers themselves but because of the labour hire companies that were going through rorting the systems. The farmers thought they were paying for decent wages ...¹⁷⁵

However, in a potentially significant departure from previous government discourse, when announcing plans to introduce legislative reforms in 2023, Burke publicly recognised a category of non-compliant employers as a target for enforcement, additional to deliberate wage thieves and the honestly inadvertent, being those who 'were reckless to the extent of really not making an effort to do the proper checks and they had the capacity to do so'.¹⁷⁶

Thus, applied too strictly, minimum wage laws threaten the good reputation of business owners and wider social prosperity. The simplistic representation of employer non-compliance with minimum wage laws as binary — deliberate or accidental — ignores other potential contributing factors such as the adequacy of business efforts to comply. By assuming that minimum wage law complexity is a major contributor to employer non-compliance, this view prioritises the convenience of business over the protection of workers' income. The binary approach, together with the assumption that only a small minority of employers breaches minimum wage laws, also gives licence to governments to target their policy responses narrowly at the worst cases of deliberate non-compliance.

¹⁷² Attorney-General's Department (Cth), 'Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance' (Discussion Paper, 19 September 2019) 2.

¹⁷³ Daniel Andrews, 'New Laws to Crack Down on Wage Theft' (Media Release, 18 March 2020).

¹⁷⁴ Australian Labor Party (n 27).

¹⁷⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 2022, 3498.

¹⁷⁶ Tony Burke, 'Address: National Press Club' (Speech, National Press Club, 1 February 2023).

3 *Employer Opposition as a Context for the Formulation of Minimum Wage Laws*

With few exceptions,¹⁷⁷ there is little explicit contemporary argument for ‘freedom of contract’ as a principle for opposing minimum wage regulation per se. Rather, employers oppose the removal of practical freedoms to pay below legal minimum wages that they currently enjoy. Employer opposition to wage minima now occurs through the discourse of undue legal ‘complexity’ and potential for unforeseen consequences from overly rigid enforcement. Employers argue that strict enforcement may cause grave social and economic injury, endangering the reputation of business owners through no fault of their own. Just as the interests, needs and character of the working-class household were framed by Justice Higgins as synonymous with society, within this discourse an association is drawn between the viability of an individual business and the viability and prosperity of wider society. The National Farmers’ Federation argued, unsuccessfully,¹⁷⁸ against proposed amendments to the Horticulture Award 2020 imposing a minimum wage floor under piece rate arrangements, claiming

the risk of putting a minimum hourly wage floor price on piecework rates is that growers will see productivity and the pool of suitable workers drop¹⁷⁹ [and] you’ll just be driving a whole bunch of growers and small growers out of business and out of the economy.¹⁸⁰

This was in the context of ongoing calls by horticulture employer representatives to increase temporary migration to address claimed labour shortages, and widespread underpayment of wages for temporary migrants working in the industry.¹⁸¹

Business representatives have resisted proposals to increase enforcement of minimum wage laws, arguing that doing so would jeopardise business viability and, consequently, Australia’s wellbeing. They have made this argument consistently since the 2015 national media exposé of 7-Eleven businesses¹⁸² brought underpayment of minimum wages into the national spotlight. For instance, the Australian Chamber of Commerce and Industry (‘ACCI’) emphasised the shared interest of business and broader society, arguing:

When Australian businesses are growing, creating more jobs and employing more people, the entire community benefits. ACCI therefore strongly urges

¹⁷⁷ HR Nichols Society, Submission No 74 to Productivity Commission, *Inquiry into Executive Remuneration* (5 June 2009); Australian Mines & Metals Association, Submission No 19 to House of Representatives Standing Committee on Education and Employment, *Fair Work Amendment (Tackling Job Insecurity) Bill 2012* (March 2013); Frank Chung, “‘Low-Paid Work Provides Dignity’: MPs Urged to Scrap \$19.49 Minimum Wage, Unions Slam “Appalling” Push”, *news.com.au* (online, 20 August 2019) <<https://www.news.com.au>>.

¹⁷⁸ *Australian Workers Union* [2022] FWCFB 4.

¹⁷⁹ An interesting claim that imposing a minimum wage floor, but no ceiling, would discourage workers from seeking employment: Cait Kelly, ‘Australian Farm Workers Entitled to Minimum Wage in Major Industry Shake-Up’, *The Guardian* (online, 4 November 2021) <<https://www.theguardian.com/australia-news>>.

¹⁸⁰ Kath Sullivan, ‘Labor Picks Fight with Farm Piece Rates in a Move Critics Say Could Drive Producers to the Wall’, *ABC News* (online, 19 March 2021) <<https://www.abc.net.au/news>>.

¹⁸¹ Howe et al (n 12).

¹⁸² ‘VIDEO: 7-Eleven: The Price of Convenience’, *Four Corners* (ABC, 31 August 2015) <<https://www.abc.net.au/news>>.

caution against changes to our workplace compliance regime, such as the introduction of criminal sanctions for underpayment, that would make it harder to do business in Australia.¹⁸³

The whole community benefits when businesses grow and employ more staff. Conversely, if employers hold back from hiring or shut up shop because they are concerned about the risk they face of imprisonment, it will adversely affect the entire community.¹⁸⁴

Similarly, the National Farmers' Federation resisted increased enforcement, claiming that 'undue restraints on business decision-making impede growth and innovation, while complexity drives up compliance costs. These issues need to be addressed to support the future competitiveness of the agriculture sector and the Australian economy.'¹⁸⁵

Some employers went as far as calling for an amnesty, protecting them from penalty for breaching wage laws. One restaurateur said:

The legislation is in need of serious reform ... It is outdated, convoluted and complex. It is almost impossible for even the most professional organisation to be totally compliant, but hitting employers with a big stick is not going to solve the problem ... [A]llow employers to make adjustments without fear of being publicly attacked or fined.¹⁸⁶

The Woolworths Group, after admitting to millions of dollars in underpaid wages, supported this notion of an amnesty from penalty for employers who have breached minimum wage laws:

We would support the notion of access to a 'Safe Harbour' regime, in which companies have the opportunity to remedy inadvertent underpayments in a timely manner without the threat of punitive sanction. Any system should ultimately motivate individuals and organisations to do the right thing, and for impacted workers to be paid back.¹⁸⁷

The Business Council of Australia even suggested that the government provide tax incentives for small businesses to encourage them to comply with wage laws:

Employers should wherever possible review and update their payroll systems to ensure they are adequate. The Government should consider measures to encourage this process, for example by providing tax incentives for smaller businesses.¹⁸⁸

A consistent theme in industry association and employer submissions to government inquiries is the claim that the majority of cases of employer non-

¹⁸³ Australian Chamber of Commerce and Industry, Submission to Attorney-General's Department (Cth), *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (October 2019) ii.

¹⁸⁴ Australian Chamber of Commerce and Industry, 'Compliance Changes Must Not Put Business at Risk' (Media Release, 8 December 2020).

¹⁸⁵ National Farmers' Federation, Submission No 223 to Productivity Commission, *Inquiry into the Workplace Relations Framework* (13 March 2015) 6.

¹⁸⁶ Dani Valent, 'Restaurateurs Call for 'Amnesty' to Deal with Wage Compliance', *The Sydney Morning Herald* (online, 3 October 2019) <<https://www.smh.com.au>>.

¹⁸⁷ Woolworths Group, Submission No 71 to Economic References Committee, *Inquiry into the Unlawful Underpayment of Employees' Remuneration* (undated).

¹⁸⁸ Business Council of Australia, Submission No 69 to Senate Economics References Committee *Inquiry into the Unlawful Underpayment of Employees' Remuneration* (March 2020) [2.4].

compliance with wage laws involve honest businesses making unavoidable errors caused by the complexity of wage laws. They argue that a distinction must be drawn in enforcing minimum wage laws, including applying penalties, between the assumed majority of non-compliant employers who make genuine accidental errors and the minority who deliberately, egregiously and systematically underpay,¹⁸⁹ claiming, in the case of the National Farmers' Federation, that 'the overwhelming number of farmers take enormous pride in being fair employers and providing rewarding jobs to Australian and foreign workers'.¹⁹⁰ They urge that 'employers should not be at risk of being labelled a "thief" for such mistakes'.¹⁹¹ Employer representatives make this argument about small businesses in particular because they lack 'sufficient resources to invest in systems that can prevent errors',¹⁹² calling for a system that allows setting of penalties that 'address the special needs and circumstances of small and medium businesses whilst at the same time enabling the judiciary to impose sufficiently severe penalties on major institutions'.¹⁹³

Industry associations sought to extend this argument — that most employers who breach minimum wage laws are innocent victims of complex wage laws — to avoid significant increases in state enforcement measures. They resisted proposals to increase enforcement efforts and penalties, including criminalising some deliberate forms of 'wage theft', claiming that 'implementing criminal penalties for wage underpayments would discourage investment, entrepreneurship and employment growth'.¹⁹⁴

Therefore, employers argue, the implied objective of minimum wage laws is to protect and ensure respect for the autonomy of the business owner, as the ultimate source of 'jobs' and thus wider social prosperity. As the ACCI expressed it, 'nobody wins when a business closes because of the size of a fine or because the employer has been imprisoned'.¹⁹⁵

4 *Enforcement of Minimum Wage Laws*

Individual workers, whether represented or not, may recover unpaid wage debts. The framework no longer ties disputes to union recognition or their co-enforcement role. Instead, the primary burden for enforcement is on the FWO whose statutory functions include promoting harmonious, productive, cooperative workplace relations, and compliance, and which has significant discretion in allocating its resources to perform these functions through a range of support and enforcement

¹⁸⁹ Restaurant and Catering Australia, Submission to Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (October 2019); Woolworths Group (n 187); Ai Group, Submission No 62 to Economics References Committee, *Inquiry into the Unlawful Underpayment of Employees' Remuneration* (6 March 2020).

¹⁹⁰ National Farmers' Federation, 'Piece Work Rate Decision Threatens to Drive Horticulture's Best Workers Away' (Media Release, 4 November 2021).

¹⁹¹ Ai Group (n 189) 3.

¹⁹² Business Council of Australia (n 188) 1.

¹⁹³ National Retail Association, Submission to Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (2019) [4.2.8].

¹⁹⁴ Ai Group (n 189) [6a].

¹⁹⁵ Australian Chamber of Commerce and Industry (n 184) (emphasis added).

actions.¹⁹⁶ However, the agency has never been adequately funded to succeed in that role.¹⁹⁷

Unions no longer hold a formal place at the centre of Australia's industrial relations system, lacking their former capacity as parties to awards.¹⁹⁸ While the *Fair Work Act* still recognises unions' enforcement role, three decades of neoliberal reform of Australia's industrial relations system have constrained unions' capacity to effectively enforce minimum wage laws. The *Fair Work Act* restricts unions' right of entry to workplaces, limiting their ability to organise and to enforce minimum wage rights.¹⁹⁹ Union density has dropped dramatically, from 41% in 1992 to 12.5% in 2022.²⁰⁰ Unions may only exercise rights of entry if they give at least 24 hours' notice and if entry is for the purpose of investigating a suspected contravention affecting a member of that union.²⁰¹ Researchers have found that many unions have an ambivalent apprehension of their enforcement role: simultaneously viewing the protection of members' minimum conditions as an integral part of their role, while also recognising that resources dedicated to enforcement take away from their ability to undertake organising, recruitment and representation activities.²⁰² Despite these challenges, unions still recover a significant amount of unpaid wages on behalf of their members²⁰³ and have had some impact monitoring and enforcing labour standards for contracted-out services.²⁰⁴ However, industries with particularly low union presence, such as hospitality and horticulture, have relatively high incidence of employer non-compliance.²⁰⁵

In that context, the FWO must decide how to allocate its limited resources to best effect. Although there is no statutory equivalent to s 284(1)(a) that requires the FWO to take into account business viability in enforcing wage minima, in practice, consideration of 'business capacity to pay' has powerfully informed the organisation's strategic approach. The FWO's 'strategic priorities' for 2020–21 provided:

[A] business' financial position and viability will be considered when deciding whether to commence litigation for serious non-compliance, or determining the size of any contrition payment included in any Enforceable Undertaking.²⁰⁶

¹⁹⁶ *Fair Work Act* (n 19) s 682.

¹⁹⁷ Clibborn and Wright (n 10); Stephen Clibborn, Submission to the Attorney-General's Department, *Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-Compliance* (25 October 2019).

¹⁹⁸ Bray and Stewart (n 132) 28.

¹⁹⁹ Hardy and Howe (n 14); Clibborn and Wright (n 10); Rae Cooper and Bradon Ellem, 'The Neoliberal State, Trade Unions and Collective Bargaining in Australia' (2008) 46(3) *British Journal of Industrial Relations* 532.

²⁰⁰ Australian Bureau of Statistics, *Trade Union Membership, August 2022* (Catalogue No 3665.0, 14 December 2022).

²⁰¹ *Fair Work Act* (n 19) s 481.

²⁰² Ingrid Landau and John Howe, 'Trade Union Ambivalence Toward Enforcement of Employment Standards as an Organizing Strategy' (2016) 17(1) *Theoretical Inquiries in Law* 201.

²⁰³ Unions NSW, *Wage Thieves: Enforcing Minimum Wages* (Report, December 2018).

²⁰⁴ Sasha Holley, 'The Monitoring and Enforcement of Labour Standards When Services Are Contracted Out' (2014) 56(5) *Journal of Industrial Relations* 672.

²⁰⁵ Senate Economic References Committee (n 12).

²⁰⁶ Fair Work Ombudsman, 'FWO Launches 2020–21 Priorities' (Media Release, 13 July 2020).

The notion that minimum wages should be oriented to the protection of businesses (rather than workers) necessarily affects the FWO's decision-making in how and when to commence litigation, considering the size of the underpayment and business' capacity to pay. The approach was formalised in the FWO's Compliance and Enforcement Policy, which notes that, in deciding when to commence litigation, the FWO shall take into account the 'characteristics of the person(s) alleged to have committed the contraventions' which include their 'sophistication and financial position (including the impact on business viability, service delivery and employees if excessive costs and sanction imposed)'.²⁰⁷ While this policy was introduced during the COVID-19 pandemic, it formalised existing practices.²⁰⁸ It was also consistent with the Morrison Coalition Government's prioritisation of the quantity of jobs over their quality as measured by compliance with minimum legal standards. That is, a non-compliant business' survival was elevated in importance over the rights of a low-waged worker.

Over the 12 years to 2022, the FWO has initiated an average of 48 litigation cases per year. While litigation is just one part of its resource-maximising strategic enforcement approach, this underscores the fact that the FWO must make compromises when applying penalties to employers' resolution of underpayment cases outside of the courts. In the prominent case of *Made Establishment*, fronted by the celebrity chef George Calombaris, the employer agreed with the FWO to repay to its employees \$7.8 million in unpaid wages and to make a 'contrition payment' of \$200,000 to consolidated revenue. In response to public criticism that its calculation of the contrition payment was too lenient relative to the quantum of underpayment, the FWO said:

One of the other factors we take into account is the financial position of a company. ... [W]e will in future take into account the size of the underpayment as a major factor. We didn't take it into account in this case. We didn't make it as perhaps as high a priority as we think, clearly, the public and others believe we should.²⁰⁹

Indeed, the FWO did take a different approach, for example agreeing with the Australian Broadcasting Corporation to a contrition payment of \$600,000 in respect of the broadcaster's underpayment of \$11.9 million in wages.²¹⁰ Nonetheless, the FWO maintains its policy to prioritise a business's capacity to pay when making decisions regarding commencing enforcement litigation and calculating contrition payments. Consistent with this approach, courts have discounted penalties imposed on businesses that contravened minimum wage laws, due to the nature of the businesses among other circumstances, 'rarely ordering penalties in the upper range of the maximum available'.²¹¹ Based on their analysis of decisions of federal courts

²⁰⁷ Fair Work Ombudsman, *Compliance and Enforcement Policy* (July 2020).

²⁰⁸ David Marin-Guzman, 'Bosses Get a COVID-19 Reprieve on Underpayments', *Australian Financial Review* (online, 13 July 2020) <<https://www.afr.com>>.

²⁰⁹ Commonwealth, *Parliamentary Debates*, Senate Education and Employment Legislation Committee: Fair Work Ombudsman Senate Estimates, 23 October 2019, 132 (Sandra Parker, Fair Work Ombudsman).

²¹⁰ Peter Ryan, 'ABC to Make \$600K "Contrition Payment" over Underpayment of 1,900 Casual Staff', *ABC News* (online, 19 June 2020) <<https://www.abc.net.au/news>>.

²¹¹ John Howe and Sean Cooney, 'Mixed Messages: The Role of the Courts in Improving Compliance with Labor Law in Australia' (2023) 43(1) *Comparative Labor Law & Policy Journal* 105, 123.

in underpayment cases since 2011, Howe and Cooney conclude that, through their heavy discounting of penalties, ‘the courts are not doing enough to contribute to the promotion of compliance through their assessment of penalty’.²¹²

The federal government’s primary measure in recent years to address non-compliance with minimum wage laws was to increase the maximum available penalties for deliberate non-compliance. In 2017 the *Fair Work Act* was amended to increase the maximum fine tenfold.²¹³ The government also introduced in the 2020 IR Bill, but later withdrew, additional increases to maximum fines and criminal sanctions for the most serious cases of non-compliance. However, all of these increased fines and criminal sanctions maintained the focus on the assumed minority of cases of deliberate underpayment by ‘bad’ employers and were so narrowly worded as to be practically unenforceable, particularly by the under-resourced FWO. The 2017 maximum penalties apply only for ‘serious contraventions’ when a ‘person knowingly contravened’ the minimum wage laws as ‘part of a systematic pattern of conduct’.²¹⁴ The criminal sanctions proposed in the 2020 IR Bill would have required a prosecutor to prove intent and that the employer ‘dishonestly engages in a systematic pattern of underpaying’.²¹⁵ In order to satisfy the evidentiary burden required to impose maximum fines or secure criminal convictions, a significantly greater investment of resources would be required to investigate and prosecute, than for civil wage-recovery actions. However, while the government significantly increased funding of the FWO over the six years to 2022, the level remains comparable in practical terms now to 2009.²¹⁶ In 2022, the Coalition government’s federal budget announced reduced funding²¹⁷ although, after the general election, the Labor government’s budget again increased funding, albeit in the context of allocating to the FWO additional responsibilities from the soon to be abolished Australian Building and Construction Commission.²¹⁸

V Discussion

The analysis above indicates that the framing, justification and application of minimum wage laws has been shaped by historically specific narratives about the roles of households and businesses in engendering social prosperity. The *Harvester* living wage offered expansive and unqualified protection to a narrow category of employee subject, the white male householder, by virtue of his status as an employee alone. This protection was an expression of a thesis about the organic nexus between the material and mental security and character of the male breadwinner, and the productivity, peace, ‘civility’ and racial purity of wider society. It conceptualised the interests, character and capacity of working-class households to securely reproduce

²¹² Ibid 124.

²¹³ *Fair Work Amendment (Protecting Vulnerable Workers) Act* (n 24).

²¹⁴ *Fair Work Act* (n 19) s 557A.

²¹⁵ The 2020 IR Bill proposed to introduce a new s 324B to the *Fair Work Act* (n 19).

²¹⁶ Clibborn, ‘Australian Industrial Relations in 2020’ (n 168).

²¹⁷ Stephen Clibborn, ‘Temporary Migrant Workers Remain Vulnerable to Workplace Exploitation’, *The Sydney Morning Herald* (online, 8 April 2022) <<https://www.smh.com.au>>.

²¹⁸ ‘Budget Gives FWO \$70M to Assume ABCC Functions’, *Workplace Express* (online, 25 October 2022) <<https://www.workplaceexpress.com.au>>. The Australian Building and Construction Commission was abolished in February 2023.

to the shared benefit of society within a highly racialised and gendered framework. The wage minima of the contemporary period, by contrast, are framed as a 'safety net', a set of measures which are not addressed to meeting the needs of employees as a totality, but rather to ameliorating potential harms and disutilities experienced by particular sub-groups of workers and/or particular elements of working life. Simultaneously, the regulation of wage minima entrenches particular economic values that are applied at the national and enterprise levels and sets these criteria in implicit opposition to employer-focused criteria, against which they must be 'balanced'. In practice, employer associations have heavily emphasised the business competitiveness and viability rationales for wage minima in public discourse and marginalised their (already residual) social rationales. This contemporary opposition to wage minima has been commonly framed in terms of a critique of the complexity of regulation and the risk of reputational damage to 'good' businesses from overzealous approaches to compliance. While institutional state actors such as the FWC and FWO have not endorsed such arguments, the legal frameworks they are required to apply provide little basis for contesting them either, given the readiness with which the fortunes of individual businesses may be constructed as constitutive of wider national economic productivity, business competitiveness and employment growth. Recent initiatives by state and federal actors to criminalise wage theft, in affirming divisions between 'honest' and other categories of employer, have unwittingly contributed to the marginalisation of worker entitlement-based rationales for regulation.

This historical perspective indicates that questions of how strictly enforced wage minima should be do not float free of understandings of who labour law should protect and why. In these arguments, a sense of secure business reproduction as synonymous with economic and social prosperity is a commonly repeated theme, as is the imperative that minimum wage enforcement be undertaken in a manner that protects 'good' employers who inadvertently underpay wages and punishes only 'bad' employers who do so deliberately. This association between minimum wage enforcement and employer reputation and good character has a symmetric resonance, in form if not function, with the imperatives for minimum wage sanctity articulated by Justice Higgins that were anchored in the need to ensure working class men could be supported to develop their character and civic capacities. For Higgins, in the early 20th century, it was crucial that the living wage was strictly applied because payment below the required minimum threatened to unravel the lives of individuals, households, industries, and ultimately society through industrial unrest and (white) population decline. For the FWO, it is important that minimum wage laws be applied cautiously, lest unfair criticism of employers who had accidentally underpaid wages unravel good businesses which might, in turn, threaten the engine of a prosperous economy. In each case, wage minima were understood as a tool for improving the secure reproduction of an entity that was understood to be representative of Australian society, and the underlying source of social value.

These divergent paradigms of protection flowed through into mechanisms and practices of enforcement, which differed substantially between the periods considered here. In the *Harvester* period, the imperative to protect male breadwinners was practically reinforced by the active role played by unions (entities that, themselves, had worker protection as a primary objective) in the enforcement

process. The use of industrial action as a trigger for institutionalised dispute resolution meant that enforcement of award terms was strict, swift, participative and decentralised, and was not characterised by chronic employer non-compliance (in urban and white settings) without union acquiescence. By contrast, contemporary enforcement processes that rely on the strategic prioritisation of an underfunded inspectorate have seen ‘business viability’ and capacity to pay considerations emerge as policy criteria in allocating resources.

Finally, our historical analysis highlights overlooked continuities in the categories of employees who have been functionally excluded from wage minima protection over time. These exclusions were explicit in the early 20th century, and included the statutory exclusion of non-whites, agricultural workers and domestic servants as well as the second-class treatment of female and junior workers and the practical (if temporary) exclusion of non-union employees. Despite major shifts from exclusive to inclusive nominal protection over the course of the century — none of the above categories of worker are now formally excluded from protection, and laws prohibiting racial discrimination apply — significant historical continuities are apparent in terms of practical access to protection by non-citizens, women, Indigenous peoples, agricultural workers, and employees in industries with low union density. In the context of an inspectorate that continues to be under-resourced and that necessarily reproduces and amplifies the economic rationales for wage minima, and where unions are highly constrained in their enforcement capacity, these functional exclusions seem unlikely to be addressed without concerted legislative intervention.

The two periods analysed here reveal multiple categories of persons and relationships that were and are understood as involving vulnerability. In the first period, white male unskilled workers, women, juniors and non-whites (including Aboriginal people) were also viewed as vulnerable, although only the first of these was accorded formal and full intervention through labour law to limit the extent of their subordination to employers, based on the idea that other institutions such as households would exercise stewardship over the others.²¹⁹ In the contemporary period, labour law sets out to intervene in a wider array of vulnerabilities, that even extend to the reputational vulnerabilities of certain employers, but provides a very different kind of institutional apparatus for enabling those vulnerabilities to be addressed in practice. This stark divergence between the periods suggests the limitations of Davidov’s thesis that the purpose of labour law concerns core and relatively unchanging norms associated with addressing vulnerabilities. Our findings indicate that, even within one jurisdiction, Australia, it is clear that there is no direct relationship between the recognition that a particular group is vulnerable and whether or how labour law is made available to address that vulnerability in practice. This thesis supports Dukes’ insistence on the value of empirically exploring the purpose of labour laws within defined historical contexts,²²⁰ and extends her argument to suggest that it is not only categories of vulnerability that merit attention, but also changing senses of the actors that are understood to be the key sources and symbols of economic and social value.

