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# *Regulating Truth and Lies in Political Advertising: Implied Freedom Considerations*

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## **Abstract**

Contemporary politics is increasingly described as ‘post-truth’. In Australia and elsewhere, misleading or false statements are being deployed in electoral campaigning, with troubling democratic consequences. Presently, two Australian jurisdictions have laws that require truth in political advertising. There have been proposals for such regulation in several more, including at the federal level. This article considers whether these laws are consistent with the implied freedom of political communication in the *Australian Constitution*. It suggests that the existing provisions, in South Australia and the Australian Capital Territory, would likely satisfy the proportionality test currently favoured by the High Court of Australia. However, the article identifies several implied freedom concerns that could prevent more onerous limitations on misleading political campaigning. Legislatures therefore find themselves between a rock and a hard place: minimalistic regulation may be insufficient to curtail the rise of electoral misinformation, while more robust laws risk invalidity under the *Constitution*.

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## I Introduction

[T]he deliberate falsehood and the outright lie used as legitimate means to achieve political ends, have been with us since the beginning of recorded history. Truthfulness has never been counted among the political virtues ...<sup>1</sup>

— Hannah Arendt

There is no human right to disseminate information that is not true.<sup>2</sup>

— Lord Hobhouse

Navigating the streets of Canberra in 2020, an observant driver might have spotted on the side of a parked van an advertisement from The Australia Institute (‘TAI’), a progressive think-tank. In bold font, it observed: ‘It’s perfectly legal to lie in a political ad and it shouldn’t be. Enough is enough.’ The advertisement ended with a call for action: ‘It’s time for truth in political advertising laws.’<sup>3</sup> TAI is not alone in making this demand; polling undertaken by the think-tank found that 84% of Australians supported the introduction of such laws.<sup>4</sup> In its report on the 2019 Federal Election, published in December 2020, the Joint Standing Committee on Electoral Matters canvassed the possibility of a federal law regulating truth in political advertising. While the Liberal–National Coalition–majority Committee did not support new regulation, dissenting reports from the Australian Labor Party (‘ALP’) and the Australian Greens members expressed appetite for reform.<sup>5</sup> ‘[W]ithout some legislative response,’ wrote Greens Senator Larissa Waters, ‘the integrity of election campaigns and public faith in political parties will continue to be eroded.’<sup>6</sup> In late 2021, Independent Member of Parliament Zali Steggall released a draft private member’s bill, Commonwealth Electoral Amendment (Stop the Lies) Bill 2021 (Cth).<sup>7</sup>

Truth-in-political-advertising laws (‘TPALs’) have existed in Australia in various forms since 1983.<sup>8</sup> Presently, South Australia (‘SA’) and the Australian Capital Territory (‘ACT’) have laws that make it an offence to publish inaccurate

<sup>1</sup> Hannah Arendt, ‘Lying in Politics: Reflections on the Pentagon Papers’, *New York Review of Books* (online, 18 November 1971) <[https://www.nybooks.com/articles/1971/11/18/lying-in-politics-reflections-on-the-pentagon-pape/?lp\\_txn\\_id=1020352](https://www.nybooks.com/articles/1971/11/18/lying-in-politics-reflections-on-the-pentagon-pape/?lp_txn_id=1020352)>.

<sup>2</sup> *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 238.

<sup>3</sup> ‘We Need Truth in Political Advertising Laws’, *The Australia Institute* (Web Page) <[https://nb.tai.org.au/truth\\_in\\_political\\_ads](https://nb.tai.org.au/truth_in_political_ads)>.

<sup>4</sup> Bill Browne, ‘We Can Handle the Truth: Opportunities for Truth in Political Advertising’ (Discussion Paper, The Australia Institute, August 2019) 38.

<sup>5</sup> Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report on the Conduct of the 2019 Federal Election and Matters Related Thereto* (Report, December 2020) 194–5, 202–3.

<sup>6</sup> *Ibid* 195 [8.39].

<sup>7</sup> Zali Steggall, ‘Zali Steggall MP to Introduce Bill to Stop the Lies in Political Advertising’, *Zali Steggall MP* (Media Release, 30 August 2021) <[https://www.zalisteggall.com.au/media\\_release\\_zali\\_steggall\\_mp\\_to\\_introduce\\_bill\\_to\\_stop\\_the\\_lies\\_in\\_political\\_advertising](https://www.zalisteggall.com.au/media_release_zali_steggall_mp_to_introduce_bill_to_stop_the_lies_in_political_advertising)>.

<sup>8</sup> For a history of parliamentary consideration of such laws, see Electoral Matters Committee, Parliament of Victoria, *Inquiry into the Provisions of the Electoral Act 2002 (Vic) Relating to Misleading or Deceptive Political Advertising* (Parliamentary Paper No 282, February 2010) 32–45.

and misleading communications in the course of electoral campaigns.<sup>9</sup> The perceived need for such regulation at the federal level, and in other states, has been heightened by the social media age<sup>10</sup> and high-profile instances of misleading campaigning. During the 2016 Federal Election, for example, the ALP ran a ‘Mediscare’ campaign claiming the Liberal–National Coalition intended to privatise Medicare;<sup>11</sup> it had indicated no such plan. In the 2019 Federal Election, the Liberal Party alleged that the ALP would introduce a ‘death tax’ if elected; again, it had no such plan.<sup>12</sup> These examples are the tip of the iceberg: on Twitter, Facebook and Instagram, as well as in more traditional media outlets, misleading, deceptive or plainly false political communication has flourished, in Australia and elsewhere.<sup>13</sup>

Attempts to regulate truth and falsehood in electoral campaigning enliven thorny free speech issues,<sup>14</sup> and, in Australia, raise the spectre of a constitutional obstacle: the implied freedom of political communication. The constitutionality of such laws has been tested once before, when the Full Court of the Supreme Court of South Australia upheld the validity of the *Electoral Act 1985* (SA) (‘*SA Act*’) in the 1995 case of *Cameron v Becker*.<sup>15</sup> However, that case’s contemporary salience is limited. *Cameron* was decided at the dawn of the implied freedom: in the subsequent quarter-century, the jurisprudence has become more complex. The test for determining constitutional validity was reformulated in *Lange v Australian Broadcasting Corporation*,<sup>16</sup> and underwent substantial modification in *McCloy v New South Wales*.<sup>17</sup> Australia’s apex court, meanwhile, has yet to confront squarely TPALs. In *Evans v Crichton-Browne*,<sup>18</sup> a case that preceded the development of the implied freedom of political communication, the High Court of Australia read down

<sup>9</sup> *Electoral Act 1985* (SA) s 113 (‘*SA Act*’); *Electoral Act 1992* (ACT) s 297A (‘*ACT Act*’). The Northern Territory is sometimes cited as having a TPAL, although the Northern Territory Electoral Commission has adopted a narrow interpretation of the relevant provision, stating ‘[t]he provision is not a truth in political advertising clause’: Northern Territory Electoral Commission, ‘Campaign Advertising and Authorisation: Local Government Elections’, (Information Sheet) <[https://ntec.nt.gov.au/\\_data/assets/pdf\\_file/0009/571446/Campaign-advertising-and-authorisation-LG.pdf](https://ntec.nt.gov.au/_data/assets/pdf_file/0009/571446/Campaign-advertising-and-authorisation-LG.pdf)> (emphasis in original).

<sup>10</sup> In the American context, one scholar has suggested that the internet and social media distinguish false speech in the contemporary era: ‘the internet has made the issue different from times past and will raise difficult issues of First Amendment law’: Erwin Chemerinsky, ‘False Speech and the First Amendment’ (2018) 71(1) *Oklahoma Law Review* 1, 2.

<sup>11</sup> Mazoe Ford, ‘Election 2016: “Mediscare” and Other Tactics from the Labor Campaign Handbook’, *ABC* (online, 4 July 2016) <<https://www.abc.net.au/news/2016-07-04/election-2016-how-did-they-do-it-inside-the-labor-campaign/7568456?nw=0>>.

<sup>12</sup> Katharine Murphy, Christopher Knaus and Nick Evershed, ‘“It Felt Like a Big Tide”: How the Death Tax Lie Infected Australia’s Election Campaign’, *The Guardian* (online, 8 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/08/it-felt-like-a-big-tide-how-the-death-tax-lie-infected-australias-election-campaign>>.

<sup>13</sup> See Browne (n 4) 5–6; McKay Coppins, ‘The Billion-Dollar Disinformation Campaign to Reelect the President’, *The Atlantic* (online, 10 February 2020) <<https://www.theatlantic.com/magazine/archive/2020/03/the-2020-disinformation-war/605530/>>. In the United States (‘US’), voting-related misinformation has taken on a troubling racial dimension. See Gilda Daniels, ‘Voter Deception’ (2010) 43(2) *Indiana Law Review* 343.

<sup>14</sup> Joo-Cheong Tham and KD Ewing, ‘Free Speech and Elections’ in Adrienne Stone and Frederick Schauer (eds), *Oxford Handbook of Free Speech* (Oxford University Press, 2021) 312, 327–8.

<sup>15</sup> *Cameron v Becker* (1995) 64 SASR 238 (‘*Cameron*’).

<sup>16</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (‘*Lange*’).

<sup>17</sup> *McCloy v New South Wales* (2015) 257 CLR 178 (‘*McCloy*’).

<sup>18</sup> *Evans v Crichton-Browne* (1981) 147 CLR 169 (‘*Evans*’).

a prohibition on false communication relating to vote-casting. The Court observed that ‘the framers of a law designed to prevent misrepresentation or concealment which may affect the political judgment of electors must consider also the importance of ensuring that freedom of speech is not unduly restricted’.<sup>19</sup>

It is probable that, should TPALs be introduced federally, or proliferate at the state and territory level, challenges will be made to their constitutional validity.<sup>20</sup> Given *Cameron* was decided before *Lange* or *McCloy*, there is no authoritative guidance on how that litigation might be resolved. Accordingly, in light of the ongoing political debate, a focused analysis on the interplay between such laws and the implied freedom of political communication is timely. This is particularly so because these issues have not previously benefited from sustained scholarly engagement. Most studies have focused on the desirability of such laws,<sup>21</sup> rather than constitutional concerns. In a 1997 research paper, Williams merely noted that ‘Australia also faces constitutional problems with seeking to regulate truth in political advertising’.<sup>22</sup> It is hoped this article might therefore have practical utility. It is possible to conceive of a spectrum of regulation: at one end, highly burdensome TPALs that are effective in addressing the problem, but contravene the implied freedom; and at the other end, a minimalistic regime that is ineffective, but does not offend the *Australian Constitution*. Considering where the line might be drawn, and how to maximise efficacy without overstepping constitutional boundaries, may aid legislative drafters.<sup>23</sup>

This article seeks to address two related questions: (1) Are existing TPALs consistent with the implied freedom of political communication in the *Constitution*?; and (2) What lessons can policymakers draw from implied freedom jurisprudence in designing efforts to address falsehoods in campaigning? The article will deploy a predominantly doctrinal approach, applying the current implied freedom test to TPALs. It will supplement this with insight from comparative law and scholarship, particularly from the United States (‘US’) and Britain.

The article begins by describing the evolution of relevant electoral regulation in Australia, from Federation to the passage, and swift repeal, of a federal TPAL in the 1980s. It then outlines the contours of TPALs in SA and the ACT, before assessing the validity of these schemes against the requirements of the implied

<sup>19</sup> Ibid 206–7 [12] (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ).

<sup>20</sup> In the ACT, Victoria and Queensland, a challenge could also be made under human rights law: *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld).

<sup>21</sup> See, eg, Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 1<sup>st</sup> ed, 2010) 142–8.

<sup>22</sup> George Williams, ‘Truth in Political Advertising Legislation in Australia’ (Research Paper No 13, Parliamentary Library, Parliament of Australia, 1997) ii. See also George Williams and Natalie Gray, ‘A New Chapter in the Regulation of Truth in Political Advertising in Australia’ (1997) 8(2) *Public Law Review* 110; George Williams, ‘Freedom of Political Discussion and Australian Electoral Laws’ (1998) 5 *Canberra Law Review* 151.

<sup>23</sup> In doing so, I echo the comments of an American scholar who undertook a similar exercise: ‘My suggestions are modest. My suggestions are unlikely to transform the state of our politics. But there is value in delineating what is permissible within the boundaries of the First Amendment as we work towards enhancing our democratic discourse’: Joshua Sellers, ‘Legislating against Lying in Campaigns and Elections’ (2018) 71(1) *Oklahoma Law Review* 141, 165.

freedom. The article finds that a constitutional challenge to these laws would likely fail on the structured proportionality methodology currently employed by a majority of the High Court, although it may have greater prospects under the alternative calibrated scrutiny approach. The article then considers other issues arising at the intersection of the implied freedom and TPALs, which may well constrain the development of broader regulation. In traversing this ground, it highlights several uncertainties in implied freedom jurisprudence that are squarely raised by TPALs. These uncertainties suggest that future litigation over the validity of TPALs will cause headaches for legislatures and the High Court alike.

## II Context

### A History

Concern with the propriety of political campaigning is not novel.<sup>24</sup> The first electoral law in Britain to regulate certain categories of false statements was enacted in 1895.<sup>25</sup> Several years later, Grantham J expressed his ‘great pity that in elections at the present time so many false statements are made, and that votes are obtained in this way’.<sup>26</sup> In Australia, the very first federal electoral law, the *Commonwealth Electoral Act 1902* (Cth), prohibited the publication of electoral advertisement handbills or pamphlets that did not identify the name and address of the person who authorised it.<sup>27</sup> This requirement was expanded by the *Commonwealth Electoral Act 1911* (Cth), which provided that, following the issuance of electoral writs, any published political comment must identify the author’s name and address.<sup>28</sup> In 1912, the High Court was asked whether such a law was within the Commonwealth’s legislative authority. Isaacs J emphatically upheld the law’s validity: ‘Parliament can forbid and guard against fraudulent misrepresentation. It would shock the conscience to deny it.’<sup>29</sup> In addition to these procedural requirements, the 1911 law also provided content-based regulation. Section 180(e) prohibited advertising that contained ‘any untrue or incorrect statement intended or likely to mislead or improperly interfere with any elector in or in relation to the casting of his vote.’ These provisions were retained, with minor additions, following amendments in 1918 and 1928.

Electoral reform elicited minimal political interest in subsequent decades. However, ahead of the 1983 Federal Election, the ALP pledged a review of electoral law if elected. The Hawke Government subsequently established a Joint Select Committee on Electoral Reform, which delivered its first report in September

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<sup>24</sup> See generally Catherine J Ross, ‘Ministry of Truth: Why Law Can’t Stop Prevarications, Bullshit, and Straight-out Lies in Political Campaigns’ (2017) 16 *First Amendment Law Review* 367, 367–9.

<sup>25</sup> *Corrupt and Illegal Practices Prevention Act 1895* See Jacob Rowbottom, ‘Lies, Manipulation and Elections — Controlling False Campaign Statements’ (2012) 32(3) *Oxford Journal of Legal Studies* 507, 508.

<sup>26</sup> *Attercliffe Division of the City of Sheffield* (1906) 5 O’Malley & Hardcastle Election Cases 218, 221.