²¹⁹ Davidov (n 53) 34.

²²⁰ Dukes, ‘Identifying the Purposes of Labor Law’ (n 52) 66.

VI Conclusion

There have been profound shifts in the ways in which wage minima, and labour laws in general, have been conceived, justified, contested and enforced in Australia over time. These shifts have not been a major focus of enforcement scholarship, which has tended to concentrate on understanding the causes of and solutions to the vulnerabilities of particular employee groups that are associated with underpayment and changes in the structure of labour inspectorates. Our approach in this article has been to redirect attention away from the ‘margins’ of the labour market and instead conceptualise wage minima as expressions of, and contributors to, concepts of social value that sit at the ‘centre’ of labour law and its wider social justification. In trying to explain the departures from the sacrosanct quality of wage minima, we have argued that there is merit in adopting a historically grounded approach which interrogates how particular configurations of law, discourse and practice have practically reinforced each other, rather than discussing enforcement practices and challenges in ahistorical and technical terms that are detached from cultural settings. This perspective opens up questions about how labour law is currently ‘constitutionalised’, and the potential advantages that might flow from revisiting the objectives of the national minimum wage, modern awards and the *Fair Work Act* to reassert the primacy of worker protection. Such a reconfiguration might also inform a reworking of the current statutory provisions which posit the performance and competitiveness of the economy as objectives at odds with strong worker protections, rather than being secured by them.

Long-term non-enforcement of minimum wage law has the potential to undermine social cohesion, and the shared expectation that nominally universal laws can be universally applied. The historical perspective advanced here shows that the sacrosanct status of the *Harvester* wage was grounded in a systemic orientation of labour law toward worker protection as a superordinate objective and to counteract the inequality of bargaining power inherent to employment relationships.²²¹ While the racialised and patriarchal context that underwrote Justice Higgins’ reasoning cannot and should not be returned to today, it is feasible for the objects of contemporary labour legislation, and the considerations guiding minimum wage and award setting, to again explicitly privilege the protection of all employees (not merely those classified as vulnerable). Such legislative amendments could potentially engender a wider cultural shift in understandings of the role of workers in creating social prosperity. Such a reorientation is compatible with, and would potentially enhance, the extensive existing policy recommendations for enhancing labour law enforceability among vulnerable worker groups.

²²¹ Davies and Freedland (n 62) 18.

Privatising Sexual Harassment

Margaret Thornton*

Abstract

Following the emergence of #MeToo, sexual harassment at work attracted sustained attention all over the world. In Australia, this resulted in multiple reports which confirmed high rates of sexual harassment and led to protracted agitation for law reform. Although the ensuing recommendations have been widely praised, this article argues that the continuing privatisation of the complaint process is a noted limitation because survivors are estopped from speaking out, while harassers remain free to harass others. With regard to the *Sex Discrimination Act 1984* (Cth), the article sets out to support the thesis as it pertains to the various steps associated with the individual complaint-based mechanism — namely, conciliation, non-disclosure agreements, litigation and the destruction of complaint files. While litigation is a public process, barely 1% of sexual harassment complaints proceed to a formal hearing, and there are strong disincentives for them doing so. Privatisation also ensures that the cumulative knowledge associated with individual complaints is denied to the public.

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I Introduction

Sexual harassment at work first came to the attention of the Australian public in the decade leading up to the millennial turn because of the periodic media reporting of scandals involving high-status harassers.¹ This created the impression that sexual harassment was the aberrant behaviour of powerful men rather than merely one manifestation of a systemic harm. A quarter of a century later, feminist activists hoped that this would change after the emergence of the international #MeToo movement. Influenced by developments in the United States, multiple survivors of sexual harassment, who formerly felt that they would not be believed, now felt empowered to speak out,² or they chose to lodge a formal complaint with a body such as the Australian Human Rights Commission ('AHRC').³ Nevertheless, in exchange for a financial settlement, they have been confronted with a demand for confidentiality regarding details about the workplace where the sexual harassment occurred, as well as the identity of the harasser. This means not only that the employer attracts no public disapprobation, but the harasser *himself* (as is invariably the case)⁴ is also subjected to no disadvantage and is theoretically left free to harass others.

The willingness of survivors to speak out following #MeToo led to vociferous campaigns for sexual harassment law to be reformed, including revelations regarding the extent of sexual harassment in prominent workplaces, such as the Australian Parliament.⁵ Numerous official inquiries have been launched into

¹ See, eg, the Ormond College affair: Jenna Mead (ed), *Bodyjamming, Sexual Harassment, Feminism and Public Life* (Random House, 1997); Helen Garner, *The First Stone: Questions about Sex and Power* (Picador, 1995). See also the David Jones affair: Bellinda Kontominas, 'David Jones Sex Harassment Case: Publicist Sues for \$37 Million', *The Sydney Morning Herald* (online, 2 August 2010) <<https://www.smh.com.au/business/david-jones-sex-harassment-case-publicist-sues-for-37m-20100802-112iw.html>>.

² See, eg, Laura Tingle, 'Brittany Higgins and Grace Tame Speak out at the National Press Club', 7.30 (Australian Broadcasting Corporation, 9 February 2022) <<https://www.abc.net.au/news/2022-02-09/brittany-higgins-and-grace-tame-speak-out-at-the/13748002>>.

³ Michael Pelly, 'Sexual Harassment Complaints Up by 25pc, Says Kate Jenkins', *Australian Financial Review* (online, 15 May 2022) <<https://www.afr.com/work-and-careers/workplace/sexual-harassment-complaints-up-by-25pc-says-kate-jenkins-20220515-p5alj1>>.

⁴ The most recent Australian national survey on sexual harassment revealed that 91% of women and 55% of men were harassed by men: see Australian Human Rights Commission ('AHRC'), *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces* (Report, November 2022) ('*Time for Respect*').

⁵ AHRC, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (Report, 2021) ('*Set the Standard*'). See also Margaret Thornton, 'Transforming the Culture of Parliament House', *AUSPUBLAW* (Blog Post, 27 April 2022) <<https://www.auspublaw.org/blog/2022/04/transforming-the-culture-of-parliament-house>>; Gabrielle Appleby and Prabha Nanda, 'Workplace Reforms in Courts and Parliaments: Some Guiding Principles', *AUSPUBLAW* (Blog Post, 27 April 2022) <<https://www.auspublaw.org/blog/2022/04/workplace-reforms-in-courts-and-parliaments-some-guiding-principles>>; Cheryl N Collier and Tracey Raney, 'Understanding Sexism and Sexual Harassment in Politics: A Comparison of Westminster Parliaments in Australia, the United Kingdom, and Canada' (2018) 25(3) *Social Politics: International Studies in Gender, State and Society* 432.

the institutional incidence of sexual harassment,⁶ the most comprehensive and wide-ranging Australian report being *Respect@Work*,⁷ which was based on data collected nationally.⁸ *Respect@Work* found sexual harassment to be widespread, with 33% of people (39% of women and 26% of men) having experienced sexual harassment in the workplace;⁹ those most vulnerable included young women under 30, LGBTIQ+ people, as well as those identifying as Aboriginal or Torres Strait Islander, and people with a disability. *Respect@Work* made 55 recommendations for change, most of which have now been enacted.¹⁰ Nevertheless, despite the positive response to remedying aspects of sexual harassment law, it is notable that the basic complaint-handling framework has remained the same, with a general preference for keeping details of complaints out of the public eye. The practice of confidentiality has persisted not only in respect of discrimination complaints arising from sex (a ground that includes pregnancy, sexual orientation and gender identity) as well as sexual harassment, but also in complaints relating to race, disability and age, the cognate grounds of discrimination proscribed at the federal level.¹¹

A flurry of reformist activity around sexual harassment occurred because of criticism from women that the government was not being sufficiently proactive in respect of women's issues, and it feared losing votes at the ballot box.¹² Although the tenor of the reforms was positive, this article argues that the approach towards sexual harassment has retained the conventional individual complaint-based model of liberal legalism. It will be shown that this individualised focus occludes the systemic nature of the discriminatory harm and the violation of human rights in such a way as to sustain the privatisation of the act of harassment. Despite sometimes

⁶ See, eg, AHRC, *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities* (Report, July 2017); Law Council of Australia, Submission to Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019); Chief Justice Susan Kiefel, 'Statement of the Hon Susan Kiefel AC, Chief Justice of the High Court of Australia' (Media Statement, 22 June 2020); Equal Opportunity Commission (SA), *Review of Harassment in the South Australian Legal Profession* (Report, April 2021); *Set the Standard* (n 5); Helen Szoke, *Preventing and Addressing Sexual Harassment in Victorian Courts and VCAT: Report and Recommendations* (Report, March 2021); Alana Moretti, 'Sexual Harassment in the Legal Profession: An Analysis of the Current Legislative Framework' (2022) 47(2) *Alternative Law Journal* 95. Prior to *Time for Respect* (n 4) in 2022, the AHRC reported on similar sexual harassment surveys conducted in 2003, 2008, 2012 and 2018. The international impact of #MeToo led to comparable studies on sexual harassment being carried out elsewhere: see, eg, Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, 2019).

⁷ AHRC, *Respect@Work: Sexual Harassment National Inquiry Report* (Report, 2020) ('*Respect@Work*'). Legislation was enacted in 2021 to implement the first 12 recommendations, and work was subsequently undertaken regarding others prior to the change of federal government in May 2022, when the Australian Labor Party took over from the conservative Liberal-Country Party Coalition Government.

⁸ *Time for Respect* (n 4).

⁹ *Ibid.*

¹⁰ *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth); *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) ('*Respect at Work Act*').

¹¹ *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth). See also *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*').

¹² Camilla Nelson, 'Women Stormed the 2022 Election in Numbers Too Big To Ignore: What Has Labor Pledged on Gender?', *The Conversation* (online, 22 May 2022) <<https://theconversation.com/au>>.

wishing to make their experiences public, individual survivors themselves become complicit in the privatisation thesis as they not only shoulder the psychological burden involved in having to prove the harassment themselves, but they also face substantial legal costs if they proceed to litigation and are therefore swayed by the lure of a financial settlement, despite its condition of confidentiality. While this article draws on the Australian federal legislation, the *Sex Discrimination Act 1984* (Cth) ('SDA'), to illustrate the argument, the individual complaint-based model found in state and territory legislation utilises a similar approach,¹³ thereby evincing a comparable deference towards the confidentiality of the substantive harm.

From the time a complaint is first lodged with the AHRC or other human rights agency, an attempt to retain a carapace of confidentiality around it is discernible, albeit not legislatively prescribed. While some survivors are in favour of privatising their complaints out of shame and embarrassment over what happened to them, others want their story to be told, particularly so that the harasser can be called to account. Corporate respondents, however, invariably insist on secrecy out of concern that any whiff of scandal could damage their brand name. Despite the fact that the official *raison d'être* of the SDA is to effect gender equality, sexual harassment highlights the dramatic inequality between corporate employers and harassers, on the one hand, and survivors, on the other hand — a triangular relationship that is invariably gendered.¹⁴ The formal complaint procedure under the SDA may assist in securing a monetary payment for the survivor as a condition of settlement, but it does nothing about calling the harasser to account or educating the community more generally. The primary concern would seem to be to ensure that there is minimal disturbance to the market activities of the employer.

To analyse the privatisation thesis, the article is presented in the following parts. Part II outlines the proscription of sexual harassment within the SDA and the steps leading to the lodgement of a formal complaint. It will be shown how, in lodging a complaint with the AHRC, the odds tend to be tilted against survivors from the outset as they assume responsibility for lodging the complaint, determining the course of action to be pursued and carrying the burden of proof despite the inequality of bargaining power between them and corporate employers. Part III shows how conciliation, the primary mode of dispute resolution under the legislation, operates to privatise justice from the outset, as the process occurs behind closed doors. Privatisation not only has the effect of protecting individual perpetrators who may go on to harass others, it also perpetuates the idea that making the harassment public is somehow shameful for survivors, a stance that does little to contain the incidence of sexual harassment in workplaces.

Part IV turns to non-disclosure agreements ('NDAs'), which entrench the confidentiality prescript. Once complainants have received a damages payment and

¹³ *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

¹⁴ Catharine A MacKinnon, 'Where #MeToo Came From, and Where It's Going', *The Atlantic* (online, 24 March 2019) 8 <<https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/>> ('Where #MeToo Came From').

signed an agreement, they are legally bound not to reveal information about the harassment. Ironically, however, the signing of an NDA normally places no constraint on the harasser, who may be left free to harass others, as occurred in the infamous Harvey Weinstein case.¹⁵ NDAs, which have become the norm in the settlement of sexual harassment complaints, also preclude the possibility of warnings to others. #MeToo led to a campaign to prohibit NDAs, but this has met with limited success in the Australian context, as will be shown.

Part V addresses litigation, which is treated as a last resort, occurring only when conciliation is unsuccessful. However, barely 1% of sexual harassment complaints lodged with the AHRC proceed to litigation under the *SDA*. Even then, when a matter is referred either to the Federal Court of Australia or the recently established Federal Circuit and Family Court of Australia, conciliation is favoured in the first instance as complaints are referred to assisted dispute resolution in a further attempt to avoid a formal hearing, for alternative dispute resolution ('ADR') is more economical for the state. The article also considers other disincentives facing survivors contemplating litigation, such as the possibility of significant legal costs, a factor that has contributed to the limited jurisprudence in discrimination law.

While litigation is normally the end of the road for a complaint that is not settled at the conciliation stage, there is a rider to the privatisation story that is considered in Part VI, which deals with the way complaint files are destroyed or 'sentenced' once they are closed. This may not directly impact the parties to a complaint, but it has potential ramifications for subsequent complainants, as well as for research and policy. The destruction of records means that there is an inability to evaluate how community attitudes or appraisal trends in the handling of complaints have changed over time. Most significantly, sentencing is a palpable reminder that it is the state, not the parties themselves, which determines that complaints of sexual harassment should remain confidential.

II Lodging a Complaint

Sexual harassment is a proscribed subset of sex discrimination and in 2020–21, of the total complaints lodged under the *SDA*, 252 (or 26%) related to sexual harassment.¹⁶ These complaints should not be regarded as individual aberrations as they represent the tip of the iceberg in respect of the systemic sexualisation of women at work, which Catharine MacKinnon, an international expert on sexual harassment, likens to an 'arm of the sex trade',¹⁷ because it is so common. While contemporary understandings of sexual harassment include same-sex harassment, as well as language and imagery that is sexualised,¹⁸ popular understandings tend to

¹⁵ 'Harvey Weinstein Timeline: How the Scandal Unfolded', *BBC News* (online, 24 January 2018) <<https://www.bbc.com/news/entertainment-arts-41594672>>.

¹⁶ AHRC, *2020–21 Complaint Statistics* (Report, 2022) ('*Complaint Statistics*').

¹⁷ MacKinnon, 'Where #MeToo Came From' (n 14) 11.

¹⁸ Catharine A MacKinnon, *Only Words* (HarperCollins, 1994) 31–47.

focus on overtly (hetero)sexualised forms of harassment,¹⁹ although the slipperiness of sex and sexism is acknowledged.²⁰ The media attention accorded prominent male harassers underscores the predilection in favour of the heterosexed paradigm.²¹ The media focus associated with #MeToo strongly reinforced the assumption that legally cognisable sexual harassment is both sexed and sexualised.²² At the same time, the theoretical understanding of sexual harassment has broadened in terms of LGBTIQ+ issues as well as conduct that transcends explicit sexual advances.²³ The focus on the harm associated with intimate relations recognises psychological harm in the computation of damages. In addition, as a result of recommendations made by *Respect@Work*, sex-based harassment has been expressly proscribed by s 28AA(1) of the *SDA*,²⁴ with particular reference to unwelcome conduct of a 'demeaning' kind.²⁵ Regardless of the broader understandings of sexual harassment that have emerged, the point I wish to stress is that the imperative in favour of privatisation has not changed; nor has it been recommended for change by *Respect@Work*, other than to look again at NDAs, as will be discussed.

Whatever sexual harassment survivors have endured, it can be difficult for them to articulate and report to a person in authority in their workplace.²⁶ Once they have done so, however, employers are anxious to keep such information in-house out of fear that the company's brand name could be damaged. Even if the CEO of a company were unaware of the harassment by an employee, the employer will be vicariously liable unless it can demonstrate that it took all reasonable steps to eliminate or mitigate the risk through its policies and codes of conduct,²⁷ but there is a lingering societal resistance to holding the employer liable in the case of individualised, interpersonal sexual relations.²⁸ In-house resolution may also have the advantage (from the employer's perspective) of protecting the harasser, who may

¹⁹ Jean L Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton University Press, 2002) 131; Vicki Schultz, 'Reconceptualizing Sexual Harassment' (1998) 107(6) *Yale Law Journal* 1683; Vicki Schultz, 'Reconceptualizing Sexual Harassment, Again', *The Yale Law Journal Forum* (Forum Post, 18 June 2018) 31; Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26(2) *Melbourne University Law Review* 422 ('Sexual Harassment').

²⁰ Leila Whitley and Tiffany Page, 'Sexism at the Centre: Locating the Problem of Sexual Harassment' (2015) 86(1) *New Formations* 34.

²¹ For a discussion of the various understandings of sexual harassment, see Thornton, 'Sexual Harassment' (n 19).

²² William E Foote and Jane Goodman-Delahunty, *Understanding Sexual Harassment: Evidence-Based Forensic Practice* (American Psychological Association, 2nd ed, 2021) 59.

²³ Ibid 59–62. For an insightful analysis of sexual relations in the workplace, see Barbara A Gutek, 'Understanding Sexual Harassment at Work' (1992) 6(2) *Notre Dame Journal of Law, Ethics and Public Policy* 335.

²⁴ *Respect@Work* (n 7) recommendation 16.

²⁵ The *Respect at Work Act* (n 10) removes the word 'seriously' from the phrase 'seriously demeaning' in *Sex Discrimination Act 1984* (Cth) s 28AA(1) ('*SDA*') in accordance with *Respect@Work* (n 7) recommendation 16(b).

²⁶ Whitley and Page (n 20) 38.

²⁷ *SDA* (n 25) s 106. See also Patricia Easteal and Skye Saunders, 'Revisiting Vicarious Liability in Sexual Harassment Cases Heard under the *Sex Discrimination Act*' (2020) 45(1) *Alternative Law Journal* 38.

²⁸ Cf Tristin K Green, *Discrimination Laundering: The Rise of Organizational Innocence and the Crisis of Equal Opportunity Law* (Cambridge University Press, 2017) 52–6.

be regarded as a valued employee,²⁹ which suggests that the interests of the survivor are unlikely to be taken seriously, particularly when that person is more likely to occupy a junior position. Nevertheless, the respondent employer will be anxious to dispose of the complaint as quickly as possible to ensure that the survivor does not complain to an external body. In-house resolution may be effective if the employer has a managerial structure and a human relations department, but a corporation may lack the requisite expertise to resolve a complaint satisfactorily,³⁰ in which case the complainant may choose to lodge a formal complaint with a human rights agency such as the AHRC.

The legislative framework in which the AHRC operates is directed towards discrimination in areas of public life, including the workplace, in accordance with the classical model of liberal legalism, which means that private life is off-limits to the law. Sexual harassment that occurs outside the workplace is not normally cognisable as a harm unless a clear connection can be established between that domain and the workplace;³¹ if the nexus is remote, it may raise questions as to employer liability.

While anti-discrimination legislation was regarded as a significant step towards equality in respect of gender and other specified grounds, it is notable that responsibility for lodging a complaint and taking any subsequent legal action in pursuit of a remedy is normally the responsibility of the person affected. Early state legislation, such as the *Anti-Discrimination Act 1977* (NSW), included provision for representative complaints, but such provisions appear to have been significantly under-utilised. However, it is notable that a new s 46PO has been included in the Respect at Work amendments to the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*') to enable unions and representative groups to apply for a matter to be heard as a representative complaint. The AHRC itself does not function as a regulator; nor is it empowered to initiate own-motion actions, including litigating claims in respect of the public interest.³² The individual complaint-based mechanism accords with the standard model of righting wrongs within the Anglo-Australian legal system. Tort law is the most familiar analogy, where the individual litigant bears the burden of proving the culpability of the wrongdoer in an endeavour to secure a remedy. If unable to satisfy the burden of proof to the requisite standard, the individual is bereft of redress unless a compromise can be reached.

The disproportionate burden placed on the complainant illustrates the privileging of the role of the employer and profit-making enterprises in a market-

²⁹ Joni Hersch, 'Valuing the Risk of Workplace Sexual Harassment' (2018) 57(2) *Journal of Risk and Uncertainty* 111.

³⁰ See, eg, Alison Mau, 'Wronged Academic Gets Public Apology As High-Profile #MeToo Case Comes to an End', *Stuff National NZ* (online, 25 August 2022) <<https://www.stuff.co.nz/national/300670732/wronged-academic-gets-public-apology-as-highprofile-metoo-case-comes-to-an-end>>.

³¹ *SDA* (n 25) s 106(2).

³² The AHRC has prepared a major discussion paper proposing reform of the present human rights framework, including that the Commission be empowered to conduct own-motion inquiries: see AHRC, 'Free and Equal: A Reform Agenda for Federal Discrimination Laws' (Position Paper, December 2021) ('Free and Equal'). The Equal Employment Opportunity Commission in the United States has an own-motion power, although it is rarely used: see Hersch (n 29) 127.

based society. This factor helps to explain why liberal legalism has long been resistant to shifting responsibility to employers to adopt a prophylactic approach in the first instance,³³ although central to a more progressive human rights advocacy. Indeed, it is notable that the legislative reforms designed to give effect to the *Respect@Work* recommendations include the requirement of a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.³⁴ However, the inclusion of a positive duty does not displace the legislative framework enabling the lodgement of an individual complaint by an affected individual.

The complaint-based system of righting wrongs places the probative responsibility entirely on the survivor, even though the employer is either the perpetrator of the wrong or is vicariously liable for the action of an employee. This imbalance in power is perpetuated within each phase of the complaint process and is crucial in whitewashing the role of the corporate employer in the harassment, a phenomenon that Green refers to as ‘organizational innocence’, which is central to her theory regarding the ineffectiveness of anti-discrimination legislation.³⁵ The focus on individual responsibility makes it very difficult for a complainant to succeed in a formal setting.³⁶

The primary mode of dispute resolution in all Australian anti-discrimination jurisdictions is conciliation, not litigation. Conciliation is treated as strictly confidential, so that it is difficult to determine what takes place behind closed doors or to evaluate its efficacy. However, it is the linchpin of sexual harassment law, as approximately 99% of complaints do not proceed to a formal hearing, although a proportion of complaints either fall by the wayside or are withdrawn.³⁷ In the case of comparable ADR methodologies that might be invoked to resolve civil rights claims in the United States, Kotkin points out that ‘the discourse about employment discrimination is skewed against workers by virtue of secrecy’.³⁸ This observation can be echoed in the Australian context and is central to the argument of this article. The confidentiality surrounding the complaint process at each stage signifies a desire

³³ See, eg, Margaret Thornton, ‘The Political Contingency of Sex Discrimination Legislation: The Case of Australia’ (2015) 4(3) *Laws* 314.

³⁴ *Respect at Work Act* (n 10) pt IIA. Victoria is in the forefront in terms of mandating positive action as duty holders are legally obliged to prevent (inter alia) workplace sexual harassment, not just respond to it: see *Equal Opportunity Act 2010* (Vic) s 15. For a useful case study, see Victorian Equal Opportunity and Human Rights Commission, *Preventing Sexual Harassment in Retail Franchises: Investigation under the Equal Opportunity Act 2010* (Report, 2022). See also Miranda G Stewart, ‘Positive Duties to Prevent Sexual Harassment at Work: Treat the Symptoms or Cure the Disease’ (2022) 47(2) *Alternative Law Journal* 101. An alternative suggestion with proactive effect, but involving criminal sanctions, would be to include sexual harassment in work health and safety laws, as proposed by Belinda Smith, Melanie Schleiger and Liam Elphick, ‘Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws’ (2019) 32(2) *Australian Journal of Labour Law* 1.

³⁵ Green (n 28).

³⁶ Cf *ibid* 49.

³⁷ Of the 3,113 complaints lodged in 2020–21, approximately 41% were conciliated, 26% were terminated or declined, 6% were withdrawn and 26% were discontinued: see AHRC, *Complaint Statistics* (n 16).