<sup>27</sup> *Commonwealth Electoral Act 1902* (Cth) s 180(a).

<sup>28</sup> *Ibid* s 181AA(1).

<sup>29</sup> *Smith v Oldham* (1912) 15 CLR 355, 362 (Isaacs J) (‘*Smith*’).

1983.<sup>30</sup> The Committee noted that it had received a submission from Geoffrey Lindell, a law lecturer, raising concerns about the proper regulation of ‘misleading electoral advertising’.<sup>31</sup> The Committee tentatively recommended that the Australian Electoral Office be empowered to seek injunctive relief against misleading advertising.<sup>32</sup> The Committee also suggested that the Committee itself could consider ‘standards governing political advertising vis a vis trades practices legislation, among other things ... at greater length’.<sup>33</sup>

Although the case was not explicitly referenced in the Committee’s report, Lindell’s concerns may have been animated by the High Court’s 1981 decision in *Evans* (sitting as the Court of Disputed Returns). That case concerned the ‘mislead or improperly interfere’ offence in the *Commonwealth Electoral Act 1918* (Cth) (*‘1918 Act’*).<sup>34</sup> The petitioners challenged the election of three Senators on the basis that advertisements containing untrue or incorrect statements were published in newspapers and broadcast on television in contravention of that provision.<sup>35</sup> The case turned on the provision’s construction: did the offence cover conduct influencing voter deliberation, or ‘does it refer only to statements intended or likely to mislead or improperly interfere with an elector in such a way that his choice when made is not properly expressed or given effect by the physical act of voting?’<sup>36</sup> The Court favoured the latter interpretation, informed by free speech concerns and practical factors. However, the Court stressed that its judgment did not foreclose the possibility of a wider provision: ‘This Court is not concerned with what it would be desirable for Parliament to provide, but with the meaning of what Parliament has in fact provided’.<sup>37</sup>

In late 1983, Parliament passed amendments to the *1918 Act*. It included, following the Committee’s rather cursory consideration, Australia’s first TPAL. Section 329(2), as amended, provided:

A person shall not, during the relevant period in relation to an election under this Act, print, publish, or distribute, or cause, permit or authorise to be printed, published or distributed, any electoral advertisement containing a statement —

- (a) that is untrue; and
- (b) that is, or is likely to be, misleading or deceptive

The offence was punishable by a fine or six months’ imprisonment. ‘Electoral advertisement’ and ‘publish’ were broadly defined, albeit a defence was provided for defendants who could prove they did not know, and could not reasonably be

<sup>30</sup> Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (Parliamentary Paper No 227, 13 September 1983).

<sup>31</sup> *Ibid* 180.

<sup>32</sup> *Ibid* 181.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Commonwealth Electoral Act 1918* (Cth) (*‘1918 Act’*) s 161(e), as at 17 February 1981.

<sup>35</sup> One petition concerned advertising to the effect that votes for Australian Democrats candidates were effectively votes for the ALP; two others concerned allegations that the ALP would introduce a wealth tax.

<sup>36</sup> *Evans* (n 18) 201 (Gibbs CJ, Stephen, Mason, Murphy, Aickin, Wilson and Brennan JJ).

<sup>37</sup> *Ibid* 206.

expected to have known, that the advertisement was of the nature prohibited. An electoral candidate, or the Australian Electoral Office, could seek injunctive relief.

The provision was short-lived. The Committee's second report, published in August 1984, noted that the new provision 'could seriously disrupt the orderly process of political campaigning'.<sup>38</sup> The Committee observed that 'even though fair advertising is desirable it is not possible to control political advertising by legislation'.<sup>39</sup> Accordingly, it recommended the repeal of s 329(2). Senator Michael Macklin filed a dissenting report, strongly rejecting the majority's position: 'It is surely a small price to pay for a better informed democracy that politicians are required to tell the truth'.<sup>40</sup> The provision was subsequently repealed.<sup>41</sup> There remains no TPAL in force at federal level today, despite the Gillard Government committing to such legislation,<sup>42</sup> and frequent parliamentary consideration (most recently in the 2020 Joint Standing Committee on Electoral Matters report).<sup>43</sup> Attempts to deploy consumer law in this context have also been unsuccessful. In *Durant v Greiner* it was held that prohibitions on misleading and deceptive conduct do not apply to campaigning, because it is not 'trade or commerce'.<sup>44</sup>

## **B South Australia**

In 1985, SA enacted the *SA Act*. It contained a TPAL. Section 113(2), as currently in force after superficial amendment since enactment, provides:

A person who authorises, causes or permits the publication of an electoral advertisement (an advertiser) is guilty of an offence if the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

Section 113 also provides for financial penalties and a *1918 Act*-style defence. Further, it empowers the Electoral Commissioner to request the advertiser withdraw the advertisement and publish a retraction, and apply to the Supreme Court for an order to that effect.

The introduction of s 113 is somewhat curious.<sup>45</sup> It was not explicitly referenced in the second reading speech. To the contrary, that speech had indicated that the 1984 Joint Select Committee on Electoral Reform report influenced the legislative design — a report that stridently criticised such laws. During legislative

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<sup>38</sup> Joint Select Committee on Electoral Reform, Parliament of Australia, *Second Report* (Parliamentary Paper No 198, 24 August 1984) i.

<sup>39</sup> *Ibid* 27.

<sup>40</sup> *Ibid* 47. For a discussion of the policy merits and shortcomings of TPALs, see William Marshall, 'False Campaign Speech and the First Amendment' (2004) 153(1) *University of Pennsylvania Law Review* 285, 293–300.

<sup>41</sup> By the *Electoral and Referendum Amendment Act 1984* (Cth) s 5.

<sup>42</sup> Agreement between the Australian Greens and the Australian Labor Party (1 September 2010) cl 3(b).

<sup>43</sup> See, eg, Joint Standing Committee on Electoral Matters (n 5) 75–84; Joint Standing Committee on Electoral Matters, Parliament of Australia, *Report of Inquiry into the Conduct of the 1993 Federal Election and Matters related thereto* (Report, November 1994) [8.1.5].

<sup>44</sup> *Durant v Greiner* (1990) 21 NSWLR 119.

<sup>45</sup> This legislative history is largely drawn from Legal, Constitutional and Administrative Review Committee, Legislative Assembly of Queensland, *Truth in Political Advertising* (Report No 4, December 1996) 11–13.

debate, the proposed provision was attacked — particularly a clause permitting candidates to seek an injunction (this was removed from the Bill). Nonetheless, the *SA Act* was enacted and is today hailed as a world leader.<sup>46</sup> It has had some practical effect, with several cases successfully brought under it.<sup>47</sup> In the six SA elections since 1997, the SA Electoral Commission has received 313 complaints relating to misleading electoral advertising, and made 25 retraction requests.<sup>48</sup> Despite its longevity, the provision is not uncontroversial. In 2014, the Commission recommended s 113's repeal, suggesting it raised an 'ethical question' about the Commission's role determining truth in politicised contexts, which 'can offend against [its] independence'.<sup>49</sup> However, in 2017, researchers Renwick and Palese interviewed representatives from both major parties and found unanimous support for the provision. The then SA Attorney General, John Rau, observed that 'whilst I acknowledge that the Electoral Commission is an imperfect adjudicator ... compared to all of the other options, it appears to be the best of the set of choices'.<sup>50</sup> Renwick and Palese concluded that s 113 was relatively 'benign', but had constrained 'politicians from making claims that are demonstrably false'.<sup>51</sup>

### C Recent Developments

The *SA Act* has provoked much consideration in other Australian states. In Queensland, a 1996 report by the Legal, Constitutional and Administrative Review Committee recommended a TPAL, although it did not come to fruition.<sup>52</sup> In Victoria, meanwhile, a detailed report of the Legislative Council's Electoral Matters Committee in 2010 determined not to recommend a TPAL. It observed that such regulation 'would have implementation difficulties and increase the risk of a more litigious approach to elections'.<sup>53</sup> In 2020, the ACT Legislative Assembly amended the *Electoral Act 1992* (ACT) ('*ACT Act*'), to provide a TPAL that took effect in July 2021. Notably, the law was introduced despite resistance from the ACT Electoral Commission, which deemed the idea 'unworkable'.<sup>54</sup> The amendment provides (in part):

<sup>46</sup> Alan Renwick and Michela Palese, 'Doing Democracy Better: How Can Information and Discourse in Election and Referendum Campaigns in the UK Be Improved?' (Research Paper, The Constitution Unit, University College London, March 2019) 22.

<sup>47</sup> These cases have been a mix of prosecutions and matters before the Court of Disputed Returns: see, eg, *Cameron* (n 15); *King v Electoral Commissioner* [1998] SAS 6557; *Featherston v Tully (No 2)* (2002) 83 SASR 347; *Hanna v Sibbons* (2010) 108 SASR 182.

<sup>48</sup> Renwick and Palese (n 46) 23 Table 2.1.

<sup>49</sup> Electoral Commission of South Australia, *Election Report: State Election 2014* (Report, 2014) 79.

<sup>50</sup> Quoted in Renwick and Palese (n 46) 27.

<sup>51</sup> Renwick and Palese (n 46) 29–30.

<sup>52</sup> Legal, Constitutional and Administrative Review Committee (n 45) ii.

<sup>53</sup> Electoral Matters Committee (n 8) 158.

<sup>54</sup> Katie Burgess, 'Truth in Political Advertising Laws "Unworkable", ACT Electoral Commission says', *The Canberra Times* (online, 25 July 2017) <<https://www.canberratimes.com.au/story/6030153/truth-in-political-advertising-laws-unworkable-act-electoral-commission-says/#gsc.tab=0>>.

297A Misleading electoral advertising

- (1) A person commits an offence if—
- (a) the person disseminates, or authorises the dissemination of, an advertisement containing electoral matter; and
  - (b) the advertisement contains a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent.

Maximum penalty: 50 penalty units.

The remainder of the provision provides a *1918 Act*-style defence and empowers the Commission to seek a retraction and, if necessary, apply to the Supreme Court.

### III Truth-in-Political-Advertising Laws and the Implied Freedom of Political Communication

#### A The Implied Freedom

The *Australian Constitution* contains no explicit protection for freedom of expression. However, in 1992 the High Court of Australia held that, by implication, the *Constitution* protects freedom of political communication.<sup>55</sup> The Court subsequently grounded this freedom in the text and structure of the *Constitution* concerning representative and responsible government, in a landmark judgment in *Lange*.<sup>56</sup> *Lange* also provided the test for determining validity that remains applicable today, albeit with modification arising from cases including *Coleman v Power*,<sup>57</sup> *McCloy*,<sup>58</sup> and *Brown v Tasmania*.<sup>59</sup> As currently stated, that test is:

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If “yes” to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?
3. If “yes” to question 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government?

This question involves ‘proportionality testing’ to determine whether the restriction that the provision imposes on the freedom is justified. The proportionality test involves consideration of the extent of the burden effected by the impugned provision on the freedom. There are three stages to the test: the enquiries as to

<sup>55</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (‘ACTV’); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>56</sup> *Lange* (n 16) 557–67 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>57</sup> *Coleman v Power* (2004) 220 CLR 1 (‘*Coleman*’).

<sup>58</sup> *McCloy* (n 17).

<sup>59</sup> *Brown v Tasmania* (2017) 261 CLR 328 (‘*Brown*’).

whether the law is justified as suitable, necessary and adequate in its balance (the *Lange/McCloy* test).<sup>60</sup>

## ***B Application to Truth-in-Political-Advertising Laws***

To begin considering the interplay between the implied freedom and TPALs, it is instructive to apply the *Lange/McCloy* proportionality test to existing TPALs. Given the similarities between the *SA Act* and *ACT Act*, they can be analysed together.

### *1 Burden*

Do the *SA Act* and *ACT Act* ‘effectively burden freedom of [political] communication ... either in its terms, operation or effect?’<sup>61</sup> This first question asks ‘nothing more complicated’ than whether the law in some way limits ‘the making or the content of political communications’.<sup>62</sup> It seems uncontroversial to suggest that this question would be answered affirmatively. By definition, TPALs impinge on the freedom: they serve to directly penalise certain types of communication. Because *Cameron* was decided before *Lange*, it did not explicitly consider the granular *Lange/McCloy* framework. Nonetheless, Lander J conceded that, although the *SA Act* ‘is directed to a very small class of persons in very narrow circumstances’, it was a ‘law that does interfere with the freedom of discourse in political matters’.<sup>63</sup> Olsson J’s comments in *Cameron* focused on the *SA Act*’s proportionality, indicating that his Honour accepted the freedom was burdened.<sup>64</sup>

There is one potential caveat. In a matter recently heard by the High Court, *Zhang v Commissioner of the Australian Federal Police*,<sup>65</sup> the Commonwealth raised the possibility that certain political communication might not be protected by the implied freedom. In written submissions defending a challenge to foreign influence laws, the Solicitor-General argued:

the implied freedom does not protect communications that are inimical to the free and informed choice of electors. For example, a communication which seeks to subvert the choice of an elector by threatening the elector with violence unless they exercise that choice in a particular way receives no protection. Nor does a communication which seeks to foment the violent overthrow of a democratic system of government. No doubt at one level the communications in both of these examples concern ‘political or government matters’. But they are nevertheless outside the range communications necessary to give effect to the constitutional provisions upon which the implied freedom is based.<sup>66</sup>

<sup>60</sup> This extract merges relevant passages from *Brown* *ibid* 364 (Kiefel CJ, Bell and Keane JJ) and *McCloy* (n 17) 194–5 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>61</sup> *Lange* (n 16) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>62</sup> *Monis v The Queen* (2013) 249 CLR 92, 142 (Hayne J).

<sup>63</sup> *Cameron* (n 15) 254.

<sup>64</sup> *Ibid* 248.

<sup>65</sup> *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 (‘*Zhang*’).

<sup>66</sup> First Defendant and Attorney-General (Cth), ‘Joint Annotated Submissions of the First Defendant and the Attorney-General of the Commonwealth (Intervening)’, Submission in *Zhang*, Case No S129/2020, 9 December 2020, 12 [29] (citations omitted) (‘Submission in *Zhang*’).

Similar ideas were ventilated by Heerey J in a 1998 case before the Federal Court of Australia involving a challenge to the censorship of a student newspaper that contained a guide to shoplifting as part of a critique of capitalism.<sup>67</sup> His Honour said, in considering the noted history of anarchist literature,

[a]ll this may be in one sense politics, but the [c]onstitutional freedom of political communication assumes — indeed exists to support, foster and protect — representative democracy and the rule of law. The advocacy of law breaking falls outside this protection and is antithetical to it.<sup>68</sup>

A party defending a TPAL might therefore seek to argue that there is no burden on political communication because the freedom does not protect ‘a statement of fact that is inaccurate and misleading to a material extent’. It could plausibly be suggested that lies play no constructive role in political discourse and thereby do not give effect to the constitutional provisions from which the implied freedom derives.<sup>69</sup> This argument might draw support from the distinction proposed by noted free speech scholar Frederick Schauer, between coverage and protection, to argue that TPALs do not give rise to a free speech question.<sup>70</sup>

Yet, while the Commonwealth’s argument in *Zhang* is superficially attractive, it lacks any basis in existing High Court authority. As *Zhang* was decided on non-constitutional grounds, the issue was not ultimately addressed by the Court.<sup>71</sup> The submissions sought to distinguish the position in *Coleman*, where the High Court found that offensive communication was still protected.<sup>72</sup> In the context of applying the *Lange/McCloy* test to existing TPALs, *Coleman* will pose a barrier to such a finding, perhaps more so than it would have in *Zhang* (a case relating to foreign interference laws), had that case been determined on constitutional grounds. It may be possible to distinguish inaccurate and misleading statements of fact from the ‘insult and emotion, calumny and invective’ that Kirby J suggested in *Coleman* had long been ‘part and parcel of the struggle of ideas’ in Australia.<sup>73</sup> Yet the boundary is not clearly demarcated and a court will be hesitant to draw such a distinction at the initial stage of the *Lange/McCloy* test. This is particularly so given a TPAL might not only restrain the making of materially-false statements, but could also have a chilling effect on a wider category of communication.

<sup>67</sup> *Brown v Members of the Classification Review Board of the Office of Film and Literature Classification* (1998) 82 FCR 225. With thanks to a referee for bringing this case to my attention.

<sup>68</sup> *Ibid* 246.

<sup>69</sup> It is notable that, even in the absolutist jurisprudence of the American First Amendment, there is support for this position. Brennan J has held that ‘the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection’: *Garrison v Louisiana*, 379 US 64, 75 (1964).

<sup>70</sup> See, eg, Frederick Schauer, ‘What Is Speech? The Question of Coverage’ in Adrienne Stone and Frederick Schauer (eds), *Oxford Handbook of Free Speech* (Oxford University Press, 2021) 159. With thanks to a referee for bringing this to my attention.

<sup>71</sup> *Zhang* (n 65) 437–8 (Kiefel CJ, Gageler, Keane, Gordon, Edelman, Steward and Gleeson JJ).

<sup>72</sup> Submission in *Zhang* (n 66) 13 [31] n 38.

<sup>73</sup> *Coleman* (n 57) 91 [239]. Although, analogously with *Coleman*, it might be suggested that falsehoods also have a long history in Australian political debate. One author has noted that ‘[e]xaggeration, distortion and lying is part and parcel of an Australian election’: Scott Bennett, *Winning and Losing: Australian National Elections* (Melbourne University Press, 1996) 77. See also Bryan Mercurio and George Williams, ‘Australian Electoral Law: “Free and Fair?”’ (2004) 32(3) *Federal Law Review* 365, 391.

On balance, it is likely a court would accept that TPALs burden the implied freedom. However, there is a strong argument that this burden is modest. An evaluation of the nature of the burden is an often-overlooked element of the *Lange/McCloy* test. However, recent judgments have reiterated its importance. As Gageler J noted in *McCloy*: ‘The simplicity of the inquiry should not detract from its importance ... The first step is critical.’<sup>74</sup> It can be compellingly argued that the *SA Act* and *ACT Act* impose a modest burden on the implied freedom, because they apply only to an extremely limited subset of political communication (materially inaccurate and misleading statements of fact), in a limited context (electoral advertising) and impact only a small cohort (those responsible for making or authorising such advertising). In another case recently decided by the High Court, *LibertyWorks Inc v Commonwealth*, the Commonwealth advanced an analogous position.<sup>75</sup> The (limited) nature of the burden, the Commonwealth submitted, was squarely relevant to the subsequent proportionality exercise, such that a finding of modest burden supported an overall holding of validity.<sup>76</sup> This was accepted by a majority of the Court. The same plurality, Kiefel CJ, Keane and Gleeson JJ, held that the ‘[t]he burden effected is likely to be modest’.<sup>77</sup> This fact was then relevant to their Honours’ ultimate finding that the law satisfied the proportionality test, because the modest burden was adequate in balance to the legitimate purpose sought to be achieved.<sup>78</sup>

## 2 Purpose

The second phase of the *Lange/McCloy* test requires an assessment of the legislative purpose: are the aims of the *SA Act* and *ACT Act* compatible with Australia’s system of representative and responsible government? The burden must be ‘explained’ by the pursuit of a compatible end: ‘[e]xplanation precedes justification.’<sup>79</sup> Both laws seek to minimise the prevalence of false electoral advertising, which helps ensure that the electorate is properly informed and not unduly influenced by falsehoods (although the rationale for SA’s TPAL was not explicitly outlined during legislative debate).<sup>80</sup> In the ACT, the relevant provisions were introduced by Member of the Legislative Assembly Caroline Le Couteur. In her comments moving the amendment, Le Couteur said:

Unfortunately, in Australia there is no shortage of examples of false or misleading electoral advertising. While not perfect, the South Australian system has worked well there for decades ... This amendment is not designed to stamp out political debate.<sup>81</sup>

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<sup>74</sup> *McCloy* (n 17) 231 [127].

<sup>75</sup> Commonwealth, ‘Defendant’s Submissions’, Submission in *LibertyWorks v Commonwealth*, Case no S10/2020, 21 October 2020.

<sup>76</sup> *Ibid* 5.

<sup>77</sup> *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490, 509 [74] (‘*LibertyWorks*’).

<sup>78</sup> *Ibid* 510 [85].

<sup>79</sup> *McCloy* (n 17) 231 [130] (Gageler J).

<sup>80</sup> South Australia, *Parliamentary Debates*, Legislative Council, 19 March 1985, 3308–12 (Chris Sumner, Attorney-General).

<sup>81</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 27 August 2020, 2285.

It seems highly likely that the High Court would find this to be a legitimate purpose, not only compatible with Australia's system of government, but serving to enhance it.<sup>82</sup> In *Cameron*, Lander J observed that the *SA Act* burdened the freedom

for the protection of the fundamental right, which is that an elector is not only to be as widely informed as the elector and any candidate would wish, but also that the elector is not lead [sic] by deceit or misrepresentation ... That it seems to me is as important as any other legitimate interest ...<sup>83</sup>

The High Court's comments in *Smith* are also salient: 'The vote of every elector is a matter of concern to the whole Commonwealth, and all are interested in endeavouring to secure ... that the voter shall not be led by misrepresentation'.<sup>84</sup> More recently, the Court has accepted legislative motives relating to election integrity as legitimate in implied freedom cases.<sup>85</sup> Accordingly, there is no reason to doubt that these TPALs' purpose would be accepted as legitimate.

### 3 Proportionality

The final phase of analysis asks whether the *SA Act* and *ACT Act* are reasonably appropriate and adapted to advance this legitimate purpose. Since *McCloy*, that question has had three elements through a process labelled structured proportionality: are the laws suitable, necessary and adequate in balance?

#### (a) Suitability

In *Comcare v Banerji*, a recent implied freedom case, Kiefel CJ, Bell, Keane and Nettle JJ observed that: 'A law is suitable ... if it exhibits a rational connection to its purpose, and a law exhibits such a connection if the means for which it provides are capable of realising that purpose.'<sup>86</sup> The TPALs exhibit a rational connection to a purpose of reducing the prevalence of falsehoods in political campaigning; by prohibiting the use of inaccurate and misleading statements of facts in electoral advertising, the provisions discourage such behaviour and provide penalties for those who engage in it. This readily constitutes means that are capable of realising the provisions' purpose. Just as the safe access zone laws in *Clubb v Edwards* were a 'rational response to a serious public health issue',<sup>87</sup> so too are the *SA Act* and *ACT Act* rational responses to serious political integrity concerns.<sup>88</sup> In *Clubb*, the plurality also noted that the impugned provision had a rational connection to a broader purpose of protecting privacy and dignity, which they held to accord with the 'constitutional values that underpin the implied freedom'.<sup>89</sup> Equally, the broader purpose of these TPALs is to ensure informed electoral participation by the political

<sup>82</sup> See *Comcare v Banerji* (2019) 267 CLR 373, 423–4 [100]–[102] (Gageler J) ('*Banerji*').

<sup>83</sup> *Cameron* (n 15) 255.

<sup>84</sup> *Smith* (n 29) 362 (Isaacs J).

<sup>85</sup> See, eg, *Unions NSW v New South Wales* (2013) 252 CLR 530, 578 (Keane J) ('*Unions NSW (No 1)*'); *McCloy* (n 17) 209 [53] (French CJ, Kiefel, Bell and Keane JJ). For a thoughtful discussion of the comparison between campaign finance-related restrictions and TPALs, see Marshall (n 40) 306–14.

<sup>86</sup> *Banerji* (n 82) 400 [33].

<sup>87</sup> *Clubb v Edwards* (2019) 267 CLR 171, 205 [84] (Kiefel CJ, Bell and Keane JJ) ('*Clubb*').

<sup>88</sup> See also *Unions NSW v New South Wales* (2019) 264 CLR 595, 638 (Nettle J) ('*Unions NSW (No 2)*').

<sup>89</sup> *Clubb* (n 87) 205 [85] (Kiefel CJ, Bell and Keane JJ).

community, which, as in *Clubb*, can be described as adhering to the underlying values animating the implied freedom. Accordingly, it is probable a court would find that the suitability requirement is satisfied.

(b) *Necessity*

A law with a legitimate purpose that burdens the implied freedom will be considered necessary ‘unless there is an obvious and compelling alternative which is equally practicable and available and would result in a significantly lesser burden’.<sup>90</sup> A court will ordinarily approach this inquiry with caution due to the risk of usurping legislative authority in the field of policymaking: ‘the question of necessity does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved.’<sup>91</sup> Locating an equally compelling alternative is therefore difficult; for a court to divine a less burdensome alternative that solution ‘must be as capable of fulfilling that purpose as the means employed by the impugned provision, ‘quantitatively, qualitatively, and probability-wise’.<sup>92</sup>

A plaintiff might contest the necessity of the *SA Act* or *ACT Act* on at least three distinct bases. First, they could argue that a prohibition on statements of fact that are ‘inaccurate and misleading to a material extent’ is overly broad. It might be contended, for example, that a narrower prohibition on only ‘materially false statements of fact’ would achieve the same purpose without casting a chill over political communication. The short-lived federal TPAL, for example, applied to ‘untrue’ communications that misled or deceived (or were likely to).<sup>93</sup> It is arguable that this is a narrower approach, on the basis that ‘inaccurate’ could encompass communications that are only inexact or partially erroneous, whereas ‘untrue’ requires more fundamental falsity.

Second, it could be argued that the scope of the prohibition, in the case of the *ACT Act* ‘advertisement containing electoral matter’,<sup>94</sup> could be more narrowly targeted. Section 4 of the *ACT Act* defines ‘electoral matter’ as printed or electronic communications ‘intended or likely to affect voting at an election’, including material with an express or implied reference to the election or the performance of a government, politician or political party. The *SA Act* contains similar, although less prescriptive, definitions. It might be submitted that these definitions could be drafted narrowly, and with a greater temporal focus — the federal TPAL, for example, only applied during a ‘relevant period’.<sup>95</sup> Given misleading and deceptive electoral campaigning arguably has the greatest electoral impact in the weeks immediately prior to an election day, when there is less time to rebut falsehoods,<sup>96</sup> a TPAL restricted to those timeframes might achieve the same policy impact without burdening speech at other times.

<sup>90</sup> *Banerji* (n 82) 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

<sup>91</sup> *McCloy* (n 17) 217 [82] (French CJ, Kiefel, Bell and Keane JJ).

<sup>92</sup> *Tajjour v New South Wales* (2014) 254 CLR 508, 571 [114] (Crennan, Kiefel and Bell JJ), quoting Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 324.

<sup>93</sup> See above Part II(A).

<sup>94</sup> *ACT Act* (n 9) s 297A(1)(a).

<sup>95</sup> *1918 Act* (n 34) s 329(2), as repealed by *Electoral and Referendum Amendment Act 1984* (Cth).

<sup>96</sup> See Ross (n 24) 387.

Finally, it seems possible that inaccurate electoral advertising is most likely to influence voter choice when undertaken by political parties or candidates. As such, it might be argued the TPALs are over-broad by applying to anyone authorising an ‘electoral advertisement’.<sup>97</sup> This includes those engaging in advertising-based advocacy on electoral matters, such as third-party campaigners.<sup>98</sup> This arguably has a broader chilling effect on political debate, beyond what would be caused if the TPALs only applied to political parties and candidates.

While these arguments are plausible, they are unlikely to meet the high threshold required by the necessity test. The first objection would likely not produce a ‘significantly lesser burden’<sup>99</sup> — while the exact wording of the test may make some difference to the extent of the burden, it is unlikely to be of sufficient magnitude as to meet this requirement. A law of the nature proposed by the second objection, meanwhile, may not be as capable as the existing laws to achieve the purpose — any narrowing of definition or temporal period necessarily reduces the coverage of the TPALs, and, potentially, their efficacy. The third objection similarly risks reducing efficacy: some existing third parties are already closely aligned to political parties;<sup>100</sup> related third-party campaign organisations could be established to evade TPALs;<sup>101</sup> and the proposition that misinformation from candidates is more corrosive than that from third parties is unproven. Accordingly, in the absence of any compelling alternative, it is likely a court would find the *SA Act* and *ACT Act* necessary in the sense required by the *Lange/McCloy* test.

(c) *Adequate in Balance?*

Finally, a court will undertake the third element of proportionality testing. This is effectively a balancing exercise between the importance of the purpose and the extent of the burden.<sup>102</sup> As the plurality explained in *Banerji*: ‘If a law presents as suitable and necessary in the senses described, it is regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom.’<sup>103</sup> The *SA Act* and *ACT Act* impose only a modest burden on the freedom. This burden is imposed in the pursuit of a legislative purpose aimed at protecting Australia’s system of informed electoral democracy (which, in turn, ensures representative government). Of course, a court should remain wary of legislative attempts to burden the implied freedom. As Mason CJ observed in *Australian Capital Television Pty Ltd v Commonwealth*, ‘[t]he Court should be astute not to accept at face value claims by the legislature and the Executive that freedom of communication will, unless curtailed, bring about

<sup>97</sup> *SA Act* (n 9) s 4(1); *ACT Act* (n 9) ss 4, 297A.

<sup>98</sup> On the broader regulatory issues raised by third-party campaigners, see Anika Gauja and Graeme Orr, ‘Regulating “Third Parties” as Electoral Actors: Comparative Insights and Questions for Democracy’ (2015) 4(3) *Interest Groups & Advocacy* 249.

<sup>99</sup> *Banerji* (n 82) 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ).

<sup>100</sup> See, eg, *Unions NSW (No 1)* (n 85).

<sup>101</sup> But see Joo-Cheong Tham and David Grove, ‘Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections’ (2004) 32(3) *Federal Law Review* 397, 420.