³⁸ Minna J Kotkin, ‘Invisible Settlements, Invisible Discrimination’ (2006) 84(3) *North Carolina Law Review* 927, 931.

to keep sexual harassment out of the workplace, arguably because sex has the potential to detract from productivity.³⁹ However, feminist scholars would also prefer to keep sex out of the workplace because of the prevalence of gender-based power differentials.⁴⁰

Despite the rhetoric of equality in the *SDA*, privatisation in the resolution of sexual harassment complaints results in a skewing of outcomes towards gender inequality. The disparity is compounded by competition and profit maximisation, which perennially outweigh the social liberal values of egalitarianism and collective good.⁴¹ This is because the institutional power associated with corporate respondents carries greater weight than the voices of survivors in a market-based economy so that the outcomes of disputes are skewed. Survivors of sexual harassment who lodge a complaint under the *SDA* are thereby caught in a web of conflicting values representing the implied inequality that necessarily arises from competition policy, on the one hand, and the rhetorical commitment to gender equality that infuses sex discrimination legislation, on the other.⁴²

III Conciliation

This Part expands on the concept of conciliation, the primary mode of dispute resolution mandated by all Australian anti-discrimination legislation, although the Victorian legislation permits a complainant to file a complaint with the tribunal in the first instance.⁴³ Conciliation is a flexible form of ADR that seeks to resolve complaints confidentially and expeditiously without the formality and costs associated with a court hearing. ADR is also indicative of the pronounced turning away from courts in Australia in recent years in civil matters.⁴⁴ Conciliation involves a human rights agency, such as the AHRC, endeavouring to settle a complaint informally by negotiating between the parties in whatever way it deems best, including bringing the parties together for a conciliation conference.

Conciliation as the *modus operandi* of anti-discrimination legislation in Australia has changed little since first developed approximately 40 years ago,⁴⁵

³⁹ Margaret Thornton, 'The Contradictions of Law Reform' (1991) 19(4) *International Journal of the Sociology of Law* 453, 465.

⁴⁰ Cohen (n 19) 132.

⁴¹ Margaret Thornton, 'Equality and Anti-Discrimination Legislation: An Uneasy Relationship' (2021) 37(2) *Law in Context* 12.

⁴² Alex Callinicos, *Equality* (Polity Press, 2000) 132.

⁴³ *Equal Opportunity Act 2010* (Vic) s 122 permits an initial complaint to be lodged directly with the Victorian Civil and Administrative Tribunal.

⁴⁴ Brian Opeskin, 'Rationing Justice: Tempering Demands for Courts in the Managerialist State' (2022) 45(2) *University of New South Wales Law Journal* 531.

⁴⁵ For analyses of Australian and UK jurisdictions, see Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98; Alysia Blackham and Dominique Allen, 'Resolving Discrimination Claims outside the Courts: Alternative Dispute Resolution in Australia and the United Kingdom' (2019) 31 *Australian Journal of Labour Law* 253(3); Dominique Allen and Alysia Blackham, 'Under Wraps: Secrecy, Confidentiality and the Enforcement of Equality Law in Australia and the United Kingdom' (2019) 43(2) *Melbourne*

although human rights agencies have adapted the model to accord with their own internal procedures,⁴⁶ such as determining what role lawyers should play.⁴⁷ Even though respondents may be legally represented or have their senior executive officers speak for them, representation for vulnerable clients is not always available due to cost and the scarcity of legal aid for civil matters.⁴⁸ The inherent inequality of bargaining power between the parties may induce a complainant to settle for less, an action that might be supported by a conciliator driven by the imperative of administrative efficiency.⁴⁹ The confidentiality of the process may also emphasise the deeply personal nature of sexual harassment as it suppresses the embarrassing, and possibly degrading, details of the conduct, a factor that puts added pressure on a survivor to settle.⁵⁰

Interviews that have been conducted by researchers with solicitors and AHRC conciliation officers indicate that a guarantee of confidentiality was also a major reason for respondents agreeing to settle.⁵¹ Because of the fear of reputational damage, they are willing to pay a secrecy premium to guarantee confidentiality.⁵² The downside is that the survivors of sexual harassment are denied any public acknowledgement of the wrong done to them in exchange for harmony, and the harassers go unpunished.⁵³ As each individual instance of discrimination is treated as discrete, the systemic nature of sexual harassment is also effectively denied. As conciliation takes place behind closed doors, a fair process cannot be assured but, if run well, it can represent a form of restorative justice for survivors.⁵⁴ Furthermore, if they are able to play a role in crafting the terms of settlement of a dispute, it may be empowering for them.

Nevertheless, the absence of public knowledge about the process means that prospective complainants are left in the dark as to how comparable complaints might have been determined, such as the time it took to achieve a resolution, as well as the terms of settlement and the quantum of damages. Indeed, the carapace of

University Law Review 384; Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 778 ('Behind the Conciliation Doors'); Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) ('*The Liberal Promise*').

⁴⁶ See, eg, Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the Regime* (Themis Press, 2010).

⁴⁷ Kingsford Legal Centre, *Having My Voice Heard: Fair Practices in Discrimination Conciliation* (Report, 2016) 12.

⁴⁸ The issue of class is beyond the ambit of this article, but I note its centrality in many sexual harassment complaints. While high-status female executives are certainly not immune from harassment, it is young women in service jobs, such as waiting on tables or serving in a shop, who are most vulnerable. In the case of sexual harassment, the latter will be unable to afford legal representation and her bargaining power will be less, and even if she has suffered considerable trauma, her damages will be minuscule compared with those of the executive.

⁴⁹ Kingsford Legal Centre (n 47) 23.

⁵⁰ Susan K Hippensteele, 'Mediation Ideology: Navigating Space from Myth to Reality in Sexual Harassment Dispute Resolution' (2006) 15(1) *Journal of Gender, Social Policy and the Law* 43, 58.

⁵¹ Allen and Blackham (n 45) 398.

⁵² Elizabeth C Tippet, 'The Legal Implications of the MeToo Movement' (2018) 103(1) *Minnesota Law Review* 229, 254.

⁵³ Foote and Goodman-Delahunty (n 22) 242.

⁵⁴ *Ibid* 17.

confidentiality prevents the development of a comprehensive evaluation of the process, which also precludes the possibility of using the information from conciliated complaints to effect policy change.⁵⁵ Public knowledge concerning the process is scant and details of settlement have been largely limited to statistical data in the annual reports of human rights agencies, although de-identified case summaries are currently published in the AHRC Conciliation Register that includes selective examples of successful conciliation.⁵⁶

Despite the convention that the process of conciliation is conducted behind closed doors and anything said or done in the process is treated as confidential, the extent of confidentiality is not altogether clear if the parties themselves agree to release information prior to a settlement. The *AHRC Act* does not expressly advert to the confidentiality of conciliation, other than with respect to the holding of a conference,⁵⁷ although anything said in the course of conciliation is not admissible in subsequent proceedings.⁵⁸ There are also strict non-disclosure rules for members of the Commission and staff members,⁵⁹ and the AHRC is subject to the provisions of the *Privacy Act 1988* (Cth).⁶⁰ This poses a significant constraint on undertaking research into conciliation, including a desire by researchers that the AHRC put them in touch with parties to a dispute.⁶¹

The conventional wisdom is that confidentiality is likely to encourage constructive negotiation in the interests of the resolution of a complaint, a stance that is supported by the common law. For example, the confidentiality of communications in negotiating a settlement is signified by lawyers conventionally marking communications to the opposing party ‘without prejudice’. The *Uniform Evidence Act 1995* (Cth) expressly excludes evidence that is adduced between persons who are in dispute and engaged in negotiating a settlement,⁶² but this privilege does not apply if the parties to the proceedings agree to disclosure.⁶³ Nevertheless, the combination of the common law and the various legislative imperatives, in conjunction with accepted practice, have all contributed to a norm of confidentiality in the conciliation process that is now generally accepted.

While a complainant may have the leeway to negotiate the terms of settlement, a well-resourced respondent invariably has the upper hand, which underscores the way the twin variables of markets and masculinity remain privileged

⁵⁵ Thornton, *The Liberal Promise* (n 45) 151.

⁵⁶ ‘Conciliation Register’, *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/complaints/conciliation-register>>. See also ‘Case Studies’, *Queensland Human Rights Commission* (Web Page) <<https://www.qhrc.qld.gov.au/resources/case-studies>>.

⁵⁷ *AHRC Act* (n 11) s 46PK(2).

⁵⁸ *Ibid* s 46PKA. Presumably, that would also include an application alleging a breach of natural justice in the conduct of a compulsory conference, as occurred in *Koppen v Commissioner for Community Relations* (1986) 11 FCR 360.

⁵⁹ *AHRC Act* (n 11) s 49(1). The AHRC, in discussing proposals for the modernisation of the regulatory framework, questions the appropriateness of criminal sanctions for a breach of this provision: see AHRC, ‘Free and Equal’ (n 32) 106–7.

⁶⁰ For a thoroughgoing overview of the privacy provisions in the various Australian jurisdictions, see Allen and Blackham (n 45).

⁶¹ See, eg, Gaze and Hunter (n 46) 32.

⁶² *Uniform Evidence Act 1995* (Cth) s 131(1).

⁶³ *Ibid* s 131(2)(a).

within the context of sexual harassment complaint-handling, despite the reforms. The confidentiality of conciliation ensures that sexual harassment remains a private matter behind closed doors, aided by a salve in the form of 'hush money' for survivors, but without any substantive public consequences for either employer or harasser, a situation underscored by the phenomenon of non-disclosure agreements, to which I now turn.

IV Non-Disclosure Agreements

NDAs represent a further step in entrenching the confidentiality of sexual harassment. These agreements are legally binding contracts of the kind commonly used by companies to protect trade secrets when negotiating business, including acquisitions and mergers. The same model has been deployed by corporate employers to ensure that the details of a sexual harassment settlement remain confidential and receive no public scrutiny.⁶⁴ While there is likely to be relatively equal bargaining power between corporations with comparable interests, this is not the case with a corporate employer and an individual employee, who may be a vulnerable young person in their first job. Indeed, the inequality of bargaining power between the parties to an NDA is such that it would appear to be corrosive of one of the key principles of the rule of law.⁶⁵ It is a legal fiction that two parties to a contract are equal and a fair bargain will emerge from their negotiations, regardless of discrepancies in their wealth and power. By disregarding this factor, an NDA is treated as though it were just another commercial transaction between equals in which the complainant agrees not to reveal details of either the harassment or the settlement, nor to pursue litigation in exchange for a monetary payment. When the parties enter into a deed of release or a conciliation agreement on settlement,⁶⁶ the respondent's lawyer may deem it desirable to highlight factors of specific concern to a corporate employer, such as 'embarrassment avoidance', which could affect its brand. The vulnerability of survivors is likely to compel them to agree to sign out of fear for their future, such as the inability to secure a reference or another job, although it is recognised that they may sometimes desire confidentiality. When they have signed, they may still worry about repercussions, such as losing their job or being punished in some other way, if they speak about the harassment.⁶⁷

#MeToo shone a light on the widespread use of NDAs in sexual harassment complaints, and campaigns were initiated to abolish them or at least to restrict their use.⁶⁸ Concern arose from the fact that Harvey Weinstein had inveigled numerous women into signing NDAs to conceal the allegations against him, but, once the

⁶⁴ For a detailed analysis of NDAs in the commercial sphere, together with their deployment by prominent sexual harassers, see Jeffrey Gordon, 'Silence for Sale' (2020) 71(4) *Alabama Law Review* 1109. See also Catharine MacMillan, 'Contracts and Equality: The Dangers of Non-Disclosure Agreements in English Law' (2022) 18(2) *European Review of Contract Law* 127, 130.

⁶⁵ Cf MacMillan (n 64) 137.

⁶⁶ AHRC, 'Free and Equal' (n 32) 109.

⁶⁷ MacMillan (n 64) 135.

⁶⁸ Kim Elsesser, 'Five Years After #MeToo, NDAs Are Still Silencing Victims', *Forbes* (online, 21 March 2022) <<https://www.forbes.com/sites/kimelsesser/2022/03/21/five-years-after-metoo-ndas-are-still-silencing-victims/?sh=36bbdefe588b>>.

women had signed, he continued to harass dozens of others with impunity.⁶⁹ This is because the NDA protects not only the reputation of the respondent employer who is providing the ‘hush’ money, but also the identity of the individual harasser. The privatising imperative of NDAs illuminates not only the retention of gender inequality but also the privileging of corporate power.

The question is whether survivors should continue to be prevented from disclosing details of the harasser’s misconduct indefinitely. While the primary aim of survivors may be a desire to ensure that the harasser is punished, they are also likely to have an altruistic desire to alert others to the threat posed by the harasser. Despite the public policy issues arising in the case of serial harassers, whose ongoing predatory behaviour remains hidden from public view, NDAs also illustrate the residual social resistance towards acknowledging sexual harassment as a systemic problem that inhibits gender equality in the workplace.

A further downside of NDAs is that they effectively isolate survivors and prevent them from receiving proper counselling and support, as the former Australian Sex Discrimination Commissioner, Kate Jenkins, pointed out.⁷⁰ Despite its far-reaching recommendations, *Respect@Work* did not go so far as to recommend doing away with NDAs, but merely that the Workplace Sexual Harassment Council identify best practice principles to inform the development of regulations on NDAs and that their terms should be reasonable.⁷¹ This ambivalent stance could be construed as evidence of a propensity to endorse the status quo and privilege corporate power.

Despite the dedicated support in the United States for freedom of contract, the country has adopted a notably stronger stance than Australia regarding NDAs, with Congress and at least 16 states enacting legislation banning employers from using NDAs to prevent employees from speaking up about harassment.⁷² They have also banned employers from imposing NDAs as a condition of getting or keeping a

⁶⁹ Ronan Farrow, ‘Harvey Weinstein’s Secret Settlements’, *The New Yorker* (online, 21 November 2017) <<https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>>.

⁷⁰ Katharine Murphy, ‘Weinstein Case Showed Nondisclosure Clauses Can Allow Abuser to Continue, Says Kate Jenkins’, *The Guardian* (online, 3 March 2022) <<https://www.theguardian.com/australia-news/2022/mar/03/weinstein-case-showed-non-disclosure-clauses-can-allow-abusers-to-continue-says-kate-jenkins>>.

⁷¹ *Respect@Work* (n 7) recommendation 38. In exhorting the modernisation of the regulatory framework, the AHRC endorses the need for guidelines regarding the use of NDAs: see AHRC, ‘Free and Equal’ (n 32) 165. During the *Respect@Work* inquiry, the Sex Discrimination Commissioner wrote to organisations asking them for a limited waiver of the confidentiality obligation to allow people to make a confidential submission to the inquiry, to which only 39 organisations agreed: see AHRC, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Community Guide, 2020) 30.

⁷² Kim Elsesser, ‘Congress Passes Law Restoring Victims’ Voices, Barring NDAs in Sexual Harassment Cases’, *Forbes* (online, 16 November 2022) <<https://www.forbes.com/sites/kimelsesser/2022/11/16/congress-passes-law-restoring-victims-voices-banning-ndas-in-sexual-harassment-cases/?sh=624e36317b30>>; Andrea Johnson, Samone Ijoma and Da Hae Kim, National Women’s Law Center, *#MeToo Five Years Later: Progress and Pitfalls in State Workplace Anti-Harassment Laws* (Report, October 2022).

job. Alternatively, it may be possible to argue that NDAs are contrary to public policy, or they constitute a public hazard.⁷³

Can't Buy My Silence, an international organisation based in Canada, has had some limited success in its campaign against NDAs,⁷⁴ in addition to having elicited support from parliamentarians and several major organisations. For example, it has published a list of English universities that have signed a pledge to stop using NDAs for complaints about sexual harassment,⁷⁵ and it has collected anonymous case studies and published them on its website to inform the public of the hidden cost of NDAs.⁷⁶ In addition, it has prepared a model Bill banning the misuse of NDAs. To date, legislation has been enacted only by the Prince Edward Island legislature,⁷⁷ but the Bill has been introduced into several other Canadian provincial legislatures.

While signing an NDA may assist a complainant in receiving compensation, the process is skewed towards the interests of respondents and harassers in their desire to conceal the harassment, including the possibility of the harasser perpetrating further acts of harassment. We see once again that employer interests and those of the invariably male harassers are privileged over survivors, whose careers may well be destroyed because of the harassment, while those of the harassers thrive. This is clearly illustrated by high-profile cases, such as that of Harvey Weinstein, where successive NDAs did not deter repeat offending, but actually facilitated it. Such incidents point to the way sexual harassment contributes to the tolerance for gender inequality in the workplace. While survivors may decline to sign an NDA and opt for litigation instead, there are powerful disincentives for pursuing that route, as already suggested. While the values articulated within a court setting have wider ramifications,⁷⁸ litigation is not a straightforward process either, as I now suggest, even though it takes place in public.

V Litigation

If a complaint is unable to be conciliated and is terminated by the AHRC, the survivor of sexual harassment may opt to litigate. However, it is notable that, even after referral to the Federal Court, there is still pressure to achieve a confidential settlement by diverting the matter to mediation or 'assisted dispute resolution' rather than proceeding directly to a formal hearing, regardless of the parties' own views.⁷⁹

⁷³ Jingxi Zhai, 'Breaking the Silent Treatment: The Contractual Enforceability of Non-Disclosure Agreements for Workplace Sexual Harassment Settlements' (2020) 2020(1) *Columbia Business Law Review* 396, 434.

⁷⁴ 'Can't Buy My Silence', *Can't Buy My Silence* (Web Page, December 2022) <<https://www.cantbuymysilence.com>>.

⁷⁵ 'Universities Pledge List', *Can't Buy My Silence* (Web Page, 2022) <<https://www.cantbuymysilence.com/uni-pledge>>.

⁷⁶ 'Share Your Story', *Can't Buy My Silence* (Web Page, 2022) <<https://www.cantbuymysilence.com/share-your-story>>.

⁷⁷ *Non-Disclosure Agreements Act*, 2021 PEI.

⁷⁸ David Luban, 'Settlement and the Erosion of the Public Realm' (1995) 83(7) *Georgetown Law Journal* 2619, 2648–58.

⁷⁹ *Federal Court of Australia Act 1976* (Cth) s 53A; *Federal Court Rules 2011* (Cth) pt 28.

Indeed, the desire by the state to settle complaints informally is such that complaints are ‘now almost routinely’ referred to some form of ADR.⁸⁰ In addition to the Federal Court, the Federal Circuit and Family Court is empowered to hear human rights cases.⁸¹ The website of the latter exhorts litigants to think differently about the need for litigation, to ‘focus on the areas of agreement and to remember that most parties to court proceedings do not require a trial or a judgment’.⁸² When the new court was established, it published a clear statement of its aim: ‘[t]o ensure that justice is delivered ... effectively and efficiently’,⁸³ which implies dispensing with a costly court infrastructure. An American commentator has suggested that the widespread trend in favour of ADR in the United States has similarly exacerbated the imperative in favour of ‘private and secret resolutions’.⁸⁴ Bypassing a formal court ensures privatisation of the details of any settlement that might be reached. Furthermore, whatever form of ADR that is invoked, it will undoubtedly save costs for the parties, as well as for the state. In fact, Opeskin points out that public expenditure on courts has declined in recent decades relative to other areas of public expenditure.⁸⁵ He argues that the state has sought to increase cost-effectiveness by tempering the demand for justice in the courts. The overwhelming preference for conciliation in the discrimination jurisdiction is a clear manifestation of this trend.

Due to the preference of the state for confidentiality and a desire to avoid paying the high costs of litigation, a very small percentage of sexual harassment complaints — barely 1% — proceed to a formal hearing at the federal level.⁸⁶ As court hearings occur in public, they are subject to the usual rules of procedure; the hearing is presided over by a judge and a reasoned decision in writing is produced. Hence, the positive side of litigation is its transparency so that, over time, the accumulated decisions come to represent an accessible body of knowledge about sexual harassment that includes matters pertaining to procedure and outcome. Nevertheless, as a result of the high rate of informal settlement, sexual harassment jurisprudence — as is the case with anti-discrimination law generally — is meagre and under-developed.⁸⁷ It would be impossible to imagine a significant decision with national ramifications, such as *Mabo*⁸⁸ in the Australian context, or *Brown v Board*

⁸⁰ Federal Court of Australia, *Annual Report 2020–21* (Report) 29–30. See also the *Civil Dispute Resolution Act 2011* (Cth), which requires that genuine steps to resolve a dispute be taken before the institution of civil proceedings.

⁸¹ The formation of the Federal Circuit and Family Court of Australia was controversial: see Opeskin (n 44) 2.

⁸² ‘Court-Based Dispute Resolution in the Federal Circuit and Family Court of Australia’, *Federal Circuit and Family Court of Australia* (Web Page, 1 September 2021) <<https://www.fcfcoa.gov.au/news/cb-dr>>.

⁸³ *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 5(a).

⁸⁴ Kotkin (n 38) 945.

⁸⁵ Opeskin (n 44) 35–6.

⁸⁶ For a comprehensive Australia-wide analysis of anti-discrimination case law since commencement of the *SDA* (n 25) in 1984, see Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Report, 2022). For a valuable case study, see Madeleine Castles, Tom Hvala and Kieran Pender, ‘Rethinking Richardson: Sexual Harassment Damages in the #MeToo Era’ (2021) 49(2) *Federal Law Review* 231.

⁸⁷ Blackham and Allen (n 45); Allen, ‘Behind the Conciliation Doors’ (n 45) 789.

⁸⁸ *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

of *Education*⁸⁹ in the United States, emanating from other than a civil lawsuit.⁹⁰ The confidentiality of conciliation means that, if perchance a public interest complaint of national significance were to be lodged, the outcome would never see the light of day. While this observation should not be taken as unqualified support for litigation, such instances highlight the fact that there are sometimes advantages associated with a public hearing, for it enables justice to be seen to be done, in accordance with the old adage.

Despite the advantages for jurisprudence associated with a formal hearing, the majority of both complainants and respondents in sexual harassment complaints prefer the confidentiality associated with conciliation or assisted mediation. On the one hand, complainants are nervous at the prospect of losing the case and having to pay high legal costs. On the other hand, no rational respondent would willingly proceed to a formal hearing if it appeared that the complainant had a reasonable chance of success.⁹¹ Indeed, for this reason, some of the sexual harassment cases that have proceeded to a public hearing at the federal level appeared to have had little chance of success at the outset, although Katzmann J struck down a vexatious proceedings order as extreme in one of Cavar's claims.⁹² Some reported decisions involved extravagant damages claims; in *Picos v Servcorp Ltd [No 2]*, for example, the complainant sought \$2.9 billion for the alleged discrimination and another \$100 million in exemplary damages.⁹³ In *Chen v Monash University*, Tracey J acknowledged the strong conviction on the part of the complainant that she had been wronged, despite the unsatisfactory evidence that led to her appeal being dismissed.⁹⁴ While one suspects that Tracey J's observation regarding the complainant's conviction could be made about many other complainants, the privatisation of complaint data precludes such a finding. While a higher percentage of sexual harassment cases go to trial in the United States than in Australia, the success rate for plaintiffs is comparatively low, with a success rate computed at 15% compared with 51% for other civil cases.⁹⁵

Complications in sexual harassment cases may also emerge from the public scrutiny of intimate and personal issues that transcend the pragmatic issues of costs and damages. However, as Cohen points out, calling sexual harassment 'personal' or 'intimate' may be another way of shielding it from public scrutiny.⁹⁶ Hippensteele suggests, furthermore, that this sensitivity on the part of a plaintiff regarding public scrutiny may be a myth, rather than an evidence-based finding.⁹⁷ In other words, it

⁸⁹ *Brown v Board of Education*, 347 US 483 (1954). See also *Brown v Board of Education II*, 349 US 294 (1955).

⁹⁰ Owen Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073. See also Dominique Allen, 'Against Settlement? Owen Fiss, ADR and Australian Discrimination Law' (2009) 10(4) *International Journal of Discrimination and the Law* 191.

⁹¹ Kotkin (n 38) 962. Cf Cohen (n 19) 34.

⁹² See, eg, *Cavar v Secom Australia Pty Ltd [No 2]* [2021] FedCFamC2G 289; *Cavar v Secom Australia Pty Ltd* [2022] FCA 1548; *Cavar v Secom Australia Pty Ltd* [2022] FCA 1558; *Shammas v Canberra Institute of Technology* [2014] FCA 71.

⁹³ *Picos v Servcorp Ltd [No 2]* [2015] FCA 494.

⁹⁴ *Chen v Monash University* [2015] FCA 130.

⁹⁵ Foote and Goodman-Delahunty (n 22) 237.

⁹⁶ Cohen (n 19) 129.

⁹⁷ Hippensteele (n 50).

underscores the somewhat outdated view that anything to do with sex or sexuality should properly be treated as private, although it is undeniable that prurient media interest adds to the sense of discomfort for survivors associated with a public hearing.