<sup>102</sup> *McCloy* (n 17) 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>103</sup> *Banerji* (n 82) 402 [38] (Kiefel CJ, Bell, Keane and Nettle JJ).

corruption and distortion of the political process.’<sup>104</sup> Nonetheless, there is evidence, in Australia and abroad, that misleading electoral advertising is having a corrosive impact on democratic norms.<sup>105</sup> Accordingly, the modest burden, compelling purpose and the suitability and necessity of the *SA Act* and *ACT Act* cumulatively favour the conclusion that these TPALs are adequate in balance. Certainly, it cannot be said that the benefit sought to be achieved by the TPALs is ‘manifestly outweighed’ by the modest burden they impose on the implied freedom. Those words require a high threshold for a finding of invalidity; in the circumstances of the *SA Act* and *ACT Act*, it is very unlikely the threshold would be reached. This finding is consistent with the holding in *Cameron*, notwithstanding the considerable subsequent evolution of the implied freedom. Lander J held that the *SA Act* ‘goes no further than is necessary to protect the legitimate interest for which it is designed’,<sup>106</sup> and Olsson J found that it was ‘manifestly proportionate’.<sup>107</sup> A contemporary consideration of either TPAL may be less emphatic, as both laws raise genuine implied freedom concerns. Yet on the ultimate analysis, it is likely the outcome would be the same.

#### 4 *Calibrated Scrutiny*

The *Lange/McCloy* test’s structured proportionality is not universally endorsed by the High Court. Gageler J has been a strident critic, insisting that it is ‘at best, a tool ... I have never considered it to be a particularly useful tool’.<sup>108</sup> Gordon J has declined to adopt the plurality’s approach,<sup>109</sup> while Edelman J did not initially adopt the *Lange/McCloy* test, but has done so in more recent judgments.<sup>110</sup> Given the retirement of two proportionality proponents, Nettle and Bell JJ, it was momentarily unclear which approach would gain ascendancy. However, in *LibertyWorks*, Gleeson J joined with Kiefel CJ and Keane J in the plurality judgment adopting structured proportionality.<sup>111</sup> Steward J, writing alone, accepted that ‘the three parts of structured proportionality can, in a given case, be used as analytical tools to test whether a given law is reasonably appropriate and adapted in the advancement of its purpose’<sup>112</sup> (albeit his Honour also cast doubt on the implied freedom’s existence).<sup>113</sup>

Nonetheless, given Gageler J and Gordon J remain outspoken critics of the majority’s approach, and have continued to apply their own approach (and attack structured proportionality in strong terms),<sup>114</sup> it is useful to consider their Honours’

<sup>104</sup> *ACTV* (n 55) 145 (Mason CJ).

<sup>105</sup> See, eg, Joint Standing Committee on Electoral Matters (n 5) 71–84.

<sup>106</sup> *Cameron* (n 15) 257.

<sup>107</sup> *Ibid* 248.

<sup>108</sup> *Brown* (n 59) 376 [159].

<sup>109</sup> See, eg, *Clubb* (n 87) 305 [390]–[391].

<sup>110</sup> *Ibid* 330–49 [462]–[508]. See also Arisha Arif and Emily Azar, ‘*Clubb v Edwards; Preston v Avery: Structured Proportionality — Has Anything Changed?*’, *AusPubLaw* (online, 3 May 2019) <<https://auspublaw.org/2019/05/clubb-v-edwards-preston-v-avery-structured-proportionality/>>.

<sup>111</sup> *LibertyWorks* (n 77).

<sup>112</sup> *Ibid* 545 [247].

<sup>113</sup> *Ibid* 546 [249].

<sup>114</sup> Including in non-implied freedom contexts: see *Palmer v Western Australia* (2021) 95 ALJR 229 (‘*Palmer*’).

alternative approach.<sup>115</sup> This is so for three reasons. First, both justices have significant tenure remaining on the bench, while two of the main adherents of structured proportionality, Kiefel CJ and Keane J, will retire in the coming years. It is not impossible, therefore, that calibrated scrutiny could become the majority approach in 2024 or thereafter. Second, even if it does not, that two members of the Court persist with an alternative approach means it may well be influential, even decisive, in determining the validity or otherwise of a TPAL in the event of a challenge. Third, the present context offers interesting insight as to the differences between the approaches when applied.

In *Clubb*, Gageler J described four steps in undertaking the calibrated scrutiny analysis:

first, to examine the nature and intensity of the burden which the protest prohibition places on political communication; second, to calibrate the appropriate level of scrutiny to the risk which a burden of that nature and intensity poses to maintenance of the constitutionally prescribed system of representative and responsible government; third, to isolate and assess the importance of the constitutionally permissible purpose of the prohibition; and finally, to apply the appropriate level of scrutiny so as to determine whether the protest prohibition is justified ...<sup>116</sup>

In *McCloy*, and *Unions NSW v New South Wales (No 2)*, Gageler J indicated that the appropriate calibration in cases involving ‘a restriction on political communication in the conduct of elections for political office’ to be ‘close scrutiny’ of the reasonable necessity of a ‘compelling’ purpose.<sup>117</sup> On first glance, the *SA Act* and *ACT Act* fall within this category — they restrict communication in the electoral context. However, it is notable that in *Cameron*, Lander J considered the emerging distinction in early implied freedom cases between content-based and content-neutral regulation. Observing that the former required stricter scrutiny, his Honour held that the *SA Act* was of the latter kind: ‘This is a law that regulates the conduct of persons in making a communication.’<sup>118</sup> The correctness of that characterisation has not been subsequently considered, yet it is at odds with the holdings of American courts, where the content-based/content-neutral distinction is central to First Amendment jurisprudence.<sup>119</sup> In *Rickert v Washington State*, the Washington Supreme Court held that a TPAL was content-based regulation, and ultimately invalidated the law.<sup>120</sup> While American cases are of limited utility in the implied freedom context,<sup>121</sup> *Rickert*

<sup>115</sup> Stone has suggested that Gageler J’s approach ‘need not be seen as an alternative to the proportionality method. On the contrary, the two could be reconciled and proportionality used as a manner for better development of the law.’: Adrienne Stone, ‘Proportionality and Its Alternatives’ (2020) 48(1) *Federal Law Review* 123, 153.

<sup>116</sup> *Clubb* (n 87) 225 [162].

<sup>117</sup> *McCloy* (n 17) 239 [153], citing *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 200 [40] (‘*Mulholland*’) quoting *ACTV* (n 55) 143; *Unions NSW (No 2)* (n 88) 621–2 [65] (Gageler J), quoting *ACTV* (n 55) 143–4 and *Mulholland* at 200–1 [40]–[41].

<sup>118</sup> *Cameron* (n 15) 256.

<sup>119</sup> Geoffrey Stone, ‘Content-Neutral Restrictions’ (1987) 54(1) *University of Chicago Law Review* 46, 46. See also Susan Williams, ‘Content Discrimination and the First Amendment’ (1991) 139(3) *University of Pennsylvania Law Review* 615; Leslie Gielow Jacobs, ‘Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations’ (2003) 34(3) *McGeorge Law Review* 595.

<sup>120</sup> *Rickert v Washington State*, 795 NW 2d 236, 6 (Wash Sup Ct, 2007) (‘*Rickert*’).

<sup>121</sup> See, eg, *Unions NSW (No 1)* (n 85) 570 [99]–[102] (Keane J).

supports the conclusion that Lander J erred in his characterisation of the *SA Act*. This, in turn, supports the adoption of a close scrutiny test.

Accordingly, a calibrated scrutiny approach would first require an identification of the nature and intensity of the burden: modest, although significant in the cases where it is engaged (given the risk of civil penalties). Second, calibration to the appropriate level of scrutiny: close scrutiny. In *Clubb*, Gageler J observed that, in such circumstances, the purpose must be ‘more than just constitutionally permissible; it needs to be compelling’.<sup>122</sup> Given that the *SA Act* and *ACT Act* are aimed at protecting electoral discourse from false and misleading communication, which distorts the political process, it is likely this purpose satisfies the ‘compelling’ threshold. Gageler J also added that, in undertaking a close scrutiny analysis, the burden ‘needs to be closely tailored to the achievement of that purpose’.<sup>123</sup> Thus, the final stage of analysis would require consideration of whether the *SA Act* and *ACT Act* go further than necessary; the burden ‘needs to be no greater than is reasonably necessary to achieve that purpose’.<sup>124</sup>

The extent of the difference between calibrated scrutiny and structured proportionality remains a source of disagreement among scholars.<sup>125</sup> Until recently, a significant outcome-based divide had not emerged, with Gageler J and Gordon J largely reaching the same position as the majority — albeit via a different route.<sup>126</sup> That changed in *LibertyWorks*, where Gageler J and Gordon J dissented, finding the law at issue invalid, whereas the majority, applying structured proportionality, rejected the challenge. However, neither justice dwelled on the significance of their contrasting approach to the divergent outcome. Indeed, Gageler J even repeated his findings in *McCloy*-style language: ‘Doing my best to express that incompatibility in the language of structured proportionality ...’.<sup>127</sup>

Despite this absence of judicial introspection, it appears that it would be at the final stage of the calibrated scrutiny approach that the distinction might matter, because it suggests a tighter scrutiny on the means employed by the legislature. The necessity phase of the *Lange/McCloy* test seeks an alternative that would impose a ‘significantly lesser burden’,<sup>128</sup> while the adequacy phase asks whether the benefit of the law is ‘manifestly outweighed’ by the burden’s adverse effect.<sup>129</sup> In contrast, calibrated scrutiny approaches the inquiry from a different direction, with attention directed to the burden–purpose nexus. This distinction can be illustrated with an example: Gageler J (and possibly Gordon J) could find that a law is insufficiently tailored because it goes further than necessary to achieve its purpose. Such a law may nonetheless survive a structured proportionality analysis: an alternative might

<sup>122</sup> *Clubb* (n 87) 232 [184].

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid* 232 [185].

<sup>125</sup> See, eg, Evelyn Douek, ‘All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia’ (2019) 47(4) *Federal Law Review* 551, 568; Rosalind Dixon, ‘Calibrated Proportionality’ (2020) 48(1) *Federal Law Review* 92, 121; Anne Carter, ‘Bridging the Divide? Proportionality and Calibrated Scrutiny’ (2020) 48(2) *Federal Law Review* 282, 283.

<sup>126</sup> See, eg, *Brown* (n 59); *Clubb* (n 87); *Unions NSW (No 2)* (n 88); *Banerji* (n 82).

<sup>127</sup> *LibertyWorks* (n 77) 517 [119].

<sup>128</sup> *Banerji* (n 82) 401 [35] (Kiefel CJ, Bell, Keane and Nettle JJ) (emphasis added).

<sup>129</sup> *Ibid* 402 [38] (emphasis added).

have a lesser burden (but not significantly so), while the law's purpose might be outweighed by the burden's impact (but not manifestly so). In such circumstances, a majority of the current High Court might uphold a law, while those undertaking a calibrated scrutiny approach might find it invalid.

This is significant in the present context because of the variety of ways in which a TPAL might be designed. As highlighted earlier in this Part, there are available criticisms of the *SA Act* and *ACT Act* that suggest a narrower approach is possible; equally, broader TPALs can be readily contemplated. The calibrated scrutiny approach suggests greater focus on legislative choices and heightened risk of invalidity where those choices stray beyond what is reasonably necessary to achieve the law's purpose. That may not be consequential if it remains the minority view, however, if it becomes ascendant, the scrutiny to be applied in any constitutional challenge of a TPAL would be stricter.

Returning to the present: are the *SA Act* and *ACT Act* closely tailored to achieving their purpose? Is the burden they impose greater than what is reasonably necessary? Despite the stricter scrutiny, it is likely these questions would be answered 'yes' and 'no' respectively. Notwithstanding the concerns around the TPALs' breadth and coverage, they are nonetheless relatively narrow. Both laws cover only (a) electoral advertising; (b) that purports to be a statement of fact; (c) that is inaccurate to a material extent; and (c) that is misleading to a material extent. Neither TPAL covers political communication beyond electoral advertising. Unlike the short-lived federal TPAL, which covered any 'statement', the *SA Act* and *ACT Act* are limited to statements purporting to be statements of fact. Under both laws, the statements must be materially inaccurate *and* misleading. Unlike the federal TPAL, neither law provides for imprisonment — only civil penalties.<sup>130</sup> Unlike the federal TPAL, neither law empowers third parties to enforce the TPAL — the respective electoral regulators are the only bodies with standing to apply for a court order under both the *SA Act* and *ACT Act* (and only the respective Director of Public Prosecutions can prosecute the offence provisions). Cumulatively, these factors suggest that both laws are closely tailored to achieving their purpose and would withstand scrutiny, even on the stricter calibrated approach.

#### IV Lessons for Regulatory Design

That the TPALs currently enacted in Australia may well survive challenge is not the end of the inquiry. The *SA Act* and *ACT Act* are limited in scope. If their validity is contested, this will aid them in the likelihood of a finding that they are constitutional. However, the extent to which they will adequately address the increasing challenge posed to Australia's electoral system by misinformation is uncertain. As has been observed in the British context, '[t]he more that the law is tailored, the less frequently it is likely to be used and it will do little to improve the quality of political debate.'<sup>131</sup> In the years ahead, other Australian jurisdictions — including the Commonwealth

<sup>130</sup> This significantly reduces each TPAL's chilling effect: James Weinstein, 'Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns' (2018) 71(1) *Oklahoma Law Review* 167, 230–1.

<sup>131</sup> Rowbottom (n 25) 534.

— may consider implementing TPALs. If the existing laws are deemed insufficient, policymakers will consider more expansive approaches. Consideration of implied freedom jurisprudence therefore provides useful guidance as to circumstances in which expanded TPALs might and might not be constitutionally permissible. Exploring this intersection also underscores ongoing uncertainties around the implied freedom.

## A Scope

The most obvious method of bolstering the efficacy of TPALs is to expand their scope. Such expansion could proceed in two dimensions: (i) increasing the substance covered; and/or, (ii) increasing the form covered. Australia's existing TPALs are: (i) limited to statements of facts; and (ii) limited to advertising. At the maximum extent, such expansion could expand to: (i) encompass any statement that is inaccurate, misleading or deceptive; and/or (ii) cover any election-related communication. Alternatively, a middle ground could be arrived at between the existing position and these outer boundaries. However, any expansion would heighten implied freedom concerns.

### 1 Substance

There are two ways of categorising the substance covered by TPALs: the content of the statement, or the nature of the inaccuracy. As to content, various jurisdictions have experimented with different methods of defining coverage. In Britain, a longstanding TPAL limits its application to 'any false statement of fact in relation to the candidate's personal character or conduct'.<sup>132</sup> In 2010, the High Court of England and Wales rejected an expansive construction that would have extended the TPAL to political conduct. The Court held: 'It would be difficult to see how the ordinary cut and thrust of political debate could properly be carried on if such were the width of the prohibition.'<sup>133</sup> In the US, meanwhile, it has been argued that laws equivalent to the offence read down in *Evans* have the surest constitutional footing: 'The strongest case for constitutionality is a narrow law targeted at false election speech aimed at disenfranchising voters'.<sup>134</sup> It has also been suggested that attempts to regulate false speech by foreign actors might be accommodated within US First Amendment jurisprudence.<sup>135</sup> As to nature, meanwhile, Ross proposes a helpful taxonomy of misleading statements in the electoral context: 'straight-out lies' ('self-referential' or 'oppositional'), 'intentional distortions', 'hyperbole' and 'indirect prevarication'.<sup>136</sup>

The closer the nexus between the content or nature of the prohibited statement and the TPAL's purpose, the more likely it will be to survive constitutional scrutiny.

<sup>132</sup> *Representation of the People Act 1983* (UK) s 106.

<sup>133</sup> *R (on the application of Woolas) v Speaker of the House of Commons* [2010] EWHC 3169 (Admin), [113] (Lord Thomas for the Court).

<sup>134</sup> Richard Hasen, 'A Constitutional Right to Lie in Campaigns and Elections?' (2013) 74(1) *Montana Law Review* 53, 71.

<sup>135</sup> Sellers (n 23) 154–8.

<sup>136</sup> Ross (n 24) 370–9.

It seems uncontroversial that a prohibition aimed squarely at speech intended to disenfranchise voters will be valid (laws of that nature already exist in most Australian jurisdictions).<sup>137</sup> Similarly, regulation of foreign misinformation might receive less implied freedom scrutiny (a related issue was raised, although not decided, in *Zhang*).<sup>138</sup> Directing a TPAL at false commentary on a politician's personal life or conduct would minimise the burden on political communication, although not remove it entirely — the line between personal and political is blurry and personal conduct might have relevant implications for political choice. However, a TPAL of that nature might give rise to concerns at the necessity stage of the *Lange/McCloy* test, given defamation law already provides remedies for political candidates maligned in electoral campaigning.<sup>139</sup> Moving in the other direction, more expansive coverage of substance will heighten implied freedom concerns. 'Straight-out lies' are no doubt the safest sphere of coverage from a constitutional perspective. 'Intentional distortions' might also be uncontroversial. Yet moving towards coverage of 'hyperbole' and 'indirect prevarication' will engender greater risk, by increasing the burden and providing greater scope for alternatives at the necessity phase. Similarly, purported statements of facts are at the safer end of the spectrum, but seeking to regulate statements more generally (as did the short-lived federal TPAL), and particularly statements of opinion, would risk constitutional jeopardy.

## 2 *Form*

Neither the *SA Act* nor *ACT Act* provide a comprehensive definition of 'advertisement'. However, it is clear — from a mix of express and implied direction — that they are intended to cover (at least) print, radio, television and online advertising. Additionally, the *ACT Act* provides that 'electoral advertisement means an advertisement containing electoral matter, *whether or not consideration was given for its publication or broadcast*'.<sup>140</sup> While the combined effect is reasonably broad, TPALs are restricted to advertising. Contemporary electoral campaigning is multifaceted and extends beyond advertising. If a politician made false claims in a newspaper column, or during a talkback radio interview, they would not be covered by the existing TPALs. If a politician made false claims on social media, they would likely not be covered (although coverage may arise if the post was 'sponsored'). Indeed, one of the more notorious recent examples of inaccurate political campaigning, 'Mediscare',<sup>141</sup> was undertaken via text message — such that it is unlikely to fall within the existing coverage.

Expanding TPALs to cover some or all of these fora would raise implied freedom concerns. Broader coverage would significantly increase the burden on political communication, particularly if, as presently, the laws extend beyond political parties and candidates. It would also change the balance of the necessity

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<sup>137</sup> *Evans* (n 18).

<sup>138</sup> Submission in *Zhang* (n 66) 13 [30].

<sup>139</sup> Indeed, early implied freedom jurisprudence largely developed in the defamation context: see generally Adrienne Stone and George Williams, 'Freedom of Speech and Defamation: Developments in the Common Law World' (2000) 26(2) *Monash University Law Review* 362.

<sup>140</sup> *ACT Act* (n 9) s 198 (emphasis added).

<sup>141</sup> See above n 11 and accompanying text.

exercise, particularly given existing TPALs offer a much narrower alternative. Whether considered under the *Lange/McCloy* test or Gageler J’s approach, it is likely that a TPAL covering all political communication during an election period would be invalid — the burden would manifestly outweigh the law’s legitimate purpose. Focusing on official speech, such as a political party’s social media account, rather than the personal account of a candidate, may assist validity, as might the introduction of temporal limits: the burden of broader scope could be mitigated by narrower application. Ultimately, it seems likely that TPAL designers have only limited room to move: the broader the scope, the higher the burden, the more evident alternatives become and the less adequate in balance a TPAL appears — cumulatively making it harder to pass constitutional scrutiny.

## **B The Chilling Effect**

One of the most challenging issues that might arise in TPAL-related constitutional litigation is the potential chilling effect of such laws.<sup>142</sup> Any attempt to expand the scope of TPALs increases the likelihood the law would act as a deterrent to speech that is not, in fact, covered by its terms: individuals will self-censor.<sup>143</sup> This would significantly increase the burden placed upon political communication by the TPAL, which could in turn tilt the balance of the *Lange/McCloy* test towards invalidity. Concern for the chilling effect of speech regulation is an important part of American law; Schauer describes it as ‘a major substantive component of first amendment adjudication’.<sup>144</sup> However, in Australia, implied freedom jurisprudence has not fully grappled with how to address effectively the risk of a chilling effect on speech without straying beyond the (limited) bounds of the freedom.<sup>145</sup> In *Brown*, Nettle J noted that Australian law ‘knows nothing of the United States constitutional doctrine of “chilling effects” on free speech’.<sup>146</sup>

A cognate issue concerns the vagueness of a TPAL as drafted. In the US, the void-for-vagueness doctrine and its ‘closely related ... constitutional cousin’ — the overbreadth doctrine,<sup>147</sup> invalidate vaguely drafted laws that make it difficult to determine whether constitutionally-protected speech is covered by statutory prohibitions.<sup>148</sup> In *Brown*, Gordon J stridently rejected the applicability of these American doctrines in Australian law, describing the jurisprudential differences as

<sup>142</sup> See Rowbottom (n 25) 525.

<sup>143</sup> Brandice Canes-Wrone and Michael C Dorf, ‘Measuring the Chilling Effect’ (2015) 90(4) *New York University Law Review* 1095, 1096.

<sup>144</sup> Frederick Schauer, ‘Fear, Risk and the First Amendment: Unraveling the “Chilling Effect”’ (1978) 58(5) *Boston University Law Review* 685, 685. But see Leslie Kendrick, ‘Speech, Intent, and the Chilling Effect’ (2013) 54(5) *William & Mary Law Review* 1633.

<sup>145</sup> But see Joshua Forrester, Lorraine Finlay and Augusto Zimmerman, ‘Finding the Streams’ True Sources: The Implied Freedom of Political Communication and Executive Power’ (2018) 43(2) *University of Western Australia Law Review* 188, 241 n 208.

<sup>146</sup> *Brown* (n 59) 410 [262].

<sup>147</sup> Richard Parker, ‘Overbreadth’, *First Amendment Encyclopedia* (Web Page, September 2017) <<https://www.mtsu.edu/first-amendment/article/1005/overbreadth>>.

<sup>148</sup> See Note, ‘The First Amendment and the Overbreadth Doctrine’ (1970) 83(4) *Harvard Law Review* 844; Note, ‘The Void-for-Vagueness Doctrine in the Supreme Court: A Means to an End’ (1960) 109(1) *University of Pennsylvania Law Review* 67.

‘too great’ for them to ‘be adopted directly or indirectly’.<sup>149</sup> Nonetheless, the plurality in *Brown*, and several other judges including Gordon J, were critical of the impugned statute’s vagueness. The plurality noted that the consideration of a law’s ‘effect on the freedom generally is necessarily one about its operation and *practical* effect’,<sup>150</sup> and that a vague law could exacerbate that effect.<sup>151</sup> Even though Nettle J had been dismissive of American chilling effect doctrine, his Honour accepted that ‘the terms of the [challenged law] are of such breadth that the likelihood of them so operating in practice as to burden the implied freedom to a significant extent cannot be discounted’.<sup>152</sup>

The relevance for present purposes is twofold. First, legislatures would be well advised to draft TPALs with extreme care to minimise vagueness. Vaguely worded prohibitions on speech will considerably increase the practical burden on political communication, which — as a majority of the High Court accepted in *Brown* — can aid a finding of invalidity. Second, TPAL litigation may well require a court to confront the chilling effect of such laws, particularly if the impugned TPAL was broader than the current examples. It may be, per Nettle J, that the chilling effect *doctrine* is foreign to implied freedom jurisprudence. But the *fact* that broad speech restrictions chill speech is true, whether it occurs in the US or Australia. The High Court is yet to fully account for that effect in its case law, in either the burden or adequacy phase of implied freedom adjudication. That may be because recent litigation has occurred in contexts where the chilling effect was not the primary vice (albeit in *Banerji*, Edelman J accepted that the relevant provision ‘casts a powerful chill’).<sup>153</sup> But it will arise centrally in TPAL litigation.

### C Evidence

The enactment of TPALs, whether modelled after existing laws or in a more expansive form, should be accompanied by supporting research indicating the problems caused by electoral misinformation and the limited impact of TPALs on political communication. Such research, of the nature typically undertaken by parliamentary committees, will become necessary to justify the TPAL’s scope if challenged on implied freedom grounds.<sup>154</sup> A failure to consider fully the appropriate contours of such regulation can be fatal to validity. As much was clear in *Unions NSW (No 2)*, after the New South Wales Government halved the campaign expenditure cap for third parties at state elections. This reduction was done without any proper consideration of whether the revised cap still enabled third-party campaigners to communicate reasonably their electoral messages. The High Court

<sup>149</sup> *Brown* (n 59) 475 [466].

<sup>150</sup> *Ibid* 374 [150] (Kiefel CJ, Bell and Keane JJ) (emphasis in original).

<sup>151</sup> *Ibid* 373–4 [149]–[150].

<sup>152</sup> *Ibid* 413 [269]. With thanks to a referee for bringing this to my attention.

<sup>153</sup> *Banerji* (n 82) 441 [164].

<sup>154</sup> In the American context, Ross (n 24) 399 has noted that

[a] reasonable inference is not a sufficient substitute for empirical evidence showing a close link between the harm to be prevented and the impact of suppressing protected speech. ... None of the reported cases contain evidence of the alleged harm and, failing that, the state cannot show how regulating campaign speech would ameliorate the purported (though common-sensical) harms.

invalidated the revised provision, finding that, despite a legitimate purpose, '[t]he defendant has not justified the burden ... as necessary'.<sup>155</sup> The absence of evidence supporting the legislative choice was criticised by the Court. Gageler J, for example, held that 'it is not possible to be satisfied that the cap is sufficient to allow a third-party campaigner to be reasonably able to present its case to voters ... [the cap] stands unjustified'.<sup>156</sup> Legislatures considering TPALs should therefore carefully consider the need for, and impact of, such laws *prior* to enacting them to ensure maximum prospects of validity.

## **D Appropriate Arbiter**

One dilemma in contemplating a TPAL scheme is who should be the arbiter of truth at various stages of the process. Both the *SA Act* and *ACT Act* offer a three-part solution. First, the relevant electoral regulator is empowered to request that the advertiser ceases disseminating a false statement and publish a retraction. Second, the regulator can apply to the relevant Supreme Court. The Court, if satisfied (under the *ACT Act*) or if satisfied beyond reasonable doubt (under the *SA Act*), may order that the advertisement be withdrawn (*SA Act*), not disseminated again (*ACT Act*) and/or that a retraction, of a specific manner and form, be published (both TPALs).<sup>157</sup> Third, as the prohibition on misleading advertisement is an offence, a prosecution can be brought by the appropriate authorities.

Accordingly, under both schemes the electoral regulator makes preliminary judgments about whether advertising complies with the TPALs, but only the Supreme Court in each jurisdiction can make a binding determination (either on application by the regulator, or in prosecution proceedings). While the regulator's request power is discretionary and not coercive ('may ask' or 'may request'), under both laws the response to any such request can be considered in assessing penalties in a subsequent prosecution.<sup>158</sup> Additionally, although the Court ultimately remains the final arbiter of truth, the time-limited nature of an election period means that, in practice, the electoral regulator's role is likely to be more influential than it appears at face-value. It may not always be possible, or politically desirable, to face judicial intervention — particularly in the frantic final days of an election.

The appropriateness of this model is contested. In testimony to the Joint Standing Committee on Electoral Matters, Australian Electoral Commissioner Tom Rogers expressed caution about involving the Australian Electoral Commission in such a model at federal level: 'Truth, particularly at election time, is sometimes in the eye of the beholder. If we're set as a tribunal deciding, "We like that one, we don't like this one," it's going to lead us, I think, into a dark place.'<sup>159</sup> In the ACT, the local Electoral Commissioner sought to have the adoption of the new TPAL postponed amid concerns about its role in the scheme. 'It will be a difficult task,' the Commissioner, Damian Cantwell, said in May 2021. 'It's an area I would rather not

<sup>155</sup> *Unions NSW (No 2)* (n 88) 618 [53] (Kiefel CJ, Bell and Keane JJ).

<sup>156</sup> *Ibid* 634 [102].

<sup>157</sup> *ACT Act* (n 9) s 297A(5); *SA Act* (n 9) s 113(5).

<sup>158</sup> *ACT Act* (n 9) s 297A(3)–(5); *SA Act* (n 9) s 113(4).

<sup>159</sup> Quoted in Joint Standing Committee on Electoral Matters (n 5) 84 [4.124].

be involved in. The sense of impartiality and independence here is very important to maintain.<sup>160</sup> Similar concerns have been raised in Canada, which presently only has a very narrow TPAL,<sup>161</sup> about the possibility of a more expansive scheme.<sup>162</sup> As these concerns appear to relate mainly to the concurrent holding of TPAL powers and core operational responsibility for the conduct of elections, it has been suggested that a standalone body could be established,<sup>163</sup> or the Australian Competition and Consumer Commission could be vested with the powers.<sup>164</sup>

These issues have constitutional salience because the scheme's arbiter may influence the implied freedom analysis. Giving a non-judicial body the ability to make conclusive determinations about accuracy may imperil validity, because limiting appeal and review options would increase the burden on communication.<sup>165</sup> On the other hand, subject to sufficiently clear criteria (as in the *SA Act* and *ACT Act*), there is nothing novel about the role exercised by the courts in a TPAL. In defamation proceedings, courts are frequently asked to determine the truth, or otherwise, of written or spoken statements.<sup>166</sup> That judicial exercise has a 400-year history in the common law.<sup>167</sup> The misleading and deceptive standard, meanwhile, has been a core feature of trade practices law for decades,<sup>168</sup> and has relevance in securities law.<sup>169</sup> Firmly incorporating the judiciary in any TPAL scheme is therefore a safeguard against invalidity. While it is unlikely to be feasible for the judiciary to be the sole body with oversight of a TPAL, providing for preliminary assessments made by executive officials (or even judges in a *persona designata* role) — but not the electoral regulator — before escalation to a court, might be an appropriate design.

Placing the judiciary at the centre of any TPAL also minimises the broader policy risks, by shifting controversial decisions away from electoral regulators. Yet it does not negate these concerns entirely. Rowbottom has urged 'caution before regulating false election statements' because '[e]ven with the independence of the judiciary, there are still dangers that court rulings in such an area will lead to the perception of judicial bias.'<sup>170</sup> Indeed, the Federal Court of Australia recently reconsidered the provision read down in *Evans* in a case arising out of the 2019

<sup>160</sup> Quoted in Lucy Bladen, 'Truth in Political Advertising Laws Should Be Delayed: ACT Electoral Commissioner', *Canberra Times* (19 May 2021, online) <<https://www.canberratimes.com.au/story/7259414/electoral-commissioner-calls-to-delay-truth-in-advertising-laws/>>.