As adjudication is invariably stressful, expensive, inflexible and drawn out, it is particularly inappropriate for vulnerable clients,⁹⁸ and is therefore likely to be regarded as a last resort for those without significant resources. It may be that only well-to-do professionals, such as senior executives, can afford to litigate. Ironically, their class position is likely to give them greater bargaining power in securing a favourable settlement even if the harm they have suffered is less than that of a survivor occupying a lower status. Nevertheless, the reality is that most survivors of sexual harassment are likely to be vulnerable employees, as epigrammatically pointed out by Catharine MacKinnon: ‘the age-old rule of impunity [is] the more power a man has, the more sex he can exact from those with less’.⁹⁹

The conventional position regarding costs is that parties are responsible for their own costs when appearing before a tribunal in state or territory human rights jurisdictions, which was also the case at the federal level prior to 2000 when the former Human Rights and Equal Opportunity Commission (‘HREOC’) conducted formal hearings. When HREOC’s judicial role was held to be unconstitutional,¹⁰⁰ it was determined that formal hearings could be conducted only by federal courts.¹⁰¹ Orders were then made according to the convention that costs lie where they fall, which meant that the losing party could face paying the substantial costs of the successful party, as well as their own. This factor inevitably influenced whether a complainant proceeded to a public hearing or not. In addition, a survivor could also face a substantial outlay in funding their own representation, particularly when confronted by a corporate respondent invariably represented by leading counsel. While individual litigants are entitled to represent themselves, they recognise that their chances of success are likely to be enhanced if legally represented.¹⁰² Taking this factor into account, Thornton, Pender and Castles, in their report for the Attorney-General’s Department, recommended that an asymmetrical costs regime would be fairer to applicants.¹⁰³ This position was supported by various lawyer and human rights groups, including the Australian Discrimination Legal Experts Group. In this model, applicants would be entitled to costs recovery if successful, but would not have to pay the respondents’ costs if unsuccessful (other than in the case of a vexatious action).¹⁰⁴ While the *Respect at Work Act* originally opted for a ‘costs neutrality’ approach, with each party bearing their own costs and the courts retaining

⁹⁸ Kingsford Legal Centre (n 47) 17.

⁹⁹ MacKinnon, ‘Where #MeToo Came From’ (n 14) 4.

¹⁰⁰ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹⁰¹ They were the Federal Magistrates Court (1999–2013), the Federal Circuit Court (2013–21), the Federal Circuit and Family Court (since 2021) and the Federal Court of Australia (since 1976).

¹⁰² Gaze and Hunter (n 46) 110.

¹⁰³ Thornton, Pender and Castles (n 86).

¹⁰⁴ Australian Discrimination Legal Experts Group, Submission to Respect@Work Taskforce, Attorney-General’s Department, *Review of Exposure Draft: Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (31 August 2022).

a discretion to depart from this position in the interests of justice,¹⁰⁵ the issue has been deferred subject to further consultation.¹⁰⁶ At the time of writing, the preferred costs model had not been settled.

The fear of facing significant costs is a marked disincentive for survivors who choose to pursue litigation, a fear that is well founded as, in the past decade, costs orders have commonly been made against unsuccessful complaints. More startling is the fact that several successful complaints in earlier cases were ordered to pay a proportion of the respondent's costs.¹⁰⁷ As there is comparatively little sexual harassment jurisprudence, as mentioned, and generalist judges may be inexperienced in the jurisdiction because of the minuscule number of cases heard, outcomes can be unpredictable. Representation is further complicated by the fact that state-funded legal aid for public interest cases has declined, and community legal centres have limited capacity to address the needs of low-paid workers, particularly those of culturally and linguistically diverse backgrounds.

While the federal legislation does not specify an upper limit for a judicial award of damages, as is the case with some state and territory legislation,¹⁰⁸ damages for sexual harassment tend to be modest, although they increased somewhat following the decision of Kenny J in *Richardson v Oracle*.¹⁰⁹ In fact, it might be argued that one of the reasons that sexual harassment has continued to be prevalent in the workplace is because damages are so low: the assumption being that higher damages would act as a deterrent to employers. If assessed at a low level, it may be more cost effective for corporate respondents simply to pay them rather than launch an appeal.¹¹⁰ On the other hand, unsuccessful applicants, confronted with the respondent's costs as well as their own, could face bankruptcy as costs orders are enforceable.¹¹¹

Unsurprisingly, therefore, when litigation moved from HREOC to the Federal Court and became a costs jurisdiction, there was a decline in the percentage of discrimination complaints that were filed.¹¹² The majority of litigants opted to settle, generally with the advice of a lawyer,¹¹³ either during conciliation or at the court-assisted dispute resolution stage. The issue of costs is likely to be less significant for corporate respondents, however, as legal costs are regarded as an

¹⁰⁵ This position accords with the stance adopted by AHRC, 'Free and Equal' (n 32).

¹⁰⁶ Attorney-General's Department (Cth), 'Review into an Appropriate Cost Model for Commonwealth Anti-Discrimination Laws' (Consultation Paper, February 2023).

¹⁰⁷ *Ho v Regulator Australia Pty Ltd* [No 2] [2004] FMCA 402; *Font v Paspaley Pearls* [2002] FMCA 142; *Richardson v Oracle Corporation Australia Pty Ltd* [No 2] (2013) 232 IR 99.

¹⁰⁸ Except for the following: *Anti-Discrimination Act* 1977 (NSW) s 108(6) (\$100,000); *Equal Opportunity Act* 1984 (WA) s 127(b)(i) (\$40,000); Northern Territory Anti-Discrimination Commission, *Complaint Handling Process* (Guidelines) 2 (\$60,000).

¹⁰⁹ *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334. For discussion, see Castles, Hvala and Pender (n 86); Joshua Taylor and Alice Taylor, 'Richardson v Oracle More than Half a Decade On: Did the "Ground Break" for Victim Compensation?' (2022) 47(1) *Alternative Law Journal* 36.

¹¹⁰ Hersch (n 29).

¹¹¹ Federal Court of Australia, *Guide to Human Rights Cases* [D13] <<https://www.fedcourt.gov.au/law-and-practice/guides/human-rights>>.

¹¹² Gaze and Hunter (n 46) xxx.

¹¹³ *Ibid* 139.

incidental cost of doing business. In any case, corporate respondents may have in-house legal counsel, they may be eligible for a tax deduction, or they may be able to pass the costs on to consumers. Their primary concern is to minimise the damage to their brand name, in which case a settlement involving a few thousand dollars may be of little consequence.

In the United States, corporate and securities law is beginning to be used to bring sexual harassment to public attention in a new form of lawsuit instituted by shareholders against large companies because of the reputational damage to the corporate brand caused by the actions of senior executives.¹¹⁴ Most claims have arisen from the adverse publicity relating to sexual harassment, which caused the price of shares to slump. Such actions show that when company boards and management are slow to respond to employee complaints, innovative causes of action can emerge. Zhai points to the very substantial settlements that have emerged from derivative suits by shareholders,¹¹⁵ such as a Fox News case in which Rupert Murdoch and his sons were involved,¹¹⁶ and which entailed a settlement of at least USD90 million.¹¹⁷ Shareholder suits can be effective if they are able to demonstrate that a company's failure to address sexual harassment has damaged its 'reputation, operations and long term value'.¹¹⁸ The shareholder cases nevertheless suggest that they are likely to be instituted only when high-status senior executives are involved, particularly those whose names are well known and publicly associated with a company; otherwise corporate boards and management are expected to take action. No shareholder actions of this kind are known to have been initiated in the Australian context to date. However, the importance of recognising the financial and reputational risks that sexual harassment poses to companies has been acknowledged by the Australasian Centre for Corporate Responsibility.¹¹⁹

VI The Sentencing of Complaint Files

The ultimate step in the privatisation of sexual harassment complaints entails the official destruction of complaint files. The appraisal of closed files and their destruction — or 'sentencing', to give the process its Orwellian technical term — has resulted in the widespread disposal of public sector records since the late 20th century. The National Archives of Australia defines sentencing as 'the process of matching an agency's information to a relevant records authority to establish the

¹¹⁴ Daniel Hemel and Dorothy S Lund, 'Sexual Harassment and Corporate Law' (2018) 118(6) *Columbia Law Review* 1583.

¹¹⁵ Zhai (n 73) 445–7. See also *ibid.*

¹¹⁶ *City of Monroe Employees' Retirement System v Murdoch* (Del Ch, CA No 2017-0833-AGB, 20 November 2017).

¹¹⁷ Jonathan Stempel, '21st Century Fox in \$90 Million Settlement Tied to Sexual Harassment Scandal', *Reuters* (online, 21 November 2017) <<https://www.reuters.com/article/us-fox-settlement-idUSKBN1DK2NI>>.

¹¹⁸ Zhai (n 73) 445–6.

¹¹⁹ Daisy Gardener, 'Sexual Harassment As Material Risk: An Investor Briefing Paper' (Australasian Centre for Corporate Responsibility, 2021).

value of information and the minimum period it must be kept for'.¹²⁰ The destruction of files is believed to be economically rational because of the cost of storage. Hence, unless retention can be shown to be in the public interest under the *Archives Act 1983* (Cth) ('*Archives Act*'),¹²¹ closed complaint files are normally destroyed after a specified period — usually three years. The reality is that every file cannot be kept, for there are thousands of shelf kilometres of government records. The extent of Commonwealth Government records alone retained by the National Archives of Australia is overwhelming as published statistics reveal.¹²² While digitisation has caused record keeping to become 'increasingly location-less',¹²³ issues pertaining to access, privacy and cost are still acute. Even if everything were kept in the cloud, David Rosenthal estimates that this would consume more than the entire GWP (Gross World Product) for a year.¹²⁴

Despite the pragmatic approach towards record destruction, the action is at odds with the idea that society's collective memory should be preserved and that transparency is a public value that is attracting increased interest in equality discourse.¹²⁵ The *Archives Act* specifies general principles for the retention and disposal of public records.¹²⁶ Because the role of archivists is to safeguard public records, there is an ever-present tension between the desire for retention and the imperative to cull. In addition to the physical space required, there is also the question of personnel with the necessary expertise to manage records in an orderly way. The issue has been the subject of Australian Law Reform Commission review on several occasions,¹²⁷ as well as being the subject of extensive debate between archivists and historians.¹²⁸

Closed files dealing with sexual harassment are caught up in the process of sentencing. It is not suggested that the files should be available to all through open access, but the question is whether de-identified records, or at least a selection of

¹²⁰ 'Appraisal and Sentencing', *National Archives of Australia* (Web Page, 2022)

<<https://www.naa.gov.au/information-management/disposing-information/appraisal-and-sentencing>>.

¹²¹ For a detailed analysis of the Act, see Kim Rubenstein, 'Erring on the Side of Destruction? Administrative Law Principles and Disposal Practices under the *Archives Act 1983* (Cth)' (1997) 4(2) *Australian Journal of Administrative Law* 78. Rubenstein is critical of the inadequacy of the legislative framework relating to the retention and preservation of records.

¹²² '[T]he archives still holds about 450 kms of records (450 kms is the approximate equivalent of about 4.5 billion pages or say 22.5 million books). Of this amount about 255 kms (say 2.5 billion pages or approximately 12 million books) is currently appraised as being national archives (ie as being of permanent value)': National Archives of Australia and National Archives of Australia Advisory Council, *Annual Report, 1998–99* (Report No 262, 1999) 19.

¹²³ Barbara Reed, 'Reinventing Access' (2014) 42(2) *Archives and Manuscripts* 123, 123.

¹²⁴ Kate Cumming and Anne Picot, 'Reinvesting Appraisal' (2014) 42(2) *Archives and Manuscripts* 133, 139.

¹²⁵ Dominique Allen, Alysia Blackham and Margaret Thornton, 'Guest Editorial: Introduction to the Special Issue *Using Transparency To Achieve Equality*' (2021) 37(2) *Law in Context* 6, 7.

¹²⁶ See, eg, National Archives of Australia, *Records Disposal Authority: Human Rights and Equal Opportunity Commission*, Job No 2003/00211156 (2003). This protocol was unchanged when the AHRC replaced HREOC: see National Archives of Australia, *Agency-Specific Records Authorities* (2022).

¹²⁷ See, eg, Australian Law Reform Commission, *Information Destruction and Retention Requirements* (Report No 108, May 2008).

¹²⁸ *Ibid* 432 [10.49].

them, should be available to third parties for legitimate purposes, such as research and policy formulation. It would nevertheless seem that de-identifying complaint files is likely to be regarded as too time-consuming for an agency with limited funds, as it would require someone with appropriate expertise scrutinising every page and redacting identifiable information; destruction is deemed to be quicker and easier, in which case confidentiality is unequivocal and permanent. When the writer set out some years ago to undertake a longitudinal study of anti-discrimination complaint handling in Australia through an analysis of selected de-identified files, the President of HREOC advised that the files for the years sought (every 10th year from the commencement of the legislation) had been destroyed.¹²⁹ The destruction of thousands of files meant that the proposed research project had to be abandoned. Inquiries to the National Archives of Australia in an endeavour to establish what complaint files it held proved to be equally futile.¹³⁰

While a longitudinal study of sexual harassment complaint files could be illuminating in documenting trends in the development of the law and changing public attitudes, such a study is precluded by the process of sentencing. In addition, the task of applying archives disposal authority is not believed to be accorded a high priority, as it is sometimes assigned to a junior officer or outsourced.¹³¹ In such instances, the process is likely to be perfunctory and ad hoc in view of the thousands of complaints lodged each year.¹³²

The pragmatic approach towards sentencing means that it is difficult to weigh up and determine the nature of the public interest when confronted by large numbers of files, as the scales invariably tip in favour of bureaucratisation. Since confidentiality is a major dimension at each step of the complaint-handling process, as I have shown, in addition to being a preeminent rationale for sentencing, nothing need ever be known about the nature of a complaint — that is, when it was lodged, who the parties were, whether the complaint was resolved and, if so, on what terms. Furthermore, any longitudinal study, such as the identification of practices from a particular period and a comparison with other periods, states, territories or overseas jurisdictions is also precluded.

Freedom of information ('FOI'), or public access to government, is a key element of the modernisation of our age. FOI acts as a counterpoint to state secrecy that characterises both complaint handling and the sentencing of files. The collision of these values means that we become enmeshed in a state of 'information

¹²⁹ Letter from Hon John von Doussa QC, President, Human Rights and Equal Opportunity Commission to Professor Margaret Thornton, 11 February 2008 (on file with the author).

¹³⁰ Twomey recounts how the records she sought for research purposes were not released until seven years after she applied for them and after her book had been published: see Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018). See also Jill Rowbotham, 'Archive's "Culture" of Secrecy a Scandal', *The Australian* (Sydney, 1 May 2019) 31.

¹³¹ Paul Macpherson, 'Improving Access for the Public to the Collection of the National Archives of Australia' (2000) 31(2) *Australian Academic and Research Libraries* 79, 81; National Archives of Australia, *Using Contractors for Records Sentencing* (2005).

¹³² The AHRC received 3,113 complaints in 2020–21, some of which covered multiple grounds: see AHRC, *Complaint Statistics* (n 16).

asymmetry’,¹³³ with the impetus both to destroy public records in accordance with the sentencing mandate, on the one hand, and to preserve them in accordance with FOI, on the other. Once we go beneath the surface, we see that there is much more than just another anti-discrimination file taking up space, for what has been permanently destroyed is not only one dimension of the trajectory of the discriminatory harm, but also an intimate record of the pain and suffering of survivors. The personal accounts in the complaint files attest to their trauma, which is otherwise rendered invisible. Bureaucratisation, like legalism more generally, tends to slough off the affective and the personal. While records exist in the form of annual reports, they tend to reduce the personal narratives of trauma to bald, generalisable statistics; the confidentiality and secrecy of complaint-handling have been supplemented by sentencing and destruction. These methods serve not only to eradicate all evidence of the dynamic trends in sexual harassment from the public record, but they also serve to blanch complaints of their subjectivity and particularity regardless of gender, LGBTIQ+ status, race, disability or age. As these characteristics are dealt with as discrete within the federal legislative framework, only the complaint files themselves could properly reveal the significance of intersectionality between grounds, a relationship where, it has been recognised, our understanding is underdeveloped in the Australian context.¹³⁴ In addition, valuable insights regarding the issue of class, which is central to many instances of sexual harassment in the workplace,¹³⁵ albeit not an operable ground in Australian anti-discrimination legislation,¹³⁶ could be documented in the files or extrapolated from them. However, all details are permanently excised unless, perchance, the rare instance proceeds to a public hearing.

VII Conclusion

It has been suggested elsewhere that #MeToo has led to a groundswell movement away from a narrow focus on corporate liability and the minimisation of reputational damage to creating a workplace culture that is physically and psychologically safe for all.¹³⁷ In contrast, this article has argued that the historic emphasis on confidentiality has persisted through the legal complaints system and been resistant to contemporary demands for greater transparency, including the concerted efforts of #MeToo. While the legal framework for addressing sexual harassment in Australia differs from that of the United States, where a somewhat higher proportion of cases proceed to litigation, similar criticisms nevertheless apply in regard to the

¹³³ The phrase is attributed to Nobel Prize economist, Joseph Stiglitz: see Rick Snell and Peter Sebina, ‘Information Flows: The Real Art of Information Management and Freedom of Information’ (2007) 35(1) *Archives and Manuscripts* 54, 64.

¹³⁴ Karen O’Connell, ‘Can Law Address Intersectional Sexual Harassment? The Case of Claimants with Personality Disorders’ (2019) 8(4) *Laws* 34; Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 84.

¹³⁵ See, eg, Kingsford Legal Centre (n 47).

¹³⁶ Margaret Thornton, ‘Social Status: The Last Bastion of Discrimination’ (2018) 19(1) *Anti-Discrimination Law Review* 5.

¹³⁷ Clayton Utz, *Sexual Harassment in the Workplace* (Report, August 2021).

inadequacy of the law.¹³⁸ The flaws that inhere within the Australian framework are embedded in the conciliation model of dispute resolution and are exacerbated by the movement away from HREOC's former quasi-judicial no-costs role to a costs regime that has encouraged complainants to opt for informal settlements that are confidential. We know that sexual harassment in the workplace is widespread, as revealed by the *Respect@Work* report and multiple other studies, but the detail is scant. The secrecy inherent in the individual complaint-based system, particularly in conciliation and NDAs, to say nothing of sentencing, has played a key role in keeping the substance and extent of sexual harassment out of the public eye. The occasional case that has come to public attention has usually been because of the identity of a prominent harasser, which has encouraged the view that sexual harassment is an aberration rather than a manifestation of the systemic undervaluation of women at work.

The limitations of the formal complaint system, particularly the protection of harassers, has resulted in a state of affairs where formal complaints are rarely lodged, despite the prevalence of sexual harassment.¹³⁹ A 2018 study by the US Equal Employment Opportunity Commission found similarly that, on average, anywhere from 87% to 94% of individuals subjected to sexual harassment did not file a formal complaint.¹⁴⁰ Instead, survivors preferred to access 'Whisper Networks' or 'Courts of Public Opinion'.¹⁴¹ In other words, they took advantage of the 'microphone' that #MeToo gave them to share their experiences and relate the lasting effects of sexual harassment.¹⁴² While transparency is the political leitmotif of our times,¹⁴³ it is 'a radical expectation in equality law',¹⁴⁴ for it is precluded at each stage of a discrimination complaint, as this article has argued.

Despite the prevailing rhetoric of transparency, speaking out is not without its hazards, for the possibility of a defamation action being instituted by the alleged harasser represents a significant deterrent.¹⁴⁵ Prominent Australian actor, Geoffrey Rush, won a defamation case against media group Nationwide News in 2020 and was awarded a record \$2.9 million in damages,¹⁴⁶ an amount many times the paltry

¹³⁸ Deborah Turkenheimer, 'Beyond #MeToo' (2019) 94(5) *New York University Law Review* 1146, 1150.

¹³⁹ *Respect@Work* (n 7) 14.

¹⁴⁰ Turkenheimer (n 138) 1165.

¹⁴¹ *Ibid* 1184.

¹⁴² Tippet (n 52) 242.

¹⁴³ Dominique Allen, 'Collecting, Sharing and Utilising Data to Inform Decision-Making and Utilising Equality' (2021) 37(2) *Law in Context* 88.

¹⁴⁴ Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency' (2021) 37(2) *Law in Context* 98.

¹⁴⁵ For an analysis of defamation law in the context of gendered harm, see Michelle Harradine, 'Defamation Law and Epistemic Harm in the #MeToo Era' (2022) 48(1) *Australian Feminist Law Journal* 31.

¹⁴⁶ *Nationwide News Pty Ltd v Rush* (2020) 380 ALR 432. See also Michael McGowan, 'Geoffrey Rush to Receive Record \$2.9 Million Damages in Daily Telegraph Defamation Case', *The Guardian* (online, 23 May 2019) <<https://www.theguardian.com/film/2019/may/23/daily-telegraph-loses-bid-to-have-judge-removed-in-geoffrey-rush-case>>.

sum received by the typical survivor of sexual harassment.¹⁴⁷ Eryn Jean Norvill, the actor who made the complaint to the theatre company management, expressly stated that she did not want to go public with the complaint, but was called as a witness for the defendant publisher. This is a paradigmatic case involving an older male harasser and a young female survivor, where *his* reputation is invariably going to be assessed more highly than *hers*. This status differential is likely to inhibit her from complaining in the first place, as also occurred with the case involving former High Court judge Dyson Heydon and six young female associates he was found to have harassed, some of whom felt obliged to leave the law altogether as a result of their experience, whereas he was able to continue an illustrious career until retirement.¹⁴⁸

The fear of a defamation action entailing crippling damages and high legal costs effectively mutes the microphone and stifles the prospect of survivors speaking out publicly in the Australian context, where the laws regarding free speech have conventionally been stricter than those of the United States. The threat of defamation proceedings underscores once again the asymmetrical relationship between perpetrators and survivors of sexual harassment. However, concern at the way defamation laws may be used to discourage the reporting of criminal and unlawful behaviour has led Australian state and territory Attorneys-General to consult on revised national defamation laws and propose that allegations of personal conduct, including discrimination and sexual harassment, should be protected by absolute privilege.¹⁴⁹ This privilege, however, would not attach to publication in a news or social media outlet where reporting is most likely, as the proposal is restricted to complaints made to official bodies, such as human rights commissions, which are already arguably privileged.

Even though transparency and openness are contemporary norms, it is suggested that they cannot be realised in the sexual harassment context because their antonyms, secrecy and confidentiality, appear to have strengthened in tandem. The neoliberal turn has undoubtedly boosted the imperative in favour of employers and the role of the market through the privileging of profit maximisation and the normalisation of NDAs. While the appropriateness of the latter has been questioned apropos #MeToo, there has been no thoroughgoing inquiry into their desirability. It is regarded as incidental that sexual harassers themselves are also able to benefit from the cloak of confidentiality and evade repercussions, leaving them free to harass others. Furthermore, the sentencing of records appears to have closed off any

¹⁴⁷ Karen O'Connell, 'Geoffrey Rush's Victory in His Defamation Case Could Have a Chilling Effect on the #MeToo Movement', *The Conversation* (online, 11 April 2019) <<https://theconversation.com>>. Another actor, Craig McLachlan, who was alleged to have sexually harassed and bullied female performers, instituted defamation proceedings against two media outlets and one of his victims, following allegations against him, but subsequently withdrew the action: see Australian Associated Press, 'Craig McLachlan Drops Defamation Case against ABC, Fairfax and Christie Whelan Browne', *The Guardian* (online, 20 May 2022) <<https://www.theguardian.com/law/2022/may/20/craig-mclachlan-drops-defamation-case-against-abc-fairfax-and-christie-whelan-browne>>.

¹⁴⁸ Kiefel (n 6); Michelle Grattan, 'High Court Apologises for Dyson Heydon's Sexual Harassment of Six Associates', *The Conversation* (online, 22 June 2020) <<https://theconversation.com/high-court-apologises-for-dyson-heydons-sexual-harassment-of-six-associates-141215>>.

¹⁴⁹ See, eg, Department of Justice and Community Services (Vic), 'Review of the Model Defamation Provisions' (Consultation Paper, August 2022).

possibility of the interrogation of confidentiality at the end point of a complaint. While it is assumed that confidentiality is in the interests of the survivor, which it may be because of the humiliation and embarrassment associated with the harassment, it is always in the interests of the corporate employer because of the desire to protect its brand name.

Sexual harassment at work is very much at the forefront of the contemporary feminist law reform agenda, but the reforms that have been effected are characterised by unevenness following #MeToo, *Respect@Work* and 'Free and Equal', because powerful corporatist and masculinist interests continue to be privileged over the interests of the largely feminised survivors. As only a tiny percentage of those who are harassed lodge a complaint¹⁵⁰ — a minuscule proportion of which proceed beyond the conciliation stage to a public hearing — few survivors of sexual harassment have the opportunity to speak publicly. For the majority, their stories are entombed in silence forever through the sentencing of their complaint files. The benefit of their experience is thereby denied to other survivors, while the harassers themselves remain theoretically free to harass others. This is the result of the privatisation and secrecy that remains deeply embedded within each stage of the individual complaint-based process of anti-discrimination legislation.