<sup>161</sup> *Canada Elections Act*, SC 2000, c 9, s 91.

<sup>162</sup> Elections Canada, *Political Communications in the Digital Age: The Regulation of Political Communications under the Canada Elections Act* (Discussion Paper No 1, May 2020) 19.

<sup>163</sup> Bladen (n 160).

<sup>164</sup> Luke Beck, Submission No 65 to Joint Standing Committee on Electoral Matters, *Inquiry into an all Aspects of the Conduct of the 2019 Federal Election and Matters related thereto* (19 September 2019) 2.

<sup>165</sup> Such an approach might also raise issues under ch III of the *Australian Constitution*.

<sup>166</sup> Cf Meiring de Villiers, 'Substantial Truth in Defamation Law' (2008) 32(1) *American Journal of Trial Advocacy* 91; Andrew Kenyon, 'Perfecting Polly Peck: Defences of Truth and Opinion in Australian Defamation Law and Practice' (2007) 29(4) *Sydney Law Review* 651.

<sup>167</sup> Marc Franklin, 'The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law' (1964) 16(4) *Stanford Law Review* 789, 790.

<sup>168</sup> Justice R S French, 'A Lawyer's Guide to Misleading or Deceptive Conduct' (1989) 63(4) *Australian Law Journal* 250.

<sup>169</sup> See, eg, Michael Duffy, 'Investor Loss from Securities Non-Disclosure: A Statutory Presumption of Causation on the Canadian Model?' (2009) 32(3) *University of New South Wales Law Journal* 965.

<sup>170</sup> Rowbottom (n 25) 525.

Federal Elections. In *Garbett v Liu*, which involved misleading corflute signs, the Court observed:

It is a large step (although it was briefly taken in 1983 ...) to constrain political discourse and argumentation by prohibiting misleading statements or conduct in that discourse. That step was taken in trade and commerce. But the field of contest in politics is broader and more apt to a width of debate where differences of views as to what is misleading or deceptive, in particular among political partisans or between opponents, may move into questions that are scarcely justiciable ...<sup>171</sup>

Respectfully, this concern seems more appropriately directed to the need for precise statutory criteria than indicating the inappropriateness of a judicial forum for resolution of TPAL proceedings. It can hardly be said that the *SA Act* and *ACT Act* could give rise to questions that are ‘scarcely justiciable’.<sup>172</sup> Because both schemes are limited to statements of fact, the adjudication required by TPALs is firmly within the scope of ordinary judicial activity.

The active involvement of third parties in TPAL schemes may heighten the risk of invalidity.<sup>173</sup> Empowering third parties to enforce TPALs is therefore somewhat of a double-edged sword: while it could increase efficacy, by relieving enforcement responsibility from the shoulders of an electoral regulator, it might significantly increase the burden on communication. This is so due to the risk of politically-motivated TPAL enforcement,<sup>174</sup> which would chill speech by raising the costs of electoral advertising (due to the need to defend frivolous cases).<sup>175</sup> These concerns were central to an American court invalidating Ohio’s TPAL on First Amendment grounds.<sup>176</sup> The law lacked an adequate filtering mechanism for frivolous claims, which meant third-party complainants could ‘use the law’s process “to gain a campaign advantage without ever having to prove the falsity of a statement”’.<sup>177</sup> Notwithstanding the divergence between implied freedom and First Amendment jurisprudence, these factors would bear on the extent of the burden imposed and may well jeopardise the necessity analysis under the *Lange/McCloy* test.

## ***E Inconsistent Application***

Vexing implied freedom issues could arise if TPALs are applied inconsistently by a regulatory body empowered to enforce the law. Whichever arbiter is chosen by a TPAL, concerns may arise about the body’s impartiality. In *Rickert*, for example, one factor relied on by the Washington Supreme Court in invalidating a TPAL was that the relevant regulator’s composition was determined by the Governor: ‘When this same governor seeks reelection, the governor’s own appointees will decide

<sup>171</sup> *Garbett v Liu* (2019) 273 FCR 1, 10–11 [37] (Allsop CJ, Greenwood and Besanko JJ) (*‘Garbett’*).

See generally Christina Devetzidis, ‘After the “Hurly-Burly Has Dimmed Outside”: Misleading and Deceptive Corflutes in *Garbett v Liu* (2019) 375 ALR 117’ (2020) 41(2) *Adelaide Law Review* 671.

<sup>172</sup> But see Tham and Ewing (n 14) 327.

<sup>173</sup> In the American context, see Sellers (n 23) 152–3.

<sup>174</sup> See Marshall (n 40) 300.

<sup>175</sup> Rowbottom (n 25) 525.

<sup>176</sup> *Susan B Anthony List v Driehaus*, 814 F 3d 466 (D Ohio, 2016).

<sup>177</sup> *Ibid* 475, quoting *Susan B Anthony List v Driehaus*, 573 US 149 (2014). See also Weinstein (n 130) 200–3.

whether to sanction the speech of campaign opponents.<sup>178</sup> These concerns would be heightened if a regulatory body frequently commenced proceedings against candidates or parties from one political viewpoint but not another.<sup>179</sup> However, current implied freedom jurisprudence contains no clear mechanisms for addressing such inconsistent application. If the improper motives of the regulator were blatant, administrative law remedies may be available.<sup>180</sup> Yet it is possible to envisage more subtle inconsistent application, or inadvertent inconsistency arising from different communication approaches adopted by political parties.

The issues, from an implied freedom perspective, are twofold. First, how would such practical selectivity be addressed in a constitutional challenge? It is High Court dogma that the implied freedom is not a personal right.<sup>181</sup> It follows that the constitutional analysis eschews focus on individual circumstances and directs attention to the statutory scheme.<sup>182</sup> In the present context, such an approach risks failing to see the wood for the trees: a TPAL might, on its face, be even-handed, but have disproportionate practical impact on a particular viewpoint. While the High Court recognised the discriminatory effect of the impugned law in *Brown*,<sup>183</sup> and invalidated it, the jurisprudence concerning discriminatory practical operation is underdeveloped. That is particularly the case if the inconsistency is only evident at a macro level. In *Banerji*, Gageler J recognised that an obligation of impartiality on public servants limited their ability to engage in ‘praise for or criticism of’ government policy.<sup>184</sup> Nonetheless, the Court did not raise concerns about guidelines that prohibited criticism yet encouraged praise, or the litigious record that indicated all recent cases in the field had involved sanctions for criticism, not praise (thereby suggesting content-based discrimination).<sup>185</sup>

The second issue is practical. In *Wotton v Queensland*, the High Court held that an implied freedom challenge to the exercise of a statutory discretion is assessed at the level of the authorising statute.<sup>186</sup> This approach, which minimises the relevance of the particular circumstances of the case,<sup>187</sup> was confirmed in *Banerji*.<sup>188</sup> However, the Court in *Banerji* did not rule out the possibility that the implied freedom could be relevant if the challenge was brought via administrative law. For

<sup>178</sup> *Rickert* (n 120) 17.

<sup>179</sup> See Hasen (n 134) 56; Weinstein (n 130) 227–8; Marshall (n 40) 299.

<sup>180</sup> HP Lee, ‘Improper Purpose’ in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 198, 198–211.

<sup>181</sup> See, eg, *Unions NSW (No 1)* (n 85) 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>182</sup> See, eg, *Banerji* (n 82); *Chief of the Defence Force v Gaynor* (2017) 246 FCR 298.

<sup>183</sup> *Brown* (n 59) 361–2 [92]–[95] (Kiefel CJ, Bell and Keane JJ), 389 [198]–[199] (Gageler J).

<sup>184</sup> *Banerji* (n 82) 424 [105].

<sup>185</sup> See Kieran Pender, ‘“A Powerful Chill”? *Comcare v Banerji* [2019] HCA 23 and the Political Expression of Public Servants’, *AusPubLaw* (online, 28 August 2019) <<https://auspublaw.org/2019/08/a-powerful-chill-comcare-v-banerji-2019-hca-23/>>; Kieran Pender, ‘Punishing Critics while Courting Praise is Censorship’, *Canberra Times* (online, 5 March 2019) <<https://www.canberratimes.com.au/story/5993418/punishing-critics-while-courting-praise-is-censorship/>>.

<sup>186</sup> *Wotton v Queensland* (2012) 246 CLR 1, 14 (French CJ, Gummow, Hayne, Crennan and Bell JJ) (‘*Wotton*’). See also *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 614 (Brennan J).

<sup>187</sup> See Kieran Pender, ‘“Silent Members of Society”? Public Servants and the Freedom of Political Communication in Australia’ (2018) 29(4) *Public Law Review* 327, 347.

<sup>188</sup> *Banerji* (n 82) 395, 406 (Kiefel CJ, Bell, Keane and Nettle JJ). The *Wotton* approach was also endorsed, although with little additional clarity, in a non-implied freedom context in *Palmer* (n 114).

example, rather than filing a constitutional challenge to the TPAL, an aggrieved political party who had received a retraction request from a regulator pursuant to a TPAL, might instead seek judicial review of the decision to make the retraction request.<sup>189</sup> How that would work in practice remains distinctly unclear. As one judge said in extra-curial remarks in 2018, ‘general propositions to the effect that the implied freedom is a restraint on executive as well as legislative power are not enough. There is scope for further principled development.’<sup>190</sup> In *Banerji*, the plurality suggested the implied freedom might be a relevant consideration,<sup>191</sup> whereas Gageler J described such an approach as containing ‘an element of conceptual confusion’.<sup>192</sup> These issues remain unsettled, and could be raised squarely by TPAL litigation.

## **F Penalties**

Finally, the nature and extent of the penalty imposed by the TPAL will likely have a bearing on validity in the event of an implied freedom challenge, influencing the extent of the burden, the necessity of the approach adopted and its adequacy in balance. The *SA Act* provides for a maximum penalty of \$5,000, if the offender is a natural person, or \$25,000 if the offender is a body corporate; the *ACT Act* provides for a maximum penalty of 50 penalty units, which at the time of writing was \$8,000 for an individual and \$40,500 for a corporation.<sup>193</sup> The federal provision, at s 329 of the *1918 Act*, that was read down in *Evans* to apply narrowly only in relation to the act of vote-casting, and was more recently considered in *Garbett*, provides a maximum penalty of imprisonment for a period not exceeding six months (or an equivalent fine). In *Evans*, the punitive nature of the provision, including the potential for imprisonment, was held to justify its reading down.<sup>194</sup>

The dilemma for legislative drafters is that, the more severe the penalty, the greater the risk of invalidity. However, modest financial penalties may not be a sufficient deterrent, particularly for larger political parties. Given the multi-million dollar budget of major parties in a Federal Election, for example, a five-figure fine would likely be seen simply as a campaigning cost. While larger financial penalties might have a disproportionate burden on smaller political parties or independents (and hence increase the risk of invalidity), penalties expressed as a percentage of turnover, as is sometime the case for corporate offences,<sup>195</sup> might be an appropriate solution. This could serve as a sufficient deterrent for larger parties without unduly

<sup>189</sup> Although the availability of judicial review might depend on the coercive nature of the request, which would be dependent on the exact nature of the power set out in the TPAL.

<sup>190</sup> Justice Pamela Tate, ‘The Federal and State Courts on Constitutional Law: The 2017 Term’ (Speech, 2018 Constitutional Law Conference, Gilbert and Tobin Centre of Public Law, 23 February 2018) 9.

<sup>191</sup> *Banerji* (n 82) 406 [45] (Kiefel CJ, Bell, Keane and Nettle JJ).

<sup>192</sup> *Ibid* 408 [52], quoting *A v Independent Commission Against Corruption* (2014) 88 NSWLR 240, 256–7 [56] (Basten JA).

<sup>193</sup> *SA Act* (n 9) s 113(2); *ACT Act* s (n 9) 297A(1).

<sup>194</sup> *Evans* (n 18) 206.

<sup>195</sup> See, eg, the offence provisions in the *Competition and Consumer Act 2010* (Cth), which provide, for example at s 45AF(3)(c): ‘if the court cannot determine the total value of those benefits—10% of the corporation’s annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence’.

burdening campaigners without such deep pockets. TPALs providing for potential imprisonment would likely face heightened implied freedom scrutiny, given the severity of the penalty would increase the burden on communication. Such an approach, if challenged, would likely also be required to demonstrate the ineffectiveness of financial penalties at the necessity stage of proportionality analysis. It is notable that Steggall's proposed federal TPAL provides only for financial penalties,<sup>196</sup> despite the presence of imprisonment penalties elsewhere in the *1918 Act*, including the related s 329 provision.

## V Conclusion

Research for this article commenced in late 2020. In January 2021, the US provided a stunning demonstration of the urgency of the issues it addresses. On 6 January 2021, supporters of then-President Donald Trump stormed the US Capitol Building. Their actions were motivated, in large part, by an online campaign of misinformation from President Trump and his associates, who had falsely claimed that the 2020 Presidential Election had been 'stolen'.<sup>197</sup> It was a vivid indication of the real world, violent consequences of factually-baseless communication. Australian political discourse may not yet be experiencing American-style polarisation. But Australia is not immune from these trends. Absent a significant socio-political shift, it seems almost inevitable that deceptive electoral campaigning — which spreads like wildfire on social media — will gain greater political salience here. The forthcoming Federal Election is anticipated to offer a troubling case study.

Regulation cannot single-handedly fix democracy's truth problem. Yet it may well be an important part of the arsenal deployed to reverse the tide of misinformation infecting Australia's elections. As and when that time comes, Australia's legislators — and courts — will have to grapple with the compatibility of laws that limit political communication with the implied freedom in the *Australian Constitution*. This article has explored that intersection. It argued that Australia's existing TPALs likely withstand constitutional challenge, on either the *Lange/McCloy* test or the alternative calibrated scrutiny approach (although this scrutiny may be more exacting). However, the article suggested more expansive TPALs may face constitutional barriers, relating to scope, potential chilling effects, the need for justifying evidence, difficulties around the appropriate arbiter and the risk of inconsistent application. In considering these obstacles, the article highlighted lingering jurisprudential uncertainties that may be raised by a TPAL case. Litigation relating to electoral regulation has been central to the implied freedom's development in the past three decades; that trend looks set to continue.

As has been underscored by comparative references throughout this article, Australia is not alone in confronting the challenge of reconciling a commitment to

<sup>196</sup> Steggall (n 7).

<sup>197</sup> Dan Barry and Sheera Frenkel, "'Be There. Will Be Wild!': Trump All but Circled the Date", *New York Times* (online, 6 January 2021) <<https://www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html>>. Several Australian politicians have echoed Trump's misinformation: see Paul Karp, 'Australian Liberal MP Craig Kelly Stands by US Capitol "Antifa" Claim, Despite Discredited Evidence', *The Guardian* (online, 8 January 2021) <<https://www.theguardian.com/australia-news/2021/jan/08/australian-liberal-mp-craig-kelly-us-capitol-antifa-claim>>.

free speech with laws seeking to regulate misleading electoral campaigning. As with other areas of implied freedom jurisprudence, Australia's unique constitutional *terroir* will have significant bearing on the ultimate resolution reached by the High Court.<sup>198</sup> In the US, the Supreme Court has insisted that even lies have First Amendment protection. 'The remedy for speech that is false is speech that is true,' held Kennedy J for the majority in *United States v Alvarez*. 'The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.'<sup>199</sup> Kennedy J could not, in 2011, have foreseen that a decade later, straight-out lies would incite thousands of Americans to storm the Capitol.<sup>200</sup> How *Alvarez's* First Amendment absolutism fares in America's current political atmosphere remains to be seen.<sup>201</sup> So, too, must we await a determination from the High Court on the constitutionality of regulating truth and lies in Australian politics.

During legislative debate over Australia's newest TPAL, the *ACT Act*, the spectre of that determination reared its head. Le Couteur, who was moving the amendment, noted that 'there is potential concern about constitutional issues for such a scheme'.<sup>202</sup> Yet ultimately, the ACT Legislative Assembly forged on with its TPAL. Le Couteur quipped: 'if it turns out that one of the few rights that our *Constitution* enshrines or at least implies means that politicians can actually lie about matters of fact without any consequences then we have bigger problems than my amendment.'<sup>203</sup> As this article has demonstrated, the *ACT Act* is probably on safe ground. While the implied freedom does provide some barriers to more stringent TPALs, the High Court is unlikely to invalidate laws that merely seek to prevent politicians from lying without consequence. In that respect, at least, Australia may be better prepared to address the post-truth political era than our American peers.<sup>204</sup>

<sup>198</sup> *Terroir* is a French word denoting the influence of local conditions (climate, soil etc) on the taste of wine. American scholar Roger Alford has commented that 'the free speech norm is given its distinctive personality in different cultures based on the local conditions of that country. The results are greatly influenced, if you will, by a country's constitutional *terroir*': Roger Alford, 'Free Speech and the Case for Constitutional Exceptionalism' (2008) 106(6) *Michigan Law Review* 1071, 1086.

<sup>199</sup> *United States v Alvarez*, 567 US 709, 15–16 (2012) ('*Alvarez*'). Kennedy J (at 11) even raised the spectre of Orwell:

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth.

<sup>200</sup> For a prescient critique of the idea that false speech deserves free speech protection, with reference to the manipulation and confusion of constituents, see Rowbottom (n 25) 523.

<sup>201</sup> Despite the First Amendment obstacles, as of 2018 at least 16 American states had laws regulating or criminalising false campaign speech: Ross (n 24) 383. The US Supreme Court is yet to directly confront the constitutionality of TPALs (*Alvarez* was a 'stolen valour' case), and intermediate-level jurisprudence is split: Hasen (n 134) 57–64; Weinstein (n 130) 171–202.

<sup>202</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 July 2020, 1540.

<sup>203</sup> *Ibid.*

<sup>204</sup> One of the most eminent free speech scholars in the US has sounded a troubling note of concern: 'I do not have a solution. I still believe in the premise of the First Amendment — that more speech is better. But evermore, I realize that it is a matter of faith, and the internet may challenge that faith for all of us': Chemerinsky (n 10) 15.

# *The Law and History of State and Territory Referendums*

Paul Kildea\*

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## **Abstract**

Australia's states and territories have together held more than 50 referendums since Federation in 1901. And yet, as the literature on federal referendums has continued to grow, scholars have largely overlooked the rich history of direct democracy at the sub-national level. This article addresses this gap by providing the first comprehensive review of the use and regulation of referendums by the states and two mainland territories. It draws attention to the immense variety of referendum votes on constitutional amendments and contentious policy issues. It also examines rules and practices on a range of matters, including initiation, the form of the question, the status of the result, voting and campaigning. Additionally, the article surveys the overall state and territory referendum record, including the frequency and approval rate of referendums, and compares it to the federal record. The analysis is informed by a referendum dataset compiled from primary sources by the author. The Appendix, which draws on this dataset, presents the first, single repository of accurate information on state and territory referendums, including dates, topics, results, informality and turnout.

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## I Introduction

Australia's states and territories have together held more than 50 referendums since Federation in 1901. Voters have been invited to have their say on some of the most contentious matters of the day, including religious instruction in schools, alcohol policy and daylight saving. This diversity of topics has been matched by the immense variation, both across time and jurisdiction, in the rules and practices governing each poll. And yet, as the literature on federal referendums has continued to grow,<sup>1</sup> scholars have largely overlooked the rich history of direct democracy at the sub-national level.<sup>2</sup> Legal academics, political scientists and historians have written about some individual referendums, often as part of wider accounts of policy issues,<sup>3</sup> and produced a few brief overviews of the field.<sup>4</sup> However, the work of examining state and territory referendums collectively, for the purpose of understanding when and how they are deployed and their contribution to democratic decision-making, remains to be done. This article begins to address this gap by providing the first comprehensive review of the use and regulation of referendums by the states and two mainland territories.<sup>5</sup>

Close analysis of state and territory referendums is worthwhile for several reasons. First, it expands our understanding of Australian democracy. It reminds us that referendums, while infrequent, are a persistent presence in the nation's representative politics, deployed to ratify and inform a wide range of important

<sup>1</sup> See, eg, George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

<sup>2</sup> Some publications that purport to provide a general study of Australian referendums ignore state and territory votes altogether: see, eg, Geoffrey de Q Walker, *Initiative and Referendum: The People's Law* (Centre for Independent Studies, Policy Monograph 10, 1987); Caroline Morris, 'Referendums in Oceania' in Matt Qvortrup (ed), *Referendums around the World: The Continued Growth of Direct Democracy* (Palgrave Macmillan, 2014) 218.

<sup>3</sup> See, eg, Edward Watt, 'Secession in Western Australia' (1958) 3 *University Studies in Western Australian History* 43; Walter Phillips, "'Six O'Clock Swill': The Introduction of Early Closing of Hotel Bars in Australia" (1980) 19(75) *Australian Historical Studies* 250; Aynsley Kellow, 'The Dispute over the Franklin River and South West Wilderness Area in Tasmania, Australia' (1989) 29(1) *Natural Resources Journal* 129; David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008); Chris Pearce, 'History of Daylight Saving Time in Queensland' (2017) 23(6) *Queensland History Journal* 389; Lauren Samuelsson, "'Six O'clock is Late Enough": The 1947 New South Wales Liquor Referendum' (2018) 15(4) *History Australia* 744. Brief coverage of individual referendums can be found in books on state constitutional law and politics: see, eg, Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004).

<sup>4</sup> The most detailed account is Graeme Orr, 'The Conduct of Referenda and Plebiscites in Australia: A Legal Perspective' (2000) 11(2) *Public Law Review* 117, 119–22. Other brief treatments include Don Aitkin, 'Australia' in David Butler and Austin Ranney (eds), *Referendums: A Comparative Study of Practice and Theory* (American Enterprise Institute for Public Policy Research, 1978) 123, 124–5; Colin Hughes, 'Australia and New Zealand' in David Butler and Austin Ranney (eds), *Referendums around the World: The Growing Use of Direct Democracy* (Macmillan, 1994) 154, 166–72; Williams and Hume (n 1) 7–8.

<sup>5</sup> Australian Capital Territory ('ACT'); New South Wales ('NSW'); Northern Territory ('NT'); Queensland ('Qld'); South Australia ('SA'); Tasmania ('Tas'); Victoria ('Vic'); Western Australia ('WA'). Referendums held by external territories and local councils are beyond the scope of this article. On Norfolk Island, see Benjamin Franklen Gussen, 'Citizen-Initiated Referenda in Australia: Lessons from Norfolk Island' (2019) 21(1) *Loyola Journal of Public Interest Law* 135.

decisions. Second, it deepens our knowledge of direct democracy in Australia, providing a counterweight to the dominant accounts of federal constitutional referendums. Third, it enriches discussions about referendum design by illuminating diverse laws and practices. In particular, the state and territory experience is a relatively untapped resource in ongoing conversations about how to improve the conduct of federal referendums. Finally, referendums remain an important tool for state and territory governments, even if they have been used only occasionally in recent decades. Recent proposals for referendums on retail trading hours (SA), voluntary assisted dying (NSW) and an inquiry into electoral reform (WA) highlight the referendum's continuing relevance in contemporary democratic politics.<sup>6</sup>

One of the challenges of writing about state and territory referendums is the difficulty of establishing basic facts. It remains the case, as it was two decades ago, that '[d]etails of State and Territory referenda are sketchy and nowhere comprehensively compiled'.<sup>7</sup> Most electoral commission and government websites publish some information on past referendums,<sup>8</sup> but the data provided are often minimal and, in some instances, contradictory.<sup>9</sup> The few nationwide lists compiled by scholars are incomplete.<sup>10</sup> One referendum, the Federal Capital Territory (now ACT) 1928 poll on prohibition, is absent from both scholarly lists and electoral commission websites.<sup>11</sup>

The necessary first step in this research project, therefore, was to build a dataset of state and territory referendums based on authoritative sources. The table

<sup>6</sup> Referendum (Retail Trading) Bill 2021 (SA); Michael Koziol, "'If it's the Only Way": Support Builds for NSW Plebiscite on Assisted Dying", *The Sydney Morning Herald* (online, 27 December 2020) <<https://www.smh.com.au/national/nsw/if-it-s-the-only-way-support-builds-for-nsw-plebiscite-on-assisted-dying-20201225-p56q56.html>>; Ministerial Expert Committee on Electoral Reform, *Ministerial Expert Committee on Electoral Reform: Discussion Paper* (Discussion Paper, 2021) <<https://www.wa.gov.au/government/publications/ministerial-expert-committee-electoral-reform-discussion-paper>>.

<sup>7</sup> Orr (n 4) 119.

<sup>8</sup> Authorities in South Australia and Western Australia have published the most detailed data: Jasha Bowe, *South Australian Referenda* (Research Series, State Electoral Office (SA), June 2005); David Black (ed), *The Western Australian Parliamentary Handbook: Twenty-Fourth Edition* (Parliament of Western Australia, 2018) 377–89. By contrast, Victoria's official websites are silent on that State's referendums, as is the website of the New South Wales Electoral Commission (although some data is accessible via an archived website: Electoral Commission NSW, *Referendums and Polls* (Web Page, 24 December 2010) <[https://web.archive.org/web/20110218173842/http://www.elections.nsw.gov.au/past\\_results/referendums\\_and\\_polls](https://web.archive.org/web/20110218173842/http://www.elections.nsw.gov.au/past_results/referendums_and_polls)>).

<sup>9</sup> For example, the Electoral Commission of Queensland ('ECQ'), Queensland Parliament and Queensland Government Gazette each provide different figures for the number of votes cast in favour of the abolition of the Queensland Legislative Council at the State's 1917 referendum: see ECQ, *Election Events* (Web Page, 2022) <<https://www.ecq.qld.gov.au/elections/election-events>>; Parliament of Queensland, 'Queensland Parliament Factsheet 6.2: Referendums', *Elections and Referendums* (Fact Sheet) <<https://www.parliament.qld.gov.au/Visit-and-learn/Education/Resources/6-Elections-and-Referendums>>; Queensland, *Queensland Government Gazette*, No 148, 10 October 1917, 1111–13. In such instances, I have adopted the figure published in the Gazette.

<sup>10</sup> For example, Aitkin (n 4), writing in 1978, omits three of the referendums held by Queensland (1910, 1920 and 1923) and three held by Western Australia (1911, 1921 and 1925). Hughes's (n 4) 1994 overview neglects two of the same WA polls (1911, 1921), plus referendums held in NSW (1981, 1991) and the ACT (1978).

<sup>11</sup> Commonwealth, *Commonwealth of Australia Gazette*, No 95, 6 September 1928, 2546.

in the Appendix provides, for the first time, a single repository of accurate information on the dates, topics and results of state and territory referendums, along with data on informal voting and turnout. I have identified 56 referendums, a set that includes three state-wide local option polls and three territory referendums initiated by the Federal Government. In developing this resource, I have drawn exclusively on primary sources including the websites and published reports of parliaments and electoral commissions, government gazettes, Australian Bureau of Statistics yearbooks and records of parliamentary debates. All percentages have been calculated from raw numbers. Where gaps or discrepancies have arisen, I have sought to resolve these through correspondence with electoral authorities and parliamentary libraries. The data presented in the Appendix provides a foundation for meaningful comparison of referendum events, both across time and jurisdiction, and sits behind the analysis presented.

It is helpful to say something at the outset about terminology. It is customary in Australia to reserve the term ‘referendum’ for binding polls on proposed constitutional amendments, and to use ‘plebiscite’ to refer to non-binding votes on policy issues.<sup>12</sup> This approach lacks nuance; it struggles, for instance, to accommodate advisory votes on constitutional questions, and binding polls on policy matters. It is also confusing to international readers. In this article, I use ‘referendum’ as a general term for all popular vote processes and, beyond that, endeavour to be specific about the defining characteristics of individual polls. The chief distinction that I adopt, as explained below, is between optional and mandatory referendums.

The article continues in Part II with a brief discussion of colonial referendums conducted in the pre-Federation period. Parts III and IV turn to the years after Federation. They examine a set of distinctive issues with respect to the calling and conduct of optional and mandatory referendums: their initiation, the form of the question put to voters, and the status of the result. Parts V and VI address issues common to both types of referendums: namely, rules and practices in relation to voting and campaigning. Part VII surveys the overall referendum record, including the frequency and approval rate of state and territory referendums, and compares it to the federal record. The article concludes in Part VIII.

## II Early Referendums

The idea of holding referendums was not initially a feature of the system of government that the colonies adopted during the 19<sup>th</sup> century and that was largely inherited from Britain.<sup>13</sup> Each colony had a written constitution and a system of responsible government in which the Premier and Ministers were accountable to the legislature. The bicameral Parliaments comprised an elected Legislative Assembly and a Legislative Council whose members were either appointed or elected. The people’s main opportunity for influencing government decisions and laws came in

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<sup>12</sup> Paul Kildea, ‘The Constitutional and Regulatory Dimensions of Plebiscites in Australia’ (2016) 27(4) *Public Law Review* 290, 292; Orr (n 4) 117.

<sup>13</sup> John Hirst, *Australia’s Democracy: A Short History* (Allen & Unwin, 2002) chs 2–3.

the form of periodic elections, although most jurisdictions limited the franchise to men until after Federation.<sup>14</sup>

By the late 19<sup>th</sup> century, however, colonial governments had used the referendum to inform decisions on important and contentious matters. This early embrace of direct democracy followed Switzerland, whose Constitution provided for the referendum and the popular initiative; the latter allowed citizens to initiate popular votes to change the Constitution and reject bills of Parliament.<sup>15</sup> It also coincided with increased interest in, and adoption of, direct democracy mechanisms in some American states during the 1890s.<sup>16</sup>

In the period 1898–1900, each of the six colonies held a referendum to approve a draft Bill establishing a federal constitution. The Corowa Conference of 1893 determined that popular involvement was crucial to the federation process and had resolved that each colony should submit the Bill to a vote.<sup>17</sup> Following the clear popular verdict in favour of federation, the Imperial Parliament enacted the Bill into law.<sup>18</sup> Of course, the new constitution itself made provision for the holding of referendums. The framers, influenced by the Swiss example, included a provision stating that any proposed amendments to the *Commonwealth Constitution* could not become law unless passed by Parliament and approved by a ‘double majority’ — that is, a national majority of voters plus a majority of voters in at least four of six states.<sup>19</sup>

Even before the federation referendums, though, the colonies were experimenting with direct democracy. In 1896, South Australia held a referendum on whether scriptural education should be introduced in state schools.<sup>20</sup> It was defeated by a wide margin. This was not only Australia’s first referendum, but also the first time that Australian women exercised the franchise. Three years later, South Australians were again called to the ballot box, this time to vote on the introduction of household suffrage for Legislative Council elections. This referendum, held on the same day as the Colony’s federation poll, returned an affirmative vote, but the result was not immediately implemented.<sup>21</sup> At around the same time, the Victorian Parliament considered (but did not pass) its own Bill to hold a referendum on

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<sup>14</sup> Department of the Senate (Cth), ‘Women in the Senate’, *Senate Brief No 3* (October 2021) 7.