¹⁵⁰ AHRC, *Time for Respect* (n 4).

George Winterton Memorial Lecture 2023

Judicial Review of Legislative and Executive Action: Acceptance and Resentment – Lessons from a Comparative Perspective

The Hon Susan Kiefel AC*

I am honoured to give this lecture which acknowledges the special contribution of Professor George Winterton to constitutional law scholarship in Australia. Professor Winterton was a scholar, a teacher, a lawyer and an enthusiast of the law until his passing. In his eulogy, Professor Gerangelos said¹ that Professor Winterton regarded the profession of teacher and scholar as the noblest of all professions. He was conscious of the immensity of the calling and the duties held both to the young and to knowledge. Sir Gerard Brennan also observed that '[i]t was in his recognition and exposition of the ways in which history, politics, the *Constitution* and the law are inextricably intertwined, that [Professor Winterton] was without peer in his cohort of Australian constitutional scholars'.² These connections are to an extent reflected in my discussion this evening, as is a comparative approach of which Professor Winterton was also a champion.

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¹ Peter Gerangelos, 'Eulogy for Professor Winterton' (2008) 30(4) *Sydney Law Review* 567, 571.

² Sir Gerard Brennan, 'Foreword' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) v, v, quoting Laurence Maher, 'George Winterton: A Singular, Gifted Scholar' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) xxxviii, xxxviii.

The Supreme Court of the United States, the Supreme Court of the United Kingdom and the High Court of Australia ('High Court') each exercise powers of judicial review of legislative and executive action. It is recognised, although on somewhat different bases, that there are limits to legislative power and that those who exercise executive power are amenable to the law.

Inevitably some decisions in the area of judicial review have drawn criticism from politicians in government. This may occur when legislative provisions are held invalid, or when a decision involves a controversial matter or a matter affecting the interests or policy of government. The criticism invariably proceeds from a misunderstanding of the role of the courts but it generally abates and the courts' decisions are accepted. But in more recent times, in the politics mentioned, the reaction to the power of the courts and the exercise of that power has appeared akin to resentment. This has led to discussion about how the courts' power may be curbed or the composition of the courts altered.

The Supreme Court of the United States and the High Court have exercised a power of judicial review for some time. Their history allows for some understanding of the early development of judicial review and the traditional view taken of the role of the courts by government. It permits a comparison with criticisms levelled at the courts in more modern times and with more recent reactions. These recent events give rise to several questions. Have the reactions to controversial decisions become stronger and less temperate? Are threats of action levelled at the courts harmful to them as institutions? Do the criticisms undermine the confidence that people have in the courts?

I Early Acceptance

History suggests that there was an early acceptance in the United States and in Australia of the role of the courts in undertaking judicial review.

There is no explicit provision in the *United States Constitution* for judicial review. *Marbury v Madison*,³ which was decided in 1803, relied on the Supremacy Clause in art VI of the *Constitution* which provided, in summary, that the *Constitution* and the laws of the United States made under it 'shall be the supreme Law of the Land' notwithstanding anything in the *Constitution* or laws of any state. From this Chief Justice Marshall was able to elucidate high constitutional principle: 'It is emphatically the province and duty of the judicial department to say what the law is'.⁴

It is well known that *Marbury v Madison* was written in the aftermath of a heavily contested presidential election. The new President, Thomas Jefferson, directed John Madison, the Secretary of State, not to deliver the commissions of justices who had been appointed by the outgoing President, John Adams, in the last two days of his Presidency. Chief Justice Marshall held that *Marbury*, one of the

³ *Marbury v Madison*, 5 US (1 Cranch) 137 (1803) ('*Marbury*').

⁴ *Ibid* 177.

people whose commission was not delivered, was legally entitled to his commission and observed that ordinarily mandamus might be expected to lie as the remedy.⁵

A statute purported to give the Supreme Court of the United States original jurisdiction over applications for writs of mandamus.⁶ But art III of the *Constitution* limited the original jurisdiction of the Court to cases where the state was a party to a lawsuit or the lawsuit involved foreign dignitaries.⁷ In all other cases its jurisdiction was appellate. The Chief Justice held the statute to be invalid as inconsistent with the *Constitution*, but ultimately concluded that the remedy of mandamus was not available.⁸

Marbury v Madison may be understood as cementing the availability of judicial review in the United States whilst simultaneously sidestepping a politically charged situation. It has been pointed out that the Court could simply have dealt with the jurisdictional question concerning remedy.⁹ But it may be that the Chief Justice was striving for acceptance of the Court's role in judicial review and to that end took the longer course to be seen to adhere to strict legalism in that process.

While the position held by the American founders in 1789 regarding the Supreme Court's function of judicial review has been a source of debate,¹⁰ the position of the framers of the *Australian Constitution* in the 1890s is far clearer.¹¹ By that time judicial review was well established in North America and the Australian founders regarded it as an integral part of the structural logic of federalism.

Despite their awareness of *Marbury v Madison*,¹² the framers of the *Australian Constitution* made no express general provision for judicial review except for s 75(v) which notably includes the remedy of mandamus. Nevertheless, the exercise of the High Court's power to undertake judicial review appears to have been accepted from the outset, which suggests that the need for it was well understood by lawyers such as Griffiths, Barton, Inglis Clark and Deakin.

In the second reading speech to the Bill which would become the *Judiciary Act 1903* (Cth) ('*Judiciary Act*'), Alfred Deakin said that '[t]he *Constitution* is to be the supreme law, but it is the High Court which is to determine how [f]ar and between what boundaries it is supreme'. He described the Court as 'the competent

⁵ Ibid 173.

⁶ *Judiciary Act of 1789*, ch 20, § 13, 1 Stat 73, 81.

⁷ *United States Constitution* art III § 2 cl 2.

⁸ See *Marbury* (n 3) 174.

⁹ Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Wolters Kluwer, 6th ed, 2019) 39–40, 43.

¹⁰ See, eg, William Michael Treanor, 'Judicial Review before *Marbury*' (2005) 58(2) *Stanford Law Review* 455.

¹¹ Brian Galligan, 'Judicial Review in the Australian Federal System: Its Origin and Function' (1979) 10(4) *Federal Law Review* 367, 394.

¹² William G Buss, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*' (2009) 33(3) *Melbourne University Law Review* 718, 781–8; John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 798; A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 234.

tribunal which is able to protect the *Constitution*, and to oversee its agencies'. The Court is, he said, 'properly termed the "keystone of the federal arch"'.¹³

The High Court was not required to establish its credentials as the Supreme Court of the United States was. In its formative years its acceptance was evident. Many of the early cases decided by the Court were constitutionally significant — such as delineating the boundaries of state and federal powers and setting new principles of constitutional interpretation. But they did not attract much controversy. In part this has been attributed to the approval and respect which the Court had early attained and the 'strict and complete legalism', in the words of Sir Owen Dixon, which the Court applied.¹⁴

In 1906, during a second reading debate about an amendment to the *Judiciary Act* to increase the number of justices of the Court to five, the then Attorney-General, Isaac Isaacs, said: 'the High Court of Australia has gained the complete confidence of the public'.¹⁵ He observed that apart from the Supreme Court of the United States there was no legal tribunal in the world which has as much power as the High Court of Australia. He noted that the same could not be said of the House of Lords and the Privy Council which, he observed, 'may find their decisions upon any point whatever reversed by an Act of the Legislature'.¹⁶

The position in England, as alluded to by Isaac Isaacs, was different. There is no written constitution. Rather, the United Kingdom has what is referred to as its 'unwritten Constitution', which may be understood as the rights recognised by the common law resulting from judicial decisions.¹⁷ Unlike the superior courts of the United States and Australia, there could be no early acceptance of a role for the courts in declaring the law. Rather the doctrine of parliamentary sovereignty promoted reliance on statutory interpretation to limit the operation and effect of statutes.¹⁸

The development of judicial review in the United Kingdom has been said to have commenced in the 1960s. Professor Sir William Wade noted that there was then a 'renaissance' of judicial review 'when public reaction against administrative injustice had become too strong to be ignored'.¹⁹ Lord Neuberger, a former President of the Supreme Court, with his customary candour, has suggested that the attitude of the House of Lords to judicial review before the 1960s was 'rather spineless'.²⁰

¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10965 (Alfred Deakin, Attorney-General).

¹⁴ *Swearing in of Sir Owen Dixon as Chief Justice* (1952) 85 CLR xi, xiv. See also Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16(1) *Federal Law Review* 1, 4–5.

¹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 July 1906, 1431 (Isaac Isaacs, Attorney-General).

¹⁶ *Ibid.*

¹⁷ AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) 196.

¹⁸ See generally Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) ch 9.

¹⁹ HWR Wade, *Constitutional Fundamentals* (Stevens & Sons, 1980) 62.

²⁰ Lord Neuberger, 'Reflections on Significant Moments in the Role of the Judiciary' (Speech, Personal Support Unit Fundraising Breakfast, 16 March 2017) [11].

Important as landmark decisions such as *Ridge v Baldwin*,²¹ *Anisminic*²² and *Council of Civil Services Unions v Minister for the Civil Service*²³ were in judicial review of administrative action, they did not involve the courts in review of legislation for invalidity. But then the United Kingdom entered the European Economic Community ('EEC') (later the European Union) and legislated to commit itself to the *European Convention on Human Rights*.²⁴ As Professor Winterton observed,²⁵ given that EEC law must prevail over domestic legislation this entailed a different conception of parliamentary sovereignty. The enactment of the *Human Rights Act 1998* (UK) has been considered to involve a transfer of political power from the executive and legislature to the judiciary.²⁶ The reality was that the courts now had the power to declare which law would prevail, to declare rights and to sometimes determine those rights as contrary to domestic legislation.

II Lapses in Acceptance

A The United States

Starting with the United States, later history was to show that recognition of the political effects of decisions involving judicial review could on occasion give rise to challenges to the legitimacy of judicial review.

Although the power of judicial review in the United States had been firmly established by *Marbury v Madison*, the Supreme Court did not exercise it to strike down another federal law for another 50 years. When it did, in *Dred Scott v Sandford*,²⁷ holding that an Act of Congress which purported to prohibit slavery in some US territories and to free slaves in others was unconstitutional, it was greeted with 'unmitigated wrath from every segment of the United States except the slave holding states'.²⁸ It was said that a 'tempest of malediction' had 'burst over the judges'.²⁹ Abraham Lincoln, not yet President, argued that steps would be taken to have the Court overrule it in the future.³⁰

In the second half of the 20th century, the Supreme Court was once again drawn into controversy by its decisions in the segregation cases such as *Brown v Board of Education*.³¹ In response to the Court's holding that laws establishing social

²¹ *Ridge v Baldwin* [1964] AC 40.

²² *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

²³ *Council of Civil Services Unions v Minister for the Civil Service* [1985] AC 374.

²⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

²⁵ George Winterton, 'The British Grundnorm: Parliamentary Supremacy Re-Examined' (1976) 92 (October) *Law Quarterly Review* 591.

²⁶ See, eg, KD Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62(1) *Modern Law Review* 79, 79.

²⁷ *Dred Scott v Sandford*, 60 US 393 (1857).

²⁸ Ronald D Rotunda and John E Nowak, *Treatise on Constitutional Law: Substance and Procedure* (Thomson-Reuters-West, 5th ed, 2012) vol 3, 445.

²⁹ Robert G McCloskey, *The American Supreme Court* (University of Chicago Press, 5th ed, 2010) 62.

³⁰ Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press, 2006) 183.

³¹ *Brown v Board of Education of Topeka*, 347 US 483 (1954).

segregation in public schools were unconstitutional, the southern states openly and aggressively resisted compliance with desegregation and the Court was forced to make orders requiring it on a number of occasions.

The decision in *Roe v Wade*,³² in 1973, again embroiled the Supreme Court in controversy. By a majority of 7 to 2 the Court held that a Texan law which prohibited all abortions violated a woman's right to privacy in the Due Process Clause of the Fourteenth Amendment. The reaction to the decision heavily polarised the community according to political and religious affiliation. Justice Blackmun, who wrote for the majority, speaking extra-judicially, expressed resentment that what was really a medical and moral problem, rather than a legal one, had to be decided by the Court.³³ It is of interest to observe that Judge Ruth Bader Ginsburg, when a judge of the US Court of Appeals for the DC Circuit, criticised the decision as preventing the resolution of the question by political means.³⁴

Up until the recent decision in *Dobbs v Jackson Women's Health Organization*,³⁵ which overturned *Roe v Wade*, the most controversial interaction between the Supreme Court and the political branches would probably have been thought to be *Bush v Gore*,³⁶ which concerned the presidential election of 2000. The Court ruled 5 to 4 that the recount then under way in Florida be stayed. Then, after hearing full oral argument, the Court issued a 7 to 2 per curiam ruling holding that Florida's recount scheme was unconstitutional, but with a 5 to 4 split (along the same ideological lines) regarding whether a constitutional recount could be fashioned in time. Later analysis was to confirm that had the recount been allowed, Gore would have won the presidency.³⁷

Some of the dissenting justices spoke of the decision as undermining the public's confidence in the Court. Justice Breyer said that that confidence is a 'public treasure' which had been attained slowly over many years, some of which were marred by the Civil War and the tragedy of segregation.³⁸ The most trenchant criticism was that the justices had been partisan in their decision making.³⁹ This would appear to have applied to both the majority and the dissentients.

Turning to more recent history, it is something of an understatement to say that the decision in *Dobbs* polarised the community. It removed the right of abortion which had come to be accepted in the decades since *Roe v Wade*. The majority were not only criticised for being partisan; it was said by many that some of the later appointees did what they had been deliberately appointed to do. The language of

³² *Roe v Wade*, 410 US 113 (1973).

³³ David J Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of Roe v Wade* (Macmillan, 1994) 607.

³⁴ Ruth Bader Ginsburg, 'Speaking in a Judicial Voice' (1992) 67(6) *New York University Law Review* 1185, 1208.

³⁵ *Dobbs v Jackson Women's Health Organization*, No 19-1392, 597 US ____ (2022) ('*Dobbs*').

³⁶ *Bush v Gore*, 531 US 98 (2000).

³⁷ Lance Dehaven-Smith, *The Battle for Florida: An Annotated Compendium of Materials from the 2000 Presidential Election* (University Press of Florida, 2005) 15, 37–41.

³⁸ *Bush v Gore* (n 36) 157.

³⁹ See, eg, Jack M Balkin, 'Bush v Gore and the Boundary between Law and Politics' (2001) 110(8) *Yale Law Journal* 1407.

criticism was harsh. The President referred to the decision as the ‘realization of an extreme ideology’⁴⁰ and the Court’s behaviour as ‘outrageous’ and ‘destabilizing’.⁴¹ The Speaker said the Court was guilty of a miscarriage of justice.⁴²

B *Australia*

Closer to home in Australia, Professor Winterton once described the *Communist Party Case*⁴³ of 1951 as ‘probably the most important [decision] ever rendered by the [High] Court’.⁴⁴ I am sure many would agree. The Court held the *Communist Party Dissolution Act 1950* (Cth) (‘Act’), which purported to ban the Communist Party and affiliated organisations, and to restrict the civil liberties of persons associated with it, to be invalid. The Court unanimously held that the Parliament has power to legislate with respect to the prevention of subversion and sedition; however, a majority of the Court concluded that the validity of such a law turned on the constitutional fact of whether a person or body was actually engaged in such subversive conduct. As the Act purported to declare the Australian Communist Party guilty of subversive conduct, of ‘engag[ing] in activities or operations designed to bring about the overthrow or dislocation of ... Australia’,⁴⁵ the Parliament had attempted to recite itself into power, and the Act was invalid. Invalidity resulted because the Parliament itself declared that constitutional fact, or authorised the government to do so, when the finding of that fact was a matter for the Court.

The decision to declare the Act invalid might have been regarded as anti-democratic. The Menzies Government had won an election in which the Act was a central policy of the Liberal Party’s election platform.⁴⁶ Menzies himself had described the result of the election as an ‘overwhelming mandate from the people’.⁴⁷ The Prime Minister was no stranger to the High Court. He had appeared before it many times, including in landmark cases.⁴⁸ His response, though strongly worded, was respectful of the Court as an institution. He said that he had ‘no legal criticism’ to make of the decision but observed that it may have caused ‘grave concern’ to the Australian public.⁴⁹

Professor Winterton observed that the decision in the *Communist Party Case* was not criticised as heavily as those in the United States, largely because the High

⁴⁰ White House, ‘Remarks by President Biden on the Supreme Court Decision to Overturn *Roe v Wade*’ (Press Statement, 24 June 2022).

⁴¹ White House, ‘Remarks by President Biden in Press Conference, Madrid, Spain’ (Press Statement, 30 June 2022).

⁴² Nancy Pelosi, ‘Dear Colleague: Miscarriage of Justice’ (Press Release, 25 June 2022).

⁴³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (‘*Communist Party Case*’).

⁴⁴ George Winterton, ‘The Significance of the *Communist Party Case*’ (1992) 18(3) *Melbourne University Law Review* 630, 653.

⁴⁵ *Communist Party Dissolution Act 1950* (Cth) Preamble.

⁴⁶ Winterton, ‘The Significance of the *Communist Party Case*’ (n 44) 635.

⁴⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 1951, 364 (Robert Menzies, Prime Minister).

⁴⁸ For example, Robert Menzies KC appeared for the claimant in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

⁴⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 1951, 364 (Robert Menzies, Prime Minister).

Court's reputation was high. Even newspapers which had supported the Act did not criticise the Court in their reports of the decision.⁵⁰ This, he said, was the case's 'greatest legacy'.⁵¹ That reputation might have been maintained of course by continued adherence to strict legalism in judgments, of which Sir Owen Dixon had earlier spoken. However, the 1980s and 1990s, in particular, may have marked something of a turning point in perceptions of judicial review in Australia.

In the *Tasmanian Dam Case*,⁵² by a majority of 4 to 3, the High Court held valid Commonwealth legislation and regulations giving effect to the World Heritage Convention, thereby preventing the Tasmanian government from undertaking construction of its dam project. The majority's approach to the external affairs power was considered by some to be an unwarranted expansion and to upset the federal-state balance of powers.⁵³

Perhaps foreseeing criticism, the Court for the first time released a media statement. This was not the neutral case summary which is now published with respect to each decision of the Court. The media statement sought to explain the role of the Court, pointing out that the questions it answered were strictly legal and that the Court was not in any way concerned with the merits of the dispute concerning the dam project.⁵⁴

This was not sufficient to prevent some newspapers and politicians from emphasising the political nature of judicial review and questioning its legitimacy.⁵⁵ It did not prevent criticism by state Premiers.⁵⁶ The criticism led to a proposal to amend the *Constitution* to limit the scope of the external affairs power. It was considered at the 1985 Australian Constitutional Convention and by the Constitutional Commission. However, the Convention split along party lines and the Commission subsequently recommended that no alteration be made.⁵⁷

*Mabo [No 2]*⁵⁸ was not strictly a judicial review case; rather, Mr Mabo sought declarations as to his rights and interests as a consequence of the annexation of the Murray Islands by the Colony of Queensland. The case nevertheless demonstrates the role of the judiciary in determining the limits and scope of executive authority and sovereignty over land. In the course of his judgment Brennan J confirmed, in terms of *Marbury v Madison*, that it is the Court's duty to declare and enforce the law.⁵⁹ It is something of an understatement to say that the decision was controversial and that it caused much public debate. Some politicians claimed the Court to have

⁵⁰ Winterton, 'The Significance of the Communist Party Case' (n 44) 653.

⁵¹ Ibid 656.

⁵² *Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*').

⁵³ Leslie Zines, 'The Tasmanian Dams Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 262, 274–5.

⁵⁴ *Tasmanian Dam Case* (n 52) 58–9.

⁵⁵ Brian Galligan, *The Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 243–4.

⁵⁶ See ibid 244.

⁵⁷ Zines (n 53) 275.

⁵⁸ *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo [No 2]*').

⁵⁹ Ibid 29.

become political and to have assumed a legislative role.⁶⁰ One political party promised to legislate to overturn it.⁶¹

Very soon after *Mabo [No 2]* there followed *Nationwide News v Wills*⁶² and *ACTV v Commonwealth*⁶³ which involved the use of the freedom of political communication, which was found to be implied by the *Constitution*, to strike down legislation. The decisions were described by one eminent academic commentator as creating a ‘political storm’.⁶⁴ The development was described on the one hand as ‘[p]erhaps the most remarkable feature of Australian constitutional development in the past decade’.⁶⁵ On the other hand, it was described as an unjustified intrusion into the legislative and political domains.⁶⁶ An anonymous federal Minister was reported as saying that the Cabinet should ‘hold discussions on limitations on the court’s powers’.⁶⁷ Some politicians called for changes to the appointment process including political screening US-style.⁶⁸ At least the Attorney-General of the day rejected such calls and pointed out that the government should not intrude into the business of the Court and notably advised ‘nor should the views of political appointees become a matter for political debate’.⁶⁹

The later native title case of *Wik Peoples*,⁷⁰ where a majority of the Court held that pastoral leases did not confer rights to exclusive possession and did not necessarily extinguish all incidents of native title,⁷¹ created another storm and claims that large tracts of land, including freehold, were at risk. A state Premier called the High Court ‘an embarrassment’ and suggested ‘constitutional surgery’ be undertaken to allow voters to elect and dismiss judges.⁷² The Deputy Prime Minister pointed to a trend towards ‘judicial activism’ and said that the next vacant seat on the High Court should be filled by a ‘capital “C” Conservative’.⁷³

In *Plaintiff M70/2011*,⁷⁴ the Court held invalid a declaration by the Minister for Immigration and Citizenship that Malaysia met the criteria stated in the

⁶⁰ Richard Bartlett, ‘Mabo: Another Triumph for the Common Law’ (1993) 15(2) *Sydney Law Review* 178, 178, quoting Bill Hassell, *The West Australian* (Perth, 24 October 1992) 2. See also sources cited in Bartlett’s article at n 2.

⁶¹ Bartlett (n 60) 178, citing *Daybreak* (ABC Radio National, 13 January 1992).

⁶² *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

⁶³ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV v Commonwealth*).

⁶⁴ HP Lee, ‘The Implied Freedom of Political Communication’ in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 383, 392.

⁶⁵ Adrienne Stone, ‘Freedom of Political Communication, the Constitution and the Common Law’ (1998) 26(2) *Federal Law Review* 219, 219.

⁶⁶ HP Lee (n 64) 383.

⁶⁷ *Ibid* 392.

⁶⁸ *Ibid*.

⁶⁹ Quoted in Margo Kingston, ‘Duffy Rules Out Checks on Court Positions’, *The Age* (Melbourne, 8 October 1992) 4.

⁷⁰ *Wik Peoples v Queensland* (1996) 187 CLR 1.

⁷¹ *Ibid* 122, 131 (Toohey J), 154–5, 166–7 (Gaudron J), 204–5 (Gummow J), 242–3, 261 (Kirby J).

⁷² Quoted in Scott Emerson and Bernard Lane, ‘States Push for High Court Change’, *The Australian* (Canberra, 19 February 1997) 1.

⁷³ Quoted in Niki Savva, ‘Fischer Seeks a More Conservative Court’, *The Age* (Melbourne, 5 March 1997) 1.

⁷⁴ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144.

Migration Act 1958 (Cth) so as to enable asylum seekers to be removed to Malaysia. The then Prime Minister held a press conference in which she said the ‘decision basically turns on its head the understanding of the law in [Australia]’.⁷⁵

The more recent decisions in *Love v Commonwealth*⁷⁶ and *Thoms v Commonwealth*⁷⁷ also drew political fire. Unnamed conservative members of the Parliament, whilst not calling for ‘capital “C” conservative’ appointments, were reported by the press to have said that future appointments to the Court would be ‘black letter lawyers’.⁷⁸

C The United Kingdom

Turning back to the United Kingdom, in the 1990s judicial review was gaining momentum. Decisions such as the *Factortame Case*⁷⁹ marked turning points in judicial review. The courts no longer relied on a ‘contrived interpretation’ of legislation.⁸⁰ The decision in 2004 in *A v Secretary of State for the Home Department*⁸¹ showed the courts were not going to completely defer to the Secretary regarding whether persons detained were a risk to national security, as had been the case in *Liversidge v Anderson*.⁸² The courts were required to engage in judicial review to ensure rights afforded under the *European Convention on Human Rights* were protected. The statutory provision providing for it was simply declared to be incompatible with the Convention.

This is the background to the Brexit cases — *Miller [No 1]*⁸³ and *Miller [No 2]*⁸⁴ — which were decided in 2016 and 2019 respectively. In the first case the Supreme Court ruled that withdrawal from the European Union could not be effected by notice given by a Minister, which is to say by use of the prerogative power. An Act of Parliament was necessary. In *Miller [No 2]*, the Court held that the government’s attempt to prorogue Parliament for five weeks while attempts were being made to legislate to require the government to seek an extension to the Brexit process in order to minimise the chance of a ‘no-deal Brexit’ had, ‘of course’, the ‘effect of frustrating or preventing the constitutional role of Parliament in holding the Government to account’.⁸⁵

The decision at first instance in *Miller [No 1]* resulted in some tabloid newspapers calling the judges of the Divisional Court ‘enemies of the people’

⁷⁵ Julia Gillard, ‘Transcript of Joint Press Conference, Brisbane’ (Transcript ID 18108, 1 September 2011) <<https://pmtranscripts.pmc.gov.au/release/transcript-18108>>.

⁷⁶ *Love v Commonwealth* (2020) 270 CLR 152.

⁷⁷ *Thoms v Commonwealth* (2022) 401 ALR 529.

⁷⁸ Nicola Berkovic, ‘The Great High Court Lottery’, *The Australian* (online, 28 October 2020) <<https://www.theaustralian.com.au>>.

⁷⁹ *R v Secretary of State for Transport; Ex parte Factortame Ltd [No 2]* [1991] 1 AC 603.

⁸⁰ Michael Gordon, *Parliamentary Sovereignty in the UK Constitution* (Bloomsbury Publishing, 2015) 162.

⁸¹ *A v Secretary of State for the Home Department* [2005] 2 AC 68.

⁸² *Liversidge v Anderson* [1942] AC 206.

⁸³ *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (‘*Miller [No 1]*’). See also *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

⁸⁴ *R (Miller) v Prime Minister* [2020] AC 373 (‘*Miller [No 2]*’).

⁸⁵ *Ibid* 408–9, [55]–[56].

because the decision was regarded by them as contrary to the will of the public as expressed in the Brexit poll.⁸⁶ All of this was met with conspicuous silence from the government, including the Lord Chancellor, who offered no support for the Court. The outrage had subsided somewhat by the time the matter was heard in the Supreme Court. *Miller [No 2]* was met with claims of judicial activism and misuse of judicial power.⁸⁷ Calls were made to abolish the Supreme Court.⁸⁸

III The Aftermath

So what of the aftermath of these recent decisions? Attention may be directed in the first place to the United Kingdom and the United States where consideration was given, respectively, to curbing the powers of the court and to altering the constitution of the court and the tenure of its judges.

In the wake of the decision in *Miller [No 2]* a general election was held in December 2019 where the Conservative Party ran a platform which included investigating reforms to the Supreme Court.⁸⁹ Following its re-election the government set up the Independent Review of Administrative Law ('IRAL') in July 2020 to consider reforms to the process of judicial review. The IRAL Report⁹⁰ was released in March 2021 at the same time as the Government's Response.⁹¹ As Professor Paul Craig observed,⁹² the Government's Response did not mention the fact that the IRAL Panel had pushed back on the great majority of suggestions for curtailment contained in the terms of reference. It spoke instead of the importance of striving 'to create and uphold a system which avoids drawing the courts into deciding on merit or moral value issues which lie more appropriately with the executive or Parliament'.⁹³ Proposals with respect to ouster clauses and to legislate for decisions to be a nullity, which had been raised for discussion, were not to be progressed.⁹⁴

The result was some reforms in the *Judicial Review and Courts Act 2022* (UK) which, amongst other things, provided the courts with a discretion to suspend quashing orders, that discretion to be guided by a non-exhaustive list of factors, and allowed the courts to limit the retrospective effect of quashing orders.⁹⁵ It removed

⁸⁶ James Slack, 'Enemies of the People: Fury over "Out of Touch" Judges Who Have "Declared War on Democracy" by Defying 17.4M Brexit Voters and Who Could Trigger Constitutional Crisis', *The Daily Mail* (online, 4 November 2016) <<https://www.dailymail.co.uk/news/article-3903436>>.

⁸⁷ See, eg, John Finnis, *The Unconstitutionality of the Supreme Court's Prorogation Judgment* (Policy Exchange, 2019) 6, 18.

⁸⁸ Derrick Wyatt and Richard Ekins, *Reforming the Supreme Court* (Policy Exchange, 2020) 9.

⁸⁹ *Get Brexit Done, Unleash Britain's Potential* (The Conservative and Unionist Party Manifesto 2019, 2019) 47–8.

⁹⁰ *Independent Review of Administrative Law* (Report, CP 407, March 2021) ('IRAL Report').

⁹¹ Ministry of Justice, *Judicial Review Reform: The Government Response to the Independent Review of Administrative Law* (Report, CP 408, March 2021) ('Government's Response').

⁹² Paul Craig, 'IRAL: The Panel Report and the Government's Response', *UK Constitutional Law Association* (Blog Post, 22 March 2021) <<https://ukconstitutionallaw.org/2021/03/22/paul-craig-iral-the-panel-report-and-the-governments-response/>>.

⁹³ Government's Response (n 91) 8 [2].

⁹⁴ *Ibid* 6 [11].

⁹⁵ *Judicial Review and Courts Act 2022* (UK) s 1.

what are called ‘*Cart*’⁹⁶ judicial reviews, by which certain decisions of the Upper Tribunal are reviewable by supervisory courts. The statute excluded the ability to judicially review a decision of the Upper Tribunal to refuse permission to appeal from first-tier tribunals but left a residual review jurisdiction for the supervisory courts in certain circumstances.⁹⁷

Thus no serious restrictions on judicial review resulted. But that is not to say that there does not remain in the United Kingdom a push for reform or curtailment of judicial review based largely on the perception that between 2015 and 2020 there was an ‘inflation’ of judicial power,⁹⁸ which was seen to have been confirmed by these high-profile cases. A group called the Policy Exchange, which claims to have influence across party divides⁹⁹ and is said to have links to the Conservative Party,¹⁰⁰ has remained active in the pursuit of this goal. In October 2022, it published a paper entitled ‘The Limits of Judicial Power: A Programme of Constitutional Reform’ which outlined reforms that would ‘restate and buttress the traditional limits on judicial power’.¹⁰¹ Its Judicial Power Project aims to ‘correct the undue rise in judicial power by restating, for modern times and in relation to modern problems, the nature and limits of the judicial power’.¹⁰²

In the United States, questions had already been raised about the Supreme Court before the decision in *Dobbs* because of an appointment which had been made close to the 2020 Presidential election. Following President Biden’s inauguration, Congressional Democrats introduced legislation¹⁰³ to expand the Court from 9 to 13 justices on the basis that the previous Republican government had politicised the Court and undermined its legitimacy with its appointments.¹⁰⁴ But most were prepared to await the Presidential Commission on the Supreme Court of the United States (‘SCOTUS’) which was formed in April 2021 by the President’s Executive Order.¹⁰⁵

The SCOTUS Report, which was submitted in December 2021, began by explaining the developments giving rise to the issuance of the Order. It accepted that

⁹⁶ The term ‘*Cart* judicial review’ refers to the Supreme Court holding in *R (Cart) v Upper Tribunal* [2012] 1 AC 663 that if a decision of the First-tier Tribunal is affected by an error of law, with the result that the refusal of the Upper Tribunal to grant permission to appeal against the decision of the First-tier Tribunal is also affected by an error of law, then the Upper Tribunal’s denial of permission to appeal could — in certain circumstances — be judicially reviewed and quashed.

⁹⁷ *Judicial Review and Courts Act 2022* (UK) s 2.

⁹⁸ Richard Ekins, *The Case for Reforming Judicial Review* (Policy Exchange, 2020) 7 [1].

⁹⁹ ‘About’, *Policy Exchange* (Web Page) <<https://policyexchange.org.uk/about/>>.

¹⁰⁰ George Monbiot, ‘No 10 and the Secretly Funded Lobby Groups Intent on Undermining Democracy’, *The Guardian* (online, 1 September 2020) <<https://www.theguardian.com/commentisfree/2020/sep/01/no-10-lobby-groups-democracy-policy-exchange>>.

¹⁰¹ Richard Ekins, *The Limits of Judicial Power: A Programme of Constitutional Reform* (Policy Exchange, 2022) 7, 16–20.

¹⁰² ‘About the Judicial Power Project’, *Policy Exchange* (Web Page) <<https://judicialpowerproject.org.uk/about/>>.

¹⁰³ Judiciary Act of 2021, HR 2584, 117th Congress § 1 (2021).

¹⁰⁴ Senator Ed Markey, ‘Expand the Supreme Court: Senator Markey and Reps Nadler, Johnson, and Jones Introduce Legislation to Restore Justice and Democracy to Judicial System’ (Press Release, 15 April 2021).

¹⁰⁵ Executive Order 14023 on the Establishment of the Presidential Commission on the Supreme Court of the United States, 86 Fed Reg 19,569 (14 April 2021).

debates surrounding the process by which the President nominates and the Senate confirms justices were not new, but the Report observed that it has become more intensely partisan in recent years.¹⁰⁶

The Report discussed arguments for and against contemporary reform, including Court expansion and methods to ensure ideological balance,¹⁰⁷ although none were suggested to offer practical benefits having any certainty. It considered term limits for the justices and explored proposals that would reduce the powers of the Supreme Court or the judicial branch as a whole, but concluded that such reforms would probably be found to be unconstitutional.¹⁰⁸

The decision in *Dobbs* was published on 24 June 2022.¹⁰⁹ Despite the trenchant criticisms from government there has, as yet, been no suggestion that there will be structural or jurisdictional changes to the Court. The President had stated he was ‘not a fan’ of ‘court packing’ during the 2020 campaign.¹¹⁰ He is said to regard the Report as a resource that he will continue to review.¹¹¹

In the past it may more confidently have been said that anger or resentment towards the courts about controversial judicial review decisions abates over time. In Australia, in particular, there was never any doubt that Tasmania would accept the decision in the *Tasmanian Dam Case* and the fears expressed following the decisions in *Mabo [No 2]*, the implied freedom cases and *Wik Peoples* proved to be unfounded.

The point to be made is that in none of the polities in question has the authority of the court been denied. That said, the decision in *Dobbs* may have seriously affected the reputation and standing of the US Supreme Court judging by the strength of the reaction to it. Time will tell.

Whatever the future holds for the courts of the United Kingdom and the United States or the curtailment of their powers, a political conversation has started about major changes to limit the authority of the courts or to effect their restructure.

No such conversation has started in Australia. But that is not to say that we should not learn from experiences elsewhere, particularly in the United States, where the Supreme Court’s reputation as partisan appears to have grown. It should teach us that there are real problems with such an appointment process so far as concerns public perceptions of the independence of the judiciary.

That is why we in Australia should be concerned about misguided arguments for ‘fixing’ the judiciary when a decision is unpopular with the government or politicians. And we should be concerned because such suggestions have been made

¹⁰⁶ Presidential Commission on the Supreme Court of the United States, *Final Report* (December 2021) 14–17.

¹⁰⁷ *Ibid* 73–94.

¹⁰⁸ *Ibid* 163–9, 179–82, 189–91.

¹⁰⁹ *Dobbs* (n 35).

¹¹⁰ Quoted in Sean Sullivan, ‘Biden Says He’s “Not a Fan of Court-Packing”’, *The Washington Post* (online, 13 October 2020) <https://www.washingtonpost.com/politics/biden-says-hes-not-a-fan-of-court-packing/2020/10/13/4ea7af22-0d02-11eb-8a35-237ef1eb2ef7_story.html>.

¹¹¹ The White House, ‘Press Briefing by Press Secretary Jen Psaki, May 4, 2022’ (Press Briefing, 4 May 2022).

more than once and over a period of time. The reactions by some in government to the implied freedom cases, that appointments should be made to the High Court US-style, and to the decision in *Wik Peoples*, that only persons of like-mind with the government should be appointed, were ill-considered. Recent statements attributed to those in government following the decisions in *Love* and *Thoms* suggest that the latter view may still be maintained. Such suggestions should be the subject of comment and criticism. And expressly rejected. They should not be made because people may assume that they will be acted upon.

It is generally understood that acceptance of the role and of the authority of our courts is essential to the maintenance of the rule of law and our democracy. The authority of a court depends upon the confidence of the public in it. That authority and that confidence cannot be maintained if the public perception of judicial independence is undermined. The perception of judicial independence requires on the part of judges adherence to strict legal and judicial method in decision-making. For those who are in a position to influence the appointment of judges it requires an understanding of the role of the court, the importance of judicial independence, including perceptions of it, and careful consideration of what is said about the use of an appointments process to 'fix' a court.

Before the High Court

Planting the Yardstick: The Approach to Mandatory Minimum Sentences and the High Court Appeals in *Delzotto* and *Hurt*

Rohan Balani*

Abstract

In *Delzotto v The King* and *Hurt v The King*, the High Court of Australia must decide a fundamental question which will shape the approach to mandatory minimum sentences in the future, both in terms of their consideration in sentencing and their use generally by Parliament. The appeals offer the High Court an opportunity to clarify whether a sentencing judge must use a mandatory minimum penalty as a yardstick in the sentencing exercise or whether a mandatory minimum penalty is only relevant where the sentence arrived at after the usual exercise of the sentencing discretion is below the mandated minimum. In doing so, the High Court will necessarily consider the core principles underlying criminal sentencing in Australia as well as the need for consistency in sentencing in the future. This column considers the appeals and suggests that the approach adopted should involve the use of a minimum penalty as a yardstick as this approach is the only one which is consistent with established principles of criminal sentencing.

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I Introduction

The appeals to the High Court in *Delzotto v The King*¹ and *Hurt v The King*² come from the New South Wales Court of Criminal Appeal ('NSWCCA') in *R v Delzotto*,³ and the Australian Capital Territory Court of Appeal ('ACTCA') in *Hurt v The Queen*,⁴ respectively. The appeals raise a fundamental question about the approach to the sentencing of offences that prescribe, through legislation, mandatory minimum penalties, where such legislation is not clear about the approach to be followed. While both *Delzotto* and *Hurt* relate to offences of possession of, access to and transmission of child abuse material under the *Criminal Code*,⁵ the High Court's decision promises to have far-reaching impacts on both the interpretation and legislative use of mandatory minimum penalties in the future. And although uncharacteristically zealous arguments against mandatory minimum sentences have been made by courts,⁶ mandatory minimum sentences are often provided for in legislation.⁷ As such, the guidance of the High Court will be critical.

II Background Facts, Legislative Framework and Procedural History

A *Delzotto*

On 25 June 2021, Mr Delzotto, before Grant DCJ in the District Court of New South Wales at Albury, was convicted of and sentenced for two offences contrary to the *Criminal Code*: namely, possessing or controlling child abuse material obtained or accessed using a carriage service, contrary to s 474.22A(1) (the 'possession offence'); and using a carriage service to access child abuse material, contrary to s 474.22(1)(a)(i) (the 'access offence').⁸ Critically, Mr Delzotto was sentenced on the basis that s 16AAB of the *Crimes Act 1914* (Cth) ('*Crimes Act*') applied to the sentencing of the possession offence because of his prior convictions in Queensland

¹ *Delzotto v The King* (High Court of Australia, Case No S44/2023) ('*Delzotto*').

² *Hurt v The King* (High Court of Australia, Case No C7/2023) ('*Hurt*').

³ *R v Delzotto* [2022] NSWCCA 117 ('*Delzotto Appeal*').

⁴ *Hurt v The Queen* (2022) 18 ACTLR 272 ('*Hurt Appeal*').

⁵ *Criminal Code Act 1995* (Cth) sch 1 ('*Criminal Code*').

⁶ Recently, by the Victorian Court of Appeal in *Buckley v The Queen* [2022] VSCA 138, [5], where mandatory minimum sentences were described by Maxwell P and T Forrest JA as 'wrong in principle' and 'requir[ing] judges to be instruments of injustice'. Criticisms have also been made by judges in other jurisdictions: see eg, Justice David M Paciocco, 'The Law of Minimum Sentences: Judicial Responses and Responsibility' (2015) 19(2) *Canadian Criminal Law Review* 173.

⁷ Despite, for example, legislative prescription of mandatory minimum penalties being described by the former Chief Justice of the Supreme Court of Western Australia as not showing mutual respect between Parliament and the courts: Wayne Martin, 'Parliament and the Courts: A Contemporary Assessment of the Ethic of Mutual Respect' (2015) 30(2) *Australasian Parliamentary Review* 80, 97–8.

⁸ *R v Delzotto* [2021] NSWDC 325 ('*Delzotto Sentencing*'). The facts underlying the offence can be found in *Delzotto Appeal* (n 3) [18]–[22] but are not required to be recounted for the purposes of this column.

in 2001.⁹ Section 16AAB of the *Crimes Act* provides that, if the person has been convicted of a ‘Commonwealth child sexual abuse offence’ then,¹⁰ subject to the operation of s 16AAC, ‘the court must impose for the current offence a sentence of imprisonment of *at least* the period specified in column 2’ of the table in s 16AAB.¹¹ Relevantly, for an offence against s 474.22A(1) of the *Criminal Code*, the period specified is four years. Section 16AAC permits a judge to reduce the sentence from four years to take account of a guilty plea and assistance to authorities, as occurred in this case, with Grant DCJ allowing a combined reduction of 30%.¹² The sentencing judge fixed an indicative sentence of two years and nine months’ imprisonment for the possession offence.¹³

In sentencing, Grant DCJ rejected the Crown’s argument that the four-year period specified in s 16AAB should be used as a yardstick and reserved for the least serious types of offending. In doing so, his Honour did not follow the approach set out by the Western Australia Court of Appeal in *Bahar v The Queen*,¹⁴ reasoning that the relevant provisions of the statute in *Bahar* — the *Migration Act 1958* (Cth) (*‘Migration Act’*) — were distinguishable from those of the *Crimes Act*.¹⁵ The *Bahar* approach requires the sentencing judge to have regard to the minimum penalty from the outset as prescribing the bottom of the range of appropriate sentences, akin to the manner in which the maximum penalty is considered as prescribing the upper limit of the range of appropriate sentences. The necessary corollary of that approach — in line with the principle that the sentence should be proportionate to the objective gravity of the offence¹⁶ — is that the mandatory minimum sentence applies as a pre-determined baseline for cases involving the least serious offending.¹⁷ Instead, Grant DCJ adopted the approach set out by the Northern Territory Supreme Court in *R v Pot*.¹⁸ The *Pot* approach requires the sentencing judge to first apply all relevant sentencing principles and, if the sentence arrived at falls below the minimum penalty, only then to have regard to it by increasing the sentence imposed to the minimum penalty prescribed by the statute.¹⁹

The Crown appealed against the sentence imposed by Grant DCJ, arguing, relevantly, that his Honour erred in failing to follow the principles set out in *Bahar*. In the *Delzotto Appeal*, the NSWCCA, constituted by Beech-Jones CJ at CL and RA Hulme and Adamson JJ, unanimously upheld the Crown’s appeal on this ground,

⁹ *Delzotto Sentencing* (n 8) [10] (Grant DCJ).

¹⁰ Defined in s 3 of the *Crimes Act 1914* (Cth) (*‘Crimes Act’*) as including offences contrary to various provisions of the *Criminal Code* (n 5).

¹¹ *Crimes Act* (n 10) s 16AAB (emphasis added).

¹² *Delzotto Sentencing* (n 8) [72].

¹³ *Ibid.*

¹⁴ *Bahar v The Queen* (2011) 45 WAR 100 (*‘Bahar’*).

¹⁵ *Delzotto Sentencing* (n 8) [30]–[31].

¹⁶ See *R v McNaughton* (2006) 66 NSWLR 566, 572.

¹⁷ *Delzotto Appeal* (n 3) [24].

¹⁸ *R v Pot* (Supreme Court of the Northern Territory, Riley CJ, 18 January 2011) (*‘Pot’*).

¹⁹ *Delzotto Appeal* (n 3) [26].

determining that the *Bahar* approach, and not the *Pot* approach, was to be applied in sentencing under the relevant provisions of the *Crimes Act*.²⁰

B *Hurt*

The background of *Hurt* is very similar to that of *Delzotto*. In 2020, Mr Hurt pleaded guilty to three offences: the possession offence; the access offence; and using a carriage service to transmit child abuse material contrary to s 474.22(1)(a)(ii) of the *Criminal Code* (the ‘transmission offence’).²¹ These offences were committed after convictions in 2019 for similar offences, all falling within the definition of ‘Commonwealth child sexual abuse offence’, as that term is used in s 16AAB of the *Crimes Act*. It was common ground that s 16AAB only applied to the possession offence,²² the other two offences having been committed prior to the commenced operation of s 16AAB.²³ The sentencing judge, Mossop J, sentenced Mr Hurt to four years’ imprisonment for the possession offence.²⁴ In his Honour’s remarks on sentence, Mossop J criticised the *Bahar* approach, concluding that, were it not for that decision, he would have favoured the *Pot* approach.²⁵ However, Mossop J determined that he was bound by the decision in *Bahar* and proceeded to sentence accordingly.²⁶

Mr Hurt appealed to the ACTCA primarily on the basis that Mossop J erred in his approach to sentencing in light of the prescribed mandatory minimum sentence by following the *Bahar* approach. The ACTCA, by majority (Kennett and Rangiah JJ), held that the *Bahar* approach was to be preferred, therefore dismissing this ground of appeal.²⁷ However, in dissent, Loukas-Karlsson J endorsed the criticisms of Mossop J and held that the decision in *Bahar* was plainly wrong and ought not be followed, and instead that the *Pot* approach should be preferred.²⁸

III Overview of the Issues

While a number of grounds of appeal are raised, they remain tangential to the fundamental question to be answered by the High Court in *Delzotto* and *Hurt*. That question can be expressed quite simply: what is the correct approach to sentencing

²⁰ Ibid [91] (Adamson J, Beech-Jones CJ at CL and RA Hulme J agreeing). Other grounds were raised by the Crown and by the appellant, none of which go to the fundamental question to be answered by the High Court, and therefore warrant no material discussion here: *Delzotto Appeal* (n 3) [8]; Crown, ‘Submissions of the Respondent’, Submissions in *Delzotto v The King*, Case No S44/2023, 7 July 2023, [23] (‘*Delzotto Respondent’s Submissions*’).

²¹ Again, the details are not required here but can be found in the judgment of the sentencing judge: *R v Hurt* [No 2] (2021) 294 A Crim R 473, 476–8 (Mossop J) (‘*Hurt Sentencing*’).

²² Ibid 498.

²³ Added to the *Crimes Act* (n 10) on 22 June 2020 by *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2020* (Cth) sch 6 pt 1 (‘Amending Act’).

²⁴ *Hurt Sentencing* (n 21) 498.

²⁵ Ibid 490–4.

²⁶ Ibid 494–5.

²⁷ *Hurt Appeal* (n 4) 307–8.

²⁸ Ibid 295.

where there is a mandatory minimum sentencing provision like that contained in s 16AAB of the *Crimes Act*? More narrowly, the High Court is to decide whether the better approach is the one set out in *Bahar* or the one set out in *Pot*. And critically, in answering the question, the High Court can consider it, on principle, not bound by considerations of comity as were the appellate courts below.²⁹ For completeness, it should be noted that the fundamental question to be answered only arises if the High Court agrees with the unanimous decisions of the courts below that s 16AAB of the *Crimes Act* applies to each of the appellants.³⁰ The remainder of this column proceeds on the basis that it does.³¹

At the outset, it is important to note that *Bahar* and *Pot* were both decided in the context of s 233C of the *Migration Act*, not s 16AAB of the *Crimes Act*, the relevant legislation in these appeals. An attempt to distinguish the provisions was made in the *Delzotto Appeal*, but was ultimately rejected, with Adamson J stating that ‘the differences between [the *Migration Act* and *Crimes Act* provisions] are, in my view, formal and reflect different drafting styles but are nonetheless substantially the same’.³² In the *Hurt Appeal*, no submission on this point was advanced, and all three judges agreed that the provisions were not relevantly distinguishable on the basis that both provisions use the phrase ‘impose a sentence of imprisonment of at least’ — which is the operative phrase implementing the minimum penalty.³³ The appellants do not seek to re-open this issue in the High Court and there is a passive acceptance of the positions arrived at by the courts below.

IV A Simple Problem of Statutory Interpretation?

The appellants in *Delzotto* and *Hurt* argue that a straightforward application of established principles of statutory interpretation will necessarily result in a sentencing judge adopting the approach set out in *Pot*. Both focus on the language in the provision which requires that the sentencing judge ‘impose a sentence of imprisonment of at least’³⁴ the specified mandatory minimum period to argue that the construction of the provision leads to a preference for the two-stage *Pot*

²⁹ *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151–2 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Totaan v The Queen* (2022) 108 NSWLR 17, 34–6 (Bell CJ, Gleeson JA, Harrison, Adamson and Dhanji JJ agreeing); Transcript of Proceedings, *Hurt v The King*; *Delzotto v The King* [2023] HCATrans 52, 19–22 (S Callan SC).

³⁰ *Delzotto Respondent’s Submissions* (n 20) [4]; *Hurt Appeal* (n 4) 311–18 (Kennett and Rangiah JJ, Loukas-Karlsson J agreeing at 278).

³¹ This issue turns on the construction of the transitional provision introduced in the Amending Act (n 23) — that is, on whether ‘the relevant conduct’ in that provision refers to the use of the carriage service to access the material or the act of possession itself. It appears quite clear that the use of the carriage service is a circumstance, but the relevant conduct is the possession, which occurred after the relevant time specified in the transitional provision: *Delzotto Respondent’s Submissions* (n 20) [19].

³² *Delzotto Appeal* (n 3) [74]. Although note that the *Migration Act* provisions did specify a minimum non-parole period which does not exist in the *Crimes Act* provisions.

³³ *Hurt Appeal* (n 4) 279–80 (Loukas-Karlsson J), 302–3 (Kennett and Rangiah JJ).

³⁴ *Crimes Act* (n 10) s 16AAB (emphasis added).

approach.³⁵ While it is accepted that the *Pot* approach achieves a result consistent with the statutory language, this argument does not go so far as to cast doubt on the correctness of the *Bahar* approach, which also results in a sentence ‘of at least’ the mandatory minimum. And as set out below, an appeal to the principle of legality to support this argument does not change the result.

The appellants then argue that there is an absence of language in the provisions of the *Crimes Act* which would evince an intention for the minimum penalty to operate as a yardstick; nor is there any material which would suggest that Parliament intended for this operation or for a general increase in sentences for the identified offences,³⁶ a criticism which has been noted by Stephen Odgers SC in commentary on mandatory minimum provisions.³⁷ The first portion of this argument can be dispensed with quite easily. It has long been accepted, and confirmed by the High Court in *Markarian v The Queen*, that the maximum penalty represents the legislature’s view of the seriousness of an offence and provides a yardstick to be used in sentencing for that offence.³⁸ It has never seriously been argued that the High Court’s approach is wrong in the absence of Parliament’s failure to specifically identify the maximum penalty as a yardstick to be used in the sentencing exercise.³⁹ Given the High Court has accepted the use of maximum penalty provisions as yardsticks in the absence of specific language, Loukas-Karlssoon J’s dissenting view in the *Hurt Appeal* — that ‘[t]he equivalence between maximum and minimum penalties which underlies the Court’s reasoning in *Bahar* cannot be justified by the statutory language used’⁴⁰ — cannot be maintained. There is, therefore, no reason in principle that such an argument can be sustained in the case of minimum penalties. In fact, a plurality of the High Court in *Magaming v The Queen* (albeit in obiter) — a decision involving a constitutional challenge to mandatory minimum penalties — has already suggested that such a parallel should be drawn:

In *Markarian v The Queen*, the plurality observed that ‘[l]egislatures do not enact maximum available sentences as mere formalities. Judges need sentencing yardsticks’. The prescription of a mandatory minimum penalty may now be uncommon but, if prescribed, a mandatory minimum penalty fixes one end of the relevant yardstick.⁴¹

In the absence of explicit parliamentary intention to draw a distinction between minimum and maximum penalties, there is no reason to doubt the logic of

³⁵ Enrico Robert Charles Delzotto, ‘Appellant’s Submissions’, Submissions in *Delzotto v The King*, Case No S44/2023, 9 June 2023, [18] (‘Delzotto Appellant’s Submissions’); Raymond James Choi Hurt, ‘Appellant’s Submissions’, Submissions in *Hurt v The King*, Case No C7/2023, 9 June 2023, [45] (‘Hurt Appellant’s Submissions’).

³⁶ Delzotto Appellant’s Submissions (n 35) [55]; Hurt Appellant’s Submissions (n 35) [34].

³⁷ Stephen Odgers SC, ‘Minimum Imprisonment for Federal Offences’ (2023) 46(5) *Criminal Law Journal* 275, 276.

³⁸ *Markarian v The Queen* (2005) 228 CLR 357, 372 (Gleeson CJ, Gummow, Hayne and Callinan JJ) (‘*Markarian*’).

³⁹ Delzotto Respondent’s Submissions (n 20) [44].

⁴⁰ *Hurt Appeal* (n 4) 290.

⁴¹ *Magaming v The Queen* (2013) 252 CLR 381, 396 (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (citations omitted) (‘*Magaming*’). Justice Keane, writing separately, made comments to a similar effect at 414.

considering the minimum penalty as fixing one end of the yardstick.⁴² Once it is accepted that the maximum penalty reflects what Parliament considers to be the appropriate punishment for the most egregious offending,⁴³ the same rationale can be applied to a minimum penalty, reflecting Parliament's view of the appropriate penalty for the least egregious offending. Therefore, having already established that the maximum penalty acts as a yardstick, it would create an inconsistency for the minimum penalty to not act in the same manner. And while it is accepted that the term 'yardstick' need not necessarily denote a guidepost at one end of the spectrum,⁴⁴ the language of the High Court in *Magaming* is clear in that the 'yardstick' tied to a mandatory minimum is described as fixing 'one end'.

There is a further flaw with the appellants' suggestion that the relevant extrinsic material does not point to an intention to increase sentences generally, which is what would occur under the *Bahar* approach. The Explanatory Memorandum to the Amending Bill contains multiple references which make clear Parliament's intention to increase sentences generally and specifically. The introduction of mandatory minimums was said to address the 'disparity between the seriousness of child sex offending and the sentences currently handed down by the courts'⁴⁵ and 'ensur[e] that the courts are handing down sentences for Commonwealth child sex offenders that reflect the gravity of these offences and ensure that the community is protected from child sex offenders'.⁴⁶ Nowhere in these statements is an indication that these comments applied only to sentences below the newly prescribed mandatory minimum, or even sentences on the lower end of the scale generally — in fact, the opposite appears to be the case. In that way, the NSWCCA in the *Delzotto Appeal* was right to conclude that the legislative history evinces Parliament's intention that sentences be increased generally (the effect of the *Bahar* approach), rather than increasing only sentences at the lower end of the scale (the effect of the *Pot* approach).⁴⁷

Mr Delzotto also draws a false equivalence between mandatory minimums in the *Crimes Act* and the approach to be taken to jurisdictional limits, such as the two-year limit for terms of imprisonment in the NSW Local Court.⁴⁸ That limit has been held as not operating like a maximum penalty, and therefore its imposition is not reserved for the worst objective case.⁴⁹ However, the equivalence can be dispensed

⁴² As the Delzotto Respondent's Submissions (n 20) note, even early authority does not draw such a distinction: at [38], citing *Reynold v Wilkinson* (1948) 51 WALR 17, 18 (Dwyer CJ).

⁴³ As has been accepted since *Markarian* (n 38), affirmed in *Muldrock v The Queen* (2011) 244 CLR 120, 132 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) and *Elias v The Queen* (2013) 248 CLR 483, 494–5 (French CJ, Hayne, Kiefel, Bell and Keane JJ).

⁴⁴ For example, a plurality of the High Court has said that the history of previous sentences for an offence 'stands as a yardstick against which to examine a proposed sentence': *Barbaro v The Queen* (2014) 253 CLR 58, 74 (French CJ, Hayne, Kiefel and Bell JJ).

⁴⁵ Explanatory Memorandum, Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2019 (Cth) [24] ('Explanatory Memorandum').

⁴⁶ *Ibid* [40].

⁴⁷ *Delzotto Appeal* (n 3) [82].

⁴⁸ Delzotto Appellant's Submissions (n 35) [36], [56].

⁴⁹ *Park v The Queen* (2021) 273 CLR 303, 311–13 (Kiefel CJ, Gageler, Keane, Edelman and Gleeson JJ); *R v Doan* (2000) 50 NSWLR 115, 123 (Grove J, Spigelman CJ agreeing at 117, Kirby J agreeing at 126).

with quickly when it is remembered that a jurisdictional limit applies regardless of the specific facts of offending and is stipulated as a function of ‘the court’s jurisdiction divorced from the offence for which the offender is to be sentenced’.⁵⁰ That is, Parliament’s legislation of a jurisdictional limit says nothing about its view of a specific offence or particular circumstances of offending — it is simply a decision as to the powers granted to a particular court. As such, a simple analogy cannot be drawn between mandatory minimum penalties and jurisdictional limits.

Lastly, the appellants turn to the principle of legality, arguing that the canon of construction would prefer an interpretation which protects personal liberty, which they argue (and it is accepted) would be achieved under the *Pot* approach, given that the *Bahar* approach increases sentences generally.⁵¹ While the very function of this legislation is to interfere with liberty, it is accepted, based on a plurality of the High Court’s statements regarding the principle’s application to such statutes, that if a constructional choice is available, the choice involving the least interference with personal liberty should be preferred.⁵² The appellants thus argue that the *Pot* approach should be preferred, adopting the language of Adams J in *Dui Kol v The Queen* that the *Pot* approach ‘does least violence to fundamental principles of criminal justice’.⁵³ But what is clear from the explanatory material is that Parliament *did* intend to interfere with the liberty of all offenders, not just those involved in the least serious offending who would otherwise fall below the minimum penalty, and not just at the margins.⁵⁴ As such, it is questionable the extent to which a constructional choice is open such that the principle of legality has scope to operate, where the evident purpose of the legislation is a targeted interference with personal liberty.⁵⁵ There is an open question, noted by Brendan Lim, as to whether the underlying motivation of the principle would allow much weight to be placed on explanatory materials.⁵⁶ Nonetheless, given that the text specifically provides for a mandatory minimum — clearly interfering with the fundamental right to liberty, albeit only explicitly for those who would have otherwise fallen below that minimum — it is difficult to argue that there is no indication in the text of the provision itself to suggest this intended interference.⁵⁷ This, coupled with the explanatory materials

⁵⁰ Delzotto Respondent’s Submissions (n 20) [33].

⁵¹ Delzotto Appellant’s Submissions (n 35) [38]–[43]; Hurt Appellant’s Submissions (n 35) [55]–[58].

⁵² *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 582 (French CJ, Kiefel and Bell JJ).

⁵³ *Dui Kol v The Queen* [2015] NSWCCA 150, [14] (Adams J, McCallum J agreeing at [27]) (*‘Dui Kol’*).

⁵⁴ See the extracts from the Explanatory Memorandum in the text accompanying nn 45, 46.

⁵⁵ *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310–11 (Gageler and Keane JJ) (*‘Lee’*). Also note the Court’s hesitance to apply the principle to sentencing legislation, as to which see generally Mirko Bagaric and Theo Alexander, ‘Addressing the Curious Blackspot that is the Separation between the Principle of Legality and Sentencing’ (2015) 41(3) *Monash University Law Review* 515.

⁵⁶ Which Lim argues would be permissible on the analysis in *Coco v The Queen* (1994) 179 CLR 427 but perhaps not so on that in *R v Secretary of State for the Home Department; Ex parte Simms* [1999] UKHL 33; Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37(2) *Melbourne University Law Review* 372, 393–4.

⁵⁷ As occurred in *Lee* (n 55), with the plurality considering general words sufficient to evince an intention to alter fundamental criminal law principles.

makes clear that the intention of Parliament was to increase sentences generally as occurs under the *Bahar* approach.⁵⁸ Further, unlike at a state or territory level,⁵⁹ there is no legislated ratio between the non-parole period to be imposed and the head sentence, leaving the judge who is sentencing for a Commonwealth offence with sufficient scope to alter the non-parole period so as to ensure only the appropriate interference with liberty required to achieve an individualised and just sentence. And in any case, as the NSWCCA has held in *R v Taylor*, nothing in the *Bahar* approach limits the imposition of the minimum penalty *only* for offences which fall within the least serious category of offending.⁶⁰ There is therefore a difficulty in maintaining an argument that the principle of legality requires the *Pot* approach to be favoured when the minimum penalty can, even under the *Bahar* approach, be imposed on sentences involving more serious categories of offending if the sentencing judge determines such a course should be taken, thereby remaining an approach which protects, to some degree, personal liberty. And while a Canadian Judge, in commentary, has set out means by which the impact of minimum sentences can be ameliorated and an approach similar to *Pot* adopted,⁶¹ such methods do not find a basis in light of the contextual interpretation of provisions such as those in the *Crimes Act*.

V The ‘Independent Reason’ of Equal Justice

The Courts below, in arriving at the conclusion that the *Bahar* approach was to be preferred, considered an ‘independent reason’, beyond the application of statutory interpretation principles, which they argued further justified preferring the *Bahar* approach over the approach in *Pot*.⁶² That ‘independent reason’ is found in the judgment of Allsop P in *Karim v The Queen*, where his Honour stated:

There is an independent reason that leads me to favour the construction in *Bahar*. Equal justice inheres in judicial power, the fabric of the law and the basal notion of justice that underpins, informs and binds the legal system. ... *To approach the matter as in Pot would see cases of perceived different seriousness by force of statute given the same penalty.* ... The statute, and through it the order of the Court, would be the instrument of unequal justice and, so, injustice.⁶³

Justice Loukas-Karlsson only briefly addressed the ‘independent reason’, suggesting that to the extent equal justice is offended by the adoption of the *Pot* approach, it

⁵⁸ As Bruce Chen has noted, this aligns with the contextual approach taken by some members of the High Court when legislation clearly abrogates rights but the extent of that abrogation or curtailment is unclear: Bruce Chen, ‘The Principle of Legality: Issues of Rationale and Application’ (2015) 41(2) *Monash University Law Review* 329, 356–8.

⁵⁹ See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.

⁶⁰ *R v Taylor* [2022] NSWCCA 256, [71]–[73] (Simpson AJA, Davies and Wilson JJ agreeing) (*‘Taylor’*).

⁶¹ Paciocco (n 6) 207–29.

⁶² *Delzotto Appeal* (n 3) [82] (Adamson J, Beech-Jones CJ at CL and RA Hulme J agreeing); *Hurt Appeal* (n 4) [144(d)] (Kennett and Rangiah JJ).

⁶³ *Karim v The Queen* (2013) 83 NSWLR 268, 282–3 (Allsop P, Bathurst CJ, Hall and Bellew JJ agreeing) (emphasis added) (citations omitted) (*‘Karim’*).

remains a consideration for Parliament and the maintenance of parity or equality is for it and not the responsibility of the courts.⁶⁴

The appellants cavil with Allsop P's 'independent reason' as a basis to prefer the *Bahar* approach, both relying on the criticisms of Adams J in *Dui Kol*. There, Adams J reasoned that the principle of parity has never justified an increase of comparative sentences, only a decrease, and that to increase sentences on the reasoning of Allsop P would involve 'disguis[ing] [the approach's] arbitrary character by emollient jurisprudence'.⁶⁵ The appellants also appeal to a countervailing consideration — the principle of legality — to argue that the elegance of the *Bahar* approach, based on the 'independent reason' of equal justice, is, in the words of Mossop J, 'achieved at a very high cost'.⁶⁶ On that basis, the appellants suggest that Allsop P's 'argument is flawed because it ignores another, competing, aspect of the principle of legality: the protection of personal liberty'.⁶⁷ The limits of an appeal to that canon of construction have already been noted above.

Mr Delzotto goes further in his criticism of Allsop P's reasoning, targeting his Honour's statement that an adoption of the *Pot* approach would mean the 'statute and through it the order of the Court, would be an instrument of unequal justice and, so, injustice'.⁶⁸ He suggests this begs the question: injustice to whom? Mr Delzotto argues that if that question is to be answered as those who would have received the minimum sentence but for the mandatory minimum penalty, the remedy is 'antithetical to justice for them' as it would be 'adopt[ing] a construction which would result in them being given a longer sentence'.⁶⁹

The fundamental flaws in this argument can be explained through a simplified example. Consider an offence which mandates a statutory minimum period of imprisonment of five years and a maximum of 20 years. Offender X and Offender Y commit the offence, and, in remarks on sentence, it is assessed that Offender X's offending is of a higher objective seriousness than Offender Y's and all relevant subjective factors are the same. Assume that but for the statutory minimum, the sentencing judge would have imposed on Offender X a sentence of five years' imprisonment, and on Offender Y a sentence of two years' imprisonment. However, because of the operation of a mandatory minimum penalty, Offender Y is also sentenced to five years' imprisonment. On the *Pot* approach, Offender X's sentence does not change. On the *Bahar* approach, however, Offender X's sentence would be increased to say, 10 years, since the five-year minimum operates as a yardstick for the least serious offending.⁷⁰ Mr Delzotto argues essentially that, but for the mandatory minimum, Offender X would have received a sentence of five years' imprisonment but under the *Bahar* approach, to ensure equal justice, they have their

⁶⁴ *Hurt Appeal* (n 4) 293.

⁶⁵ *Dui Kol* (n 53) [16] (Adams J, McCallum J agreeing at [27]).

⁶⁶ *Hurt Sentencing* (n 21) 492.

⁶⁷ Delzotto Appellant's Submissions (n 35) [38].

⁶⁸ *Karim* (n 63) 283.

⁶⁹ Delzotto Appellant's Submissions (n 35) [41].

⁷⁰ Noting that it is not an automatic movement upwards as explained in *R v Taylor* (n 60) [71]–[73] (Simpson AJA, Davies and Wilson JJ agreeing).

sentence increased, and this increase is the ‘remedy’ to the perceived injustice of Offender X. That, however, inaccurately characterises the increase as a ‘remedy’. Adopting the *Bahar* approach does not ‘remedy’ the injustice by increasing sentences. Instead, it *removes* the scope for any individualised perception of injustice in its entirety — Offender X cannot logically complain of a higher sentence by comparison to Offender Y if their sentence is proportionate to the objective seriousness of their offending compared with Offender Y.⁷¹ In fact, it is the *Pot* approach which could create room for perceived injustice where an offender, in this case Offender Y, is sentenced to the same period of imprisonment as an offender whose offending is more serious than theirs (here, Offender X).

Lastly, in intervening submissions by the North Australia Aboriginal Justice Agency (‘NAAJA’), two additional reasons for rejecting Allsop P’s ‘independent reason’ are suggested. First, NAAJA submits that ‘[w]hen Parliament passes a mandatory sentencing prescription it necessarily renders *irrelevant* those matters that would otherwise have taken a sentence below the mandatory minimum, at least to that extent’.⁷² However, NAAJA fails to cite authority for this proposition. It could equally be said that Parliament’s intention is to force a re-evaluation of such factors by sentencing judges whereby those matters are assessed in light of a new yardstick, being the statutory minimum penalty. Second, NAAJA relies on the decision in *R v Deacon*⁷³ to argue that ‘Parliament ought to be taken to have been willing to pay the price of some unequal justice when imposing mandatory minimums’.⁷⁴ This analysis, however, suffers from the criticism that Mossop J sought to raise against the analysis in *Bahar*, with which Loukas-Karlssoon J agreed — it is circular in that it accepts, as its starting point, the correctness of the assertion that is sought to be proved. The argument fails to appreciate the reality that equal justice is embedded within the core principles of the criminal sentencing system in Australia,⁷⁵ and it would be doubtful that Parliament would not legislate with an intention to maintain such a fundamental tenet of sentencing.⁷⁶ It is the departure from *this* fundamental principle which would require explicit words to that effect.⁷⁷ Such words do not appear in the legislation.

VI Conclusion

The appeals in *Delzotto* and *Hurt* can resolve a fundamental, and increasingly impactful, point of contention in Australian sentencing law. Concepts of justice and

⁷¹ See generally, Dina Yehia SC, ‘Boat People as Victims of the System: Mandatory Sentencing of “People Smugglers” — Politics or Justice?’ (2016) 3(1) *Northern Territory Law Journal* 18, 33–4.

⁷² North Australia Aboriginal Justice Agency, ‘NAAJA’s Submissions Seeking Leave to Be Heard Amicus Curiae’, Submissions in *Delzotto v The King*, Case No S44/2023, 21 June 2023, [21] (emphasis in original) (‘NAAJA’s Submissions’).

⁷³ *R v Deacon* (2019) 282 A Crim R 329, 346 (Grant CJ, Southwood J and Riley AJ).

⁷⁴ NAAJA’s Submissions (n 72) [23].

⁷⁵ *Kable v DPP (NSW)* (1996) 189 CLR 51, 107 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455, 502 (Gaudron J).

⁷⁶ *Karim* (n 63) 299.

⁷⁷ See the comments in *R v Dang* [2018] QCA 331, [38] (McMurdo JA, Gotterson and Morrison JJA agreeing) specifically in the context of equal justice.

the means by which it is achieved must be settled in a society governed by the rule of law. These appeals offer the High Court an opportunity to provide clear guidance on the use of legislatively prescribed mandatory minimum sentences for sentencing judges.⁷⁸ The analysis set out above makes clear that the approach endorsed by the NSWCCA in the *Delzotto Appeal* and the majority of the ACTCA in the *Hurt Appeal* — that is, the *Bahar* approach — best aligns with the intention of Parliament and the fundamental criminal law principle of equal justice. It is also the approach which maintains consistency in the law by drawing parallels with the well-established principles to be applied when Parliament has legislated a maximum penalty for an offence. It would be a bold decision of the High Court to depart from such an approach, thereby creating an inconsistency in the law while chipping away at equal justice in the process.

⁷⁸ Which has been sought for some time: see Andreas Schloenhardt and Colin Craig, 'Penalties and Punishment: People Smugglers before Australian Courts' (2016) 40(2) *Criminal Law Journal* 92, 98–9.

Review Essay

The Universality of Class Action Dilemmas

The Australian Class Action: A 30-Year Perspective
by Michael Legg and James Metzger (eds) (2023)
Federation Press, 312 pp, ISBN 9781760024253

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Abstract

This review essay considers the universality of dilemmas and tensions that arise in class action litigation, wherever practised. It does so by exploring the evolution of the Australian class action in its doctrinal, political and historical dimensions, as recounted in Michael Legg and James Metzger's edited collection of papers, *The Australian Class Action: A 30-Year Perspective*. While the book is rooted in the Australian experience, it lays bare common themes across jurisdictions, such as the unique role of the judge in a class action, the challenges to effective representation, and concerns about the commodification of litigation.

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I Introduction

No form of litigation consumes as much legislative attention, press coverage or academic ink than the class action. Various called group proceedings, collective redress or representative litigation, the class action aims to facilitate the efficient resolution of many, often small, claims that would otherwise be too costly to pursue individually. The ability of a representative plaintiff and their entrepreneurial counsel to hold public and private institutions to account is both its power and the source of its controversy. Although early versions of group proceedings can be found in 13th century England,¹ the modern class action was birthed in the United States in 1966, followed some 25 years later by second-generation models in Canada, Israel and Australia.² In a period when these other jurisdictions have recently reformed their statutes, and third-generation jurisdictions are grappling with their nascent regimes,³ the timing of *The Australian Class Action: A 30-Year Perspective*⁴ could not be more auspicious.

Michael Legg and James Metzger have edited a multidisciplinary and transnational collection of essays by practising lawyers, judges and academics that explores, like other books before it,⁵ the evolution and the political and economic dimensions of class actions, but with a focus on the Australian experience. The aim of the book is to take stock of the developments in Australian class actions on the occasion of the 30th anniversary of their introduction, and to forecast and make recommendations about what is to come. In doing so, they also lay bare common themes across jurisdictions, such as the unique role of the judge in a class action, the challenges to effective representation, and concerns about the commodification of litigation. As I hope this review, written from the perspective of a Canadian class action scholar, will convey, the reader need not be a student or practitioner of Australian class action litigation to find the book equally useful and fascinating.

¹ Stephen Yeazell, *From Medieval Group Litigation to the Modern Class Action* (Yale University Press, 1987) 38.

² Jasminka Kalajdzic, 'The State of Reform in First and Second Generation Class Action Jurisdictions' in Alan Uzelac and Stefaan Voet (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer, 2021) 303.

³ In the past decade, 28 countries in the European Union have adopted some version of collective redress, although several countries developed earlier, albeit underutilised, class litigation models: see Linda S Mullenix, 'For the Defense: 28 Shades of European Class Actions' in Alan Uzelac and Stefaan Voet (eds), *Class Actions in Europe: Holy Grail or a Wrong Trail?* (Springer, 2021) 43.

⁴ Michael Legg and James Metzler (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023).

⁵ See, eg, Deborah R Hensler, Christopher Hodges and Ianika Tzankova (eds), *Class Actions in Context: How Culture, Economics and Politics Shape Collective Litigation* (Edward Elgar Publishing, 2016); Stefan Wrška, Steven Van Uytsel and Mathias Siems (eds), *Collective Actions* (Cambridge University Press, 2012).

II The Origins of Class Actions and Their Mission

Legg and Metzger's introductory chapter lays the groundwork for understanding the political and social forces that brought the class action device to Australia.⁶ Part IVA of the *Federal Court of Australia Act 1976* (Cth) ('*Federal Court Act*') was enacted in 1992, the same year the first common law province in Canada passed its class action legislation.⁷ Unlike its Canadian counterpart, however, pt IVA has never been amended, despite major developments in class action practice that the drafters could not have envisioned, particularly issues resulting from the ubiquity of litigation funding and from competing class actions. Legg and Metzger trace these developments in detail, as do authors of several subsequent chapters. Their survey illustrates that judges in the early years of Australian class actions were preoccupied with settling the interpretation of the legislation, while the past two decades have been consumed by filling the many gaps in it. Building the common law in this fast-moving sector has been difficult; where does gap-filling end and legislative rewriting begin? The courts' competing decisions on the availability of a common fund order illustrate this tension.⁸ On other issues — notably carriage decisions and settlement fairness criteria — the Federal Court has drawn on US and Canadian authorities to fill the gaps.⁹ Legg and Metzger rightly predict that amendments to pt IVA will one day address litigation funding, common funds, oversight of settlements and procedures for addressing competing class actions. Perhaps not coincidentally, three of these four were the subject of legislative reform in Ontario in 2020.¹⁰ Rachael Mulheron's detailed discussion of the *Paccar* appeal in the United Kingdom, however, strikes a cautionary note: even where lawmakers attempt to leave no gaps by resolving questions about common funds and litigation funding explicitly, considerable debate and uncertainty remain.¹¹

Australian class actions were introduced with an explicit mission: to improve access to justice and to aid government regulators by deterring contraventions of the law. How well class actions achieve the first of these goals is the subject of Michael Legg's chapter on access to justice and compensation.¹² He explores the challenges

⁶ Michael Legg and James Metzger, 'Thirty Years of Class Actions in Australia' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 1 ('Thirty Years of Class Actions').

⁷ *Class Proceedings Act*, SO 1992, c 6 ('*Ontario CPA*').

⁸ Legg and Metzger, 'Thirty Years of Class Actions' (n 6) 28. Peta Spender also investigates this tension using institutional theory in her chapter, 'Class Actions: Insights from Regulatory and Institutional Theory' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 170.

⁹ Legg and Metzger, 'Thirty Years of Class Actions' (n 6) 29–37.

¹⁰ Common funds have been permitted in Ontario since the inception of class actions, thus no amendment was needed. The amended statute does address litigation funding (s 33.1), settlement approval and administration (s 27.1) and competing class actions (s 13.1): *Ontario CPA* (n 7).

¹¹ Rachael Mulheron, 'Third Party Funding, Class Actions and the Task of Statutory Interpretation' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 276. The UK Supreme Court delivered its decision in *Paccar* on 26 July 2023: *Paccar Inc v Road Haulage Association Ltd* [2023] UKSC 28.

¹² Michael Legg, 'Access to Justice and Compensation Through the Class Action' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 40.

to achieving substantive access to justice by first defining the meaning of compensation in the common law ('put[ting] the injured person back in the position they were in prior to the contravention'¹³) and then discussing the features of class action litigation that complicate achievement of the principle. These include the high number of settlements, which are inherently compromises of one's rights; the agency problems that are also inherent due to class counsel's control of the litigation and the lack of incentives for the representative to monitor them; the presence of litigation funders which at a minimum reduces the sums available to class members; and the inability of courts to maximise compensation for the group. Yet, as Legg himself notes, most litigation of all types settles, and the presence of some court oversight in class actions is arguably better than none. The additional cost imposed by funders and the potential for self-dealing, however, are amplified in representative litigation, and the difficulty of assessing damages accurately for every member of a potentially vast class is a problem, but only if full compensation is the benchmark for success. Legg's discomfort with class members receiving 'second-hand justice' illustrates another recurring theme in the book: class actions are qualitatively and normatively different from bilateral litigation.

III Class Actions: Equal, but Different

The difficulties of adapting common law rules and procedures to large-scale actions are discussed in a number of chapters, starting with Justice Michael Lee and Emerson Hynard's essay on estoppel.¹⁴ The cardinal focus of the common law is on achieving finality. The operation of statutory estoppel created upon judgment or settlement in a class action, however, is complicated; since class members do not control the proceeding or decide which claims are advanced, should they be estopped from litigating individual causes of action that were not included in the class action? Lee and Hynard do an admirable job discussing the complicated case law and delineating the tension between access to justice and procedural fairness on the one hand, and the importance of finality on the other. They offer possible solutions to prospective law reformers, including the requirement that members come forward with information about their individual claims before settlement, even in open classes. Canadian and American observers should take note of the salutary effects of such a system: with better information about the number of claimants and the nature of their claims, class counsel could more accurately estimate the size of the class and their damages, and could provide more direct notice of any subsequent settlement. As the authors rightly note,

a group member is always going to have to bring forward the necessary information to advance their individual claim or take an active step to participate in the proceeds of a settlement or judgment. Stipulating a date earlier than judgement or settlement for a group member to take that active step does not deliver upon that group member any unfairness, but reflects an

¹³ Ibid 45.

¹⁴ Justice Michael Lee and Emerson Hynard, 'A Tale of Two Interests: Access to Justice and Finality in Class Action Litigation' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 60.

appropriate balance ... between the interests of access to justice and the commercial reality of facilitating finality.¹⁵

The concept of open justice also proves uniquely problematic in class actions, as the chapter by Aaron Moss and Justices Jayne Jagot and Bernard Murphy reveals.¹⁶ Although individuals in bilateral litigation are free to keep their settlements confidential (eg, to protect commercial secrets or business reputation interests), a class action affects persons who are not before the court and engages interests beyond the immediate parties. Moreover, class actions ‘perform a public function, being employed to vindicate broader statutory policies or challenge actions of the executive which affect wide classes of persons’.¹⁷ In this context, suppression orders in respect of legal opinions, retainer agreements or terms of a settlement undermine public confidence in the operation of class actions and the laws that are the subject of the actions. The authors astutely point out that the hold of common law traditions on judges is strong, and judges must be trained, therefore, to think differently about private disputes with important public interests in play. More than just judicial education about the particular legal issue (eg, the availability of suppression orders), they need training about judging in the non-adversarial context of settlement approval more generally.¹⁸

The tension between the public interest and the interests of individuals is the focus of Andrew Higgins’ brilliant contribution, ‘Due Process in Class Actions’.¹⁹ Due process is a constitutional requirement flowing from ch III of the *Australian Constitution*. Higgins distinguishes between decisions made in the course of class action governance — the subject of considerable legal innovation by case management judges who must weigh competing interests — and the due process rights of litigants which the court must actively protect. He notes, as I have elsewhere,²⁰ that class members have few due process rights, but they are crucial: adequate representation, effective notice of key points in the proceeding, and opting out of the litigation.²¹ Abrogating these rights delegitimises the class action. Higgins also touches on the now familiar theme of the uniqueness of class actions, not as ‘a distortion of the “ideal” bipolar model of litigation’, but as a necessary expansion of procedural tools to address the disputes that arise from mass production and mass marketing.²² At the same time, he cautions against adopting a purely collectivist

¹⁵ Ibid 85–86.

¹⁶ Justice Jayne Jagot, Justice Bernard Murphy and Aaron Moss, ‘Open Justice and Class Actions: Including a Judicial Perspective’ in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 87.

¹⁷ Ibid 93.

¹⁸ Ibid 104.

¹⁹ Andrew Higgins, ‘Due Process in Class Actions’ in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 113.

²⁰ Jasminka Kalajdzic, ‘Class Member Rights’ in Janet Walker, H Michael Rosenberg and Jasminka Kalajdzic (eds), *Class Actions in Canada: Cases, Notes, and Materials* (Emond Publishing, 3rd ed, 2023) 223.

²¹ Higgins (n 19) 116–17. The right to object to proposed settlements is also on my list, a right Higgins would include subject to the qualification that any opportunity to participate ‘cannot make the litigation so unwieldy that it undermines the public and private benefits of the class action procedure’: at 134.

²² Ibid 114.

perspective, one which makes no room for individual rights. He argues persuasively that the individual right to due process may be different in class actions than in 'ordinary' litigation, but it is there.

Several chapters later, James Metzger offers a starkly opposing view of class actions and due process. The core of his provocative argument is that class actions do not reflect the democratic values of either the United States or Australia because 'the decision about whether and how a citizen's rights should be determined has been given over to entities unknown to many, most or essentially all of those citizens' — namely, the class attorney.²³ He also maintains that the class attorney as prime decision-maker for the class can and often does engage in self-interested behaviour that further distances the plaintiffs from the core purpose of the civil justice system — the determination of, and consequences for, a violation of a person's rights.²⁴ In keeping with his view that the primary aim of democratic governance is to preserve personal autonomy, Metzger states that the role of courts in constitutional democracies is to guard people's rights, and that people have the right to present their own cases and make their own litigation decisions. He rather ominously states that class action procedure is an 'example of how democratic values can be undermined in ways that might be imperceptible to the average citizen, but which have an impact upon the democratic order and the foundations of that order'.²⁵ He makes only a passing reference to the obvious response to his thesis: the ability of the citizen to opt out *is* an exercise of personal autonomy. Moreover, he does not comment on the lack of any practical alternatives to class proceedings, or on the impact that a culture of corporate and government impunity might have on the health of the body politic or democracy itself.

IV Political, Economic and Regulatory Dimensions

If Metzger's chapter is the most critical of class actions, Peter Cashman's reflective essay is the most laudatory.²⁶ As a class attorney, law commissioner and academic, Cashman has pioneered, studied and measured the many ways Australian class actions have facilitated greater access to justice. Still, he is clear-eyed about their shortcomings, most especially the high cost of commercial litigation financing of class actions. In his view, not only do funders take too large a share of the proceeds of litigation (an average of 23.4%, or roughly double the legal fees in settlements approved in 2020 and 2021²⁷), but their proactive involvement and influence can lead to problematic settlements. Cashman provides a detailed list of reforms to improve the system, including a loosening of the prohibition against percentage fees for counsel and the introduction of a public funding mechanism modeled on Ontario's Class Proceedings Fund.

²³ James Metzger, 'Class Actions in a Democratic Society' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 225, 227.

²⁴ *Ibid.* There is, however, no empirical data cited to support this central claim.

²⁵ *Ibid.* 243.

²⁶ Peter Cashman, 'Financing and Funding Class Actions: Some Reflections from the Trenches and the Ivory Tower' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 136.

²⁷ *Ibid.* 161.

The partisan political discourse evident in some of the chapters is an almost inevitable feature of every discussion about class actions; because of the power they wield, class actions are the subject of assiduous politicking.²⁸ As Linda Mullenix explains in ‘The Politics of Class Action Reform’, numerous political actors sought legal reforms in the United States to promote constituent interests.²⁹ Defendants and the highly conservative US Chamber of Commerce directly lobbied Republican members of Congress to achieve sweeping legislative reforms at the turn of the century.³⁰ A little more than a decade later, they almost managed to pass a second statute, the *Fairness in Class Action Litigation Act of 2017*, that would have instituted severe restrictions on both class actions and multidistrict litigation proceedings.³¹ Plaintiff-oriented efforts were similarly engaged at the rulemaking level under the auspices of the American Law Institute.³² They proved less successful, due to the deliberative drafting and comment procedures of the Institute’s *Principles of the Law of Aggregate Litigation* project. Thus, US institutions responsible for reform have, at least recently, been able to resist the ‘extreme efforts of political actors who seek to revamp law to their own advantage’.³³ Recent experience with law reform in Ontario and Australia confirms the presence of partisan actors, including the US Chamber of Commerce.³⁴

As mentioned above, in addition to judicial efficiency and access to justice, class actions also perform a deterrence function. Peta Spender leans on regulatory theory to help explain why the class action may be understood as a regulator.³⁵ Class actions ‘regulate’ in that they control, order and influence the conduct of corporations through monitoring (by class counsel), compliance and enforcement. Entrepreneurial class counsel aggregate the claims of right holders who may otherwise have no understanding of their entitlement to recourse. The effect of such legal mobilisation is to help enforce substantive law, though it may also be characterised as profit-driven rent-seeking. Both can be true. Spender’s chapter and others employ terms such as ‘rent-seeking’ and ‘agency costs’ liberally. Indeed, one cannot escape the vocabulary of law and economics when critically appraising class

²⁸ Class actions are almost always attacked by corporate-friendly conservative political actors, although at least one academic has argued that class actions are, in fact, consistent with conservative principles: Brian T Fitzpatrick, *The Conservative Case for Class Actions* (University of Chicago Press, 2019).

²⁹ Linda S Mullenix, ‘The Politics of Class Action Reform: Reflections on the American Experience’ in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 245.

³⁰ Ibid 256, citing the *Class Action Fairness Act of 2005*, 28 USC §§ 1332(d), 1453, 1711–15 (2005).

³¹ Ibid 269.

³² Ibid 258–64. Mullenix does not discuss the relative power and resources of defendant-led lobbying efforts versus those of plaintiff interests.

³³ Ibid 247.

³⁴ The Chamber’s written submissions to the Law Commission of Ontario included, among others, recommendations for a more restrictive certification test and for codifying requirements for third party litigation funders: US Chamber of Commerce, Institute for Legal Reform, Submission to Law Commission of Ontario, *Review of the Ontario Class Proceedings Act* (May 2018). The Chamber also lobbied against class actions during the Victoria Law Reform Commission’s 2017 project on Litigation Funding and Group Proceedings: US Chamber of Commerce, Institute for Legal Reform, Submission to Victoria Law Reform Commission, *Litigation Funding and Group Proceedings* (September 2017).

³⁵ Spender (n 8).

actions. For this reason, Ben Chen and Michael Legg's chapter, 'The Law and Economics of Australian Class Actions', is an extremely useful primer on economic reasoning regardless of jurisdiction.³⁶ Undoubtedly, 'an understanding of Law and Economics helps to highlight and explain the fundamental factors that are likely to have a strong influence on the key players or values in a class action'.³⁷ The language of 'incentives', 'transaction and monitoring costs', 'cost internalisation' and 'information asymmetries' is replete in the literature, as well as in the case law of first- and second-generation class action jurisdictions. Basic economic theory provides intuitive explanations for how class actions might achieve their three objectives and, by extension, assist judges gauge the consequences of their choices.

V Conclusion

The Australian Class Action achieves what its editors set out to do: it reflects on the origins of pt IVA of the *Federal Court Act*, assesses 30 years of developments and proposes amendments to the Act in light of that experience. The book offers a good balance of doctrinal, critical and theoretical perspectives. Many chapters provide a detailed and useful account of the history and state of class actions, while others offer important critiques through political, regulatory and economic lenses. For these reasons, the collection will be a very useful addition to every law school's and jurist's library, both in Australia and wherever class actions are litigated.

The book also succeeds in highlighting that some of the tensions in Australian class proceedings are, in fact, universal. Balancing fairness and efficiency, protecting the interests of the class while incentivising class counsel (and funders) to undertake this complex litigation, giving effect to public goals by way of private litigation — all are matters that preoccupy judges and observers in the United States, Canada and elsewhere. In tackling these vexing issues, the authors shed light on another universal theme — the sui generis character of class actions that resists the neat application of rules designed for bilateral litigation of disputes between known parties. What do core concepts such as standing, open justice, compensation and due process mean in the context of a procedure that necessarily privileges the collective over the individual? As Higgins adroitly points out, 'very little of modern life is individually negotiated', and '[t]oday's *Donoghue v Stevenson* would likely be a class action based on contamination of a factory making identical drinks for multiple markets'.³⁸ That reality compels a different kind of procedure, one that can resolve questions of fact or law common to untold numbers of individuals. Fortunately, the challenges which this modern procedure generates are also common. Scholars, judges and practitioners in every class action jurisdiction would do well to learn from each other.

³⁶ Ben Chen and Michael Legg, 'The Law and Economics of Australian Class Actions' in Michael Legg and James Metzger (eds), *The Australian Class Action: A 30-Year Perspective* (Federation Press, 2023) 202.

³⁷ Ibid 205.

³⁸ Higgins (n 19) 118, citing *Donoghue v Stevenson* [1932] AC 562.

Book Review

Court-Supervised Restructuring of Large Distressed Companies in Asia: Law and Policy by Wai Yee Wan (2022) Hart Publishing 384 pp, ISBN 9781509952335

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Professor Wai Yee Wan's *Court-Supervised Restructuring of Large Distressed Companies in Asia: Law and Policy* is ambitious in its scope and aim. Through a comparative review of four Asian jurisdictions — China, India, Hong Kong and Singapore — she sets out to find the 'optimal regulatory design of a restructuring framework'.¹ An important part of the answer to this question is something that comparative law scholars have been emphasising for a while now. It is that local institutions and culture matter. Wan reminds us of prior scholarship in corporate law and corporate governance (including her own) which argues that transplants of Anglo-American laws into Asian jurisdictions often do not take into consideration local factors that are absent from the United States ('US') and the United Kingdom ('UK'). However, she rightly notes the dearth of similar academic literature in the area of corporate insolvency.² So Wan's book indeed fills an important gap.

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¹ Wai Yee Wan, *Court-Supervised Restructuring of Large Distressed Companies in Asia: Law and Policy* (Hart Publishing, 2022) vii.

² *Ibid.*

Also, her book comes in the wake of the COVID-19 pandemic which caused most countries to focus on corporate insolvency reforms because of the number of businesses pushed into insolvency as a result of the accompanying lockdowns.³ However, while the focus of post-COVID reforms has been on small and medium enterprises and out-of-court solutions, Wan's book — as the title makes abundantly clear — is concerned with large companies and court-supervised restructuring.⁴ One of the reasons Wan gives for focusing on court-supervised restructuring is that bargaining (even in out-of-court settlements) takes place in the shadow of the law.⁵

A major 'root and branch' review of Australia's corporate insolvency laws, the first in over 30 years, is currently under way.⁶ Naturally, it is a time when lawyers and policymakers in this country are not only assessing Australian corporate insolvency laws⁷ but also looking outwards at reforms in other countries. In that sense, this book is a timely publication for an Australian audience as well.

Wan's book is faithful to the traditional theoretical framework in corporate insolvency law, the creditors' bargain theory, and — more broadly — theories informed by law and economics. The book does not address the substantive arguments of progressive theories on insolvency law; it sidesteps the debate about the goals of insolvency law by simply noting that the goal of minimising transaction costs is very important irrespective of which theoretical lens one is looking through.⁸ Wan adds to the law and economics framework in corporate insolvency by identifying how the relevant agency costs differ across the jurisdictions being considered. Since controlling shareholders are dominant in large companies in Asian jurisdictions, the underlying incentives of various players will vary accordingly. Further, creditors in Asian jurisdictions are often related parties, giving rise to conflicts of interest which should be considered while applying the conceptual framework.

The book studies four Asian jurisdictions while using the US and the UK as familiar models for comparison. China, India, Hong Kong and Singapore are four important jurisdictions where insolvency laws have been reformed in recent years, and so this book is an important resource for those looking to understand corporate restructuring in these jurisdictions. Australian lawyers and policymakers will find it well worth reading since the book provides insights into two key issues: (i) incentives at play in closely held firms in the context of insolvency and restructuring; and (ii) what has worked and not worked in other countries where law reform has been inspired by US and UK law. In considering the latter, Wan reflects on legal transplants and how such transplants may fare in a new environment with its own unique local features. As she rightly remarks in the conclusion, 'lawmakers

³ Aurelio Gurrea-Martínez, 'The Future of Insolvency Law in a Post-Pandemic World' (2022) 31(3) *International Insolvency Review* 385.

⁴ *Ibid.*

⁵ Wan (n 1) 24.

⁶ On 28 September 2022, the Parliamentary Joint Committee on Corporations and Financial Services began an inquiry into corporate insolvency in Australia. The committee's final report was presented to the Senate on 12 July 2023 and tabled in the House of Representatives on 1 August 2023.

⁷ See, eg, Michael Murray and Jason Harris, 'Rebuilding the Structure of the Australian Insolvency System' (2022) 22(1–2) *Insolvency Law Bulletin* 14.

⁸ Wan (n 1) 17.

need to understand that reforms to adopt specific tools must consider the benefits and trade-offs specific to the jurisdiction'.⁹

The book's initial chapters discuss the theoretical framework employed (Chapter 1), the historical background of insolvency law in the four jurisdictions studied (Chapter 2), and agency problems in the context of corporate insolvency in each jurisdiction (Chapters 3 and 4). These chapters provide a strong lens through which insolvency and restructuring in the four Asian jurisdictions can be understood. Chapter 5 looks at the high levels of non-performing loans ('NPLs') on the balance sheets of banks in India and China and the consequent problems. The next three chapters deal with the role of insolvency practitioners (Chapter 6), the courts' role in court-supervised restructuring (Chapter 7), and the relationship between restructuring law, contract enforcement and directors' duties (Chapter 8). The final chapter considers the implications of the book's analysis and findings for future reform.

While many states have introduced restructuring processes, one of the first steps to ensuring that such processes work is to incentivise directors to initiate them. Chapter 9 looks at this issue. There is great variance in the policy choices made by the four Asian jurisdictions in this context. However, local factors play a role in how these policy choices play out. For instance, India provides neither incentives for initiation of formal restructuring nor disincentives in the form of penalties for non-initiation. Yet, the restructuring process is initiated by creditors because the insolvency legislation is being used by creditors as a debt recovery tool.¹⁰ Wan also notes that Hong Kong's proposed reforms include insolvent trading laws along the lines of what we have in Australia in s 588G of the *Corporations Act 2001* (Cth) ('*Corporations Act*').¹¹ This is interesting from an Australian perspective because recent reforms here introduced a safe harbour to soften the impact of s 588G. The safe harbour was meant to encourage directors to attempt to restructure rather than prematurely enter the company into a formal administration process.¹² Yet, another jurisdiction has found it worthwhile to adopt the more stringent position that Australia has moved away from.

Judges matter for corporate law because they can ensure that 'corporate law on the books (good or bad) is good off the books'.¹³ The same holds true for corporate insolvency law. In corporate insolvency, particularly restructuring, there is plenty of literature on the importance of the expertise and competence of judges to ensure optimal outcomes. Chapter 7 focuses on courts' exercise of discretion in the context of restructuring, rather than on the expertise and competence of judges, thereby offering new insights into the role of courts. Interestingly, Wan also notes how the goals of insolvency law in each jurisdiction factor into how much discretion judges are given rather than simply the creation of bright line rules. Despite some

⁹ Ibid 293.

¹⁰ Ibid 261.

¹¹ Ibid 272.

¹² Explanatory Memorandum, Treasury Laws Amendment (2017 Enterprise Incentives No 2) Bill 2017 (Cth) 5.

¹³ Luca Enriques, 'Do Corporate Law Judges Matter? Some Evidence from Milan' (2002) 3(4) *European Business Organization Law Review* 765.

jurisdictions not explicitly stating the goals of their insolvency laws, Wan draws inferences from the contexts of the introduction of those laws. This echoes how courts in Australia have been guided by the goals of voluntary administration explicitly stated in s 435A of the *Corporations Act*¹⁴ when dealing with voluntary administration (the prominent court-supervised restructuring process in this country).

An important player in corporate restructuring is the insolvency professional and the book devotes Chapter 6 to comparatively assessing the insolvency professional's role and regulation. This chapter, after evaluating the appointment, remuneration, accountability and independence of the insolvency professional, concludes that the key is to strike an appropriate balance between granting autonomy to the insolvency professional and increasing judicial oversight over them. Looking at the state of play in each jurisdiction, as this chapter does, helps tease out the consequences of various policy choices.

A potential danger of undertaking a comparative project that spans multiple jurisdictions is that some of the specific features of jurisdictions do not receive attention. This book manages to avoid that danger. For example, in examining the issue of NPLs plaguing India and China, Wan considers the specific problems and potential regulatory strategies despite NPLs not being a big concern in the other jurisdictions studied.

Overall, the book not only provides a ready comparative reference on court-supervised restructuring across four important Asian jurisdictions, but also offers theoretical and practical insights for policymakers, scholars and lawyers in other jurisdictions. In particular, I am sure that it offers many insights for those of us teaching and thinking about Australian insolvency law in the current times when reform is on the agenda.

¹⁴ For a discussion of some cases where s 435A of the *Corporations Act 2001* (Cth) has guided the courts, see Roman Tomasic and Jenny Fu, 'Legal Innovation and the Rescue of Corporate Groups: The Arrium Voluntary Administration' (2018) 33(3) *Australian Journal of Corporate Law* 290.