<sup>15</sup> Alexander H Trechsel and Hanspeter Kriesi, ‘Switzerland: The Referendum and Initiative as a Centrepiece of the Political System’ in Michael Gallagher and Pier Vincenzo Uleri (eds), *The Referendum Experience in Europe* (Macmillan Press, 1996) 185, 185–8.

<sup>16</sup> Thomas E Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Harvard University Press, 1989) 50–1.

<sup>17</sup> Helen Irving, ‘When Quick Met Garran: The Corowa Plan’, *Papers on Parliament No 32* (Parliament of Australia, December 1998).

<sup>18</sup> *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.

<sup>19</sup> *Commonwealth Constitution* s 128.

<sup>20</sup> John Weste, ‘The 1896 Referendum on Scriptural Education in South Australian State Schools’ in David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008) 3.

<sup>21</sup> Coral Stanley, ‘The 1899 Amended Commonwealth Bill and Extension of the Legislative Council Franchise’ in David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008) 20. The Council refused to support the change; household suffrage was not adopted until 1913: Hirst (n 13) 100.

scriptural education.<sup>22</sup> And legislators in some colonies, frustrated at upper houses for obstructing legislation, introduced Bills that would have allowed referendums to resolve parliamentary deadlocks.<sup>23</sup> It was during this decade, too, that the Labor Party began to advocate for the use of the popular initiative.<sup>24</sup>

By the time of Federation in 1901, then, the referendum was well understood by the colonies and increasingly accepted as a device to supplement representative and responsible government. This continued into the early decades of the 20<sup>th</sup> century, with numerous state governments holding or considering referendums on a range of issues, including the composition of Parliament, religious instruction in schools, and liquor regulation.

These early referendums were *optional*, in the sense that they were held at the discretion of the Government, in the absence of any legal requirement.<sup>25</sup> Their purpose was to ascertain public opinion on a divisive issue. In time, and particularly as some states altered their Constitutions to protect certain features from amendment, governments began holding referendums because they were legally required to do so. These *mandatory* referendums, unlike their optional counterparts, were a necessary stage in the law-making process — the proposed change could not become law unless approved by voters at the ballot box.

It is helpful to divide state and territory referendums into these two categories as each faces a set of distinctive issues in relation to how they are called and conducted. Those issues, examined in Parts III and IV, include their initiation, the form of the question put to voters and the status of the result. It should be noted that all sub-national referendums have been initiated by the Government and/or legislature. The states and territories have considered, but never adopted, citizen-initiated referendums.<sup>26</sup>

### III Optional Referendums

The vast majority of state and territory referendums have been optional. In this research, I have recorded 43 of the 56 sub-national referendums as falling into this category.

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<sup>22</sup> Lilian Tomn, 'The Referendum in Australia and New Zealand' (1897) 72 *The Contemporary Review* 242.

<sup>23</sup> *Ibid.*

<sup>24</sup> Walker (n 2) 20.

<sup>25</sup> Laurence Morel, 'Types of Referendums, Provisions and Practice at the National Level Worldwide' in Laurence Morel and Matt Qvortrup (eds), *The Routledge Handbook to Referendums and Direct Democracy* (Routledge, 2018) 29; Maija Setälä, *Referendums and Democratic Government* (Palgrave Macmillan, 1999) 70–4.

<sup>26</sup> George Williams and Geraldine Chin, 'The Failure of Citizens's Initiated Referenda Proposals in Australia: New Directions for Popular Participation?' (2000) 35(1) *Australian Journal of Political Science* 27, 29.

## A *Initiation*

A state or territory legislature typically initiates an optional referendum by passing an enabling Bill. The Bill usually establishes a date or timeframe for the vote and sets out the question to be submitted to voters. In Queensland and the Northern Territory, the Legislative Assembly may initiate a referendum by resolution.<sup>27</sup> Each legislature has authority to legislate for optional referendums by virtue of its general legislative power to make laws with respect to its jurisdiction.<sup>28</sup>

There are generally no stated limits on the sorts of topics that can be put to a vote, although the Northern Territory Government may only hold referendums on matters within its executive authority.<sup>29</sup> Governments have held optional polls on a wide range of subject matters, as summarised in Table 1 below.<sup>30</sup> Questions about liquor regulation, such as the introduction of 6pm closing for licensed premises, and prohibition, have been the most numerous. The vast majority of these were put in the first half of the 20<sup>th</sup> century, when alcohol policy was highly divisive and a common subject of referendums in Australia and other Western nations.<sup>31</sup> In more recent times, daylight saving has emerged as the issue most often put to a popular vote.

A question arises as to why any government would hold a referendum when it could instead pursue reform through the ordinary legislative route.<sup>32</sup> Generally speaking, states and territories have opted to put issues to the people for one of two reasons.<sup>33</sup> The first has been to remove contentious issues from the parliamentary agenda. This rationale has been central to decisions to call referendums on issues such as religious instruction in schools (eg, QLD 1910),<sup>34</sup> liquor licensing (eg, SA 1915)<sup>35</sup> and daylight saving (eg, QLD 1992).<sup>36</sup> On controversial issues like these, a referendum may be appealing to a government because it provides a circuit-breaker for entrenched disagreements within parties, or between the lower and upper houses, or because it shifts decision-making responsibility to the electorate.

<sup>27</sup> *Referendums Act 1997* (Qld) s 5(b); *Referendums Act 1998* (NT) s 5(1).

<sup>28</sup> *Australian Capital Territory (Self-Government) Act 1988* (ACT) s 22(1); *Constitution Act 1902* (NSW) s 5; *Northern Territory (Self-Government) Act 1978* (NT) s 6; *Constitution of Queensland 2001* (Qld) s 8 and *Constitution Act 1867* (Qld) s 2; *Constitution Act 1934* (SA) s 5 with *Australian Constitutions Act 1850* (Imp) s 14; Tasmania by *Australian Constitutions Act 1850* (Imp) s 14; *Constitution Act 1975* (Vic) s 16; *Constitution Act 1889* (WA) s 2.

<sup>29</sup> *Referendums Act 1998* (NT) (n 27) s 4(1); *Northern Territory (Self-Government) Regulations 1978* (Cth) reg 4.

<sup>30</sup> Here I draw on categories outlined in David Butler and Austin Ranney, 'Practice' in David Butler and Austin Ranney (eds), *Referendums around the World: The Growing Use of Direct Democracy* (Macmillan, 1994) 1, 2–3.

<sup>31</sup> Phillips (n 3); Benoit Dostie and Ruth Dupré, 'Serial Referendums on Alcohol Prohibition: A New Zealand Referendum' (2016) 40(3) *Social Science History* 491.

<sup>32</sup> See Laurence Morel, 'The Rise of "Politically Obligatory" Referendums: The 2005 French Referendum in Comparative Perspective' (2007) 30(5) *West European Politics* 1041, 1045–51.

<sup>33</sup> See also Hughes (n 4) 154; Orr (n 4) 120–1.

<sup>34</sup> Yvonne Perkins, 'Queensland's Bible in State Schools Referendum: A Case Study of Democracy' (BA Thesis, University of Sydney, 2010) 66.

<sup>35</sup> Phillips (n 3) 258.

<sup>36</sup> Pearce (n 3) 396.

The second reason has been to seek additional legitimacy for changes to fundamental rules or institutions. This has, for instance, motivated the calling of referendums on proposals to reduce the size of the New South Wales Legislative Assembly (1903),<sup>37</sup> secede Western Australia from the Commonwealth (1933),<sup>38</sup> and grant statehood to the Northern Territory (1998).<sup>39</sup> Judgments about the necessity of referendums sometimes vary across jurisdictions. South Australia is the only state to have held a popular vote on whether the salaries of parliamentarians should be increased (1911). That decision may have led to some regret: voters rejected the measure by a ratio of 2:1, and it was another decade before members received a pay increase.<sup>40</sup>

**Table 1:** Optional referendums by subject matter

Category	Issues
Constitutional (4)	<ul style="list-style-type: none"> <li>- Size of Legislative Assembly (1)</li> <li>- Members' pay (1)</li> <li>- Electoral system (1)</li> <li>- Constitutional convention (1)</li> </ul>
Territorial (4)	<ul style="list-style-type: none"> <li>- WA secession (1)</li> <li>- North-east NSW statehood (1)</li> <li>- ACT self-government (1)</li> <li>- NT statehood (1)</li> </ul>
Social/moral (35)	<ul style="list-style-type: none"> <li>- Liquor (18)</li> <li>- Daylight saving (7)</li> <li>- Religious education (4)</li> <li>- Retail trading (3)</li> <li>- Gambling (2)</li> <li>- Hydro-electric power (1)</li> </ul>

The decisions to hold discretionary referendums have sometimes been highly contentious. Opposition parties, particularly in upper houses, have often scrutinised and challenged government justifications for holding a popular vote in the absence of a legal requirement. For instance, the Western Australian Government's first attempt to hold a vote on secession was blocked by the Legislative Council, and the vote was only able to proceed after the Government conceded to the Labor Opposition's demands for the ballot to include a second question on holding a constitutional convention.<sup>41</sup> At other times, governments have set out to legislate,

<sup>37</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 September 1903, 2675 (John See): 'The Parliament cannot settle [the issue] because it has no authority'.

<sup>38</sup> Watt (n 3).

<sup>39</sup> Alistair Heatley and Peter McNab, 'The Northern Territory Statehood Convention 1998' (1998) 9(3) *Public Law Review* 155, 155.

<sup>40</sup> *Payment of Members Act Amendment Act 1921* (SA) s 2(1).

<sup>41</sup> Watt (n 3) 47–51.

but had a referendum forced upon them. In 1968, the Tasmanian Premier, Eric Reece, announced a plan to redevelop a Hobart hotel to include a casino and ruled out a referendum on the matter. He soon reversed that position, though, due to opposition both within Cabinet and the Legislative Council.<sup>42</sup> Similarly, the Federal Government initially dismissed the idea of giving ACT voters a say on their electoral system, but Senate opposition, not to mention unhappiness in the territory itself, prompted it to change course.<sup>43</sup>

## ***B Form of the Question***

The questions put to voters at optional referendums have taken a variety of different forms. The most common approach has been to present voters with a binary, Yes/No choice — as in New South Wales's 1976 poll, which asked 'Are you in favour of daylight saving?'.<sup>44</sup> Three referendums have invited electors to decide between two substantive proposals. The most recent of these 'dual option' polls was the Australian Capital Territory's 1992 electoral system referendum, which asked voters to choose between single member electorates and proportional representation (Hare-Clark). Finally, 12 referendums have been 'multi-option' polls that have prompted voters to choose between three or more policy alternatives. This design feature has been used most frequently for votes on alcohol policy. At South Australia's 1915 referendum, for example, voters were asked to choose between 6, 7, 8, 9, 10 and 11pm as their preferred closing time for licensed premises. At that referendum, voters were instructed to choose only one option, whereas at other multi-option polls electors have been required to record partial or full preferences.

For dual- and multi-option polls, the decision about what options to include in the question has sometimes been hotly debated. This is understandable, as the alternatives on the ballot paper define the parameters of voter choice. In 1903, for instance, New South Wales voters were presented with three options regarding the size of the Legislative Assembly — 125 (status quo), 100 and 90 — but some in Parliament argued for additional options (such as 150 and 25) to be added.<sup>45</sup> More problematically, the options given to Tasmanians at their 1981 referendum weakened the credibility of the vote. Electors were asked to choose between two locations on the Gordon River for the construction of a planned hydro-electricity dam, but were not given the option of voting against the construction of a dam altogether. In response, the Tasmanian Wilderness Society launched a campaign urging voters to write 'No Dams' on their ballot papers and to not otherwise record a preference. Overall, more than 33% of electors did so, contributing to a massive

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<sup>42</sup> Terry Newman, 'Tasmanian Referenda Since Federation' in Bryan Beaumont, Leslie Zines and Charles Fenton, *Report of the Royal Commission into the Constitution Act 1934 Tasmania* (Hobart, 1982) 165–6 (app T).

<sup>43</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1991, 1419 (David Simmons).

<sup>44</sup> *Daylight Saving (Referendum) Act 1976* (NSW) sch, form B.

<sup>45</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 November 1903, 4271 (JCL Fitzpatrick).

informal vote.<sup>46</sup> While one location (Gordon below Franklin) received far more votes than the other, its share only marginally exceeded the informal vote. As Hughes concluded: ‘The lesson learned was that a combination of compulsory voting with a formulation of a referendum question that ignores the wishes of a large part of the electorate will produce a messy result.’<sup>47</sup>

### **C Status of the Result**

Proposals put at optional referendums have generally been considered ‘carried’ where they have attracted a simple majority of votes.<sup>48</sup> Different thresholds have applied to local option polls and to some proposals to abolish liquor licenses. In Victoria and Western Australia, for instance, proposals to restrict licensing were required to achieve a super-majority of 60% *and* meet a turnout quorum of 30% of electors.<sup>49</sup> This approach was criticised by some legislators for being undemocratic, and has not been used for many decades.<sup>50</sup>

The fact that an optional referendum proposal is carried does not necessarily mean that it will be implemented. The rules and practices have varied. For about two-fifths of optional referendums, the legislature has stipulated in the enabling law that certain consequences must follow a vote in favour of the proposed measure. Parliaments have used different formulations to do this. One approach, used on several occasions, has involved the Parliament enacting the proposed policy change, but making its commencement conditional on a Yes vote. Prior to Tasmania’s 1968 casino referendum, for instance, the State Parliament passed an Act that authorised the issuing of a hotel casino licence, and made the Act’s commencement contingent on public approval at the ballot box.<sup>51</sup> This approach was also adopted at all four of Western Australia’s daylight saving referendums.<sup>52</sup> For some other referendums, the legislature has simply sought to specify the legal consequences that should follow the vote. Thus, the determination of voters at the Australian Capital Territory prohibition poll was to have ‘full force and effect’ for at least five years and until a future poll was taken.<sup>53</sup> While such provisions cannot legally constrain future Parliaments, in practice governments and Parliaments have respected the popular verdict given at each of these referendums.

Most optional referendums, though, have been advisory, meaning that their results have not been legally binding on the Government or Parliament.<sup>54</sup> This status

<sup>46</sup> Tasmanian Parliamentary Library, ‘Referendums in Tasmania’ (Information Sheet, May 2002) <<https://www.parliament.tas.gov.au/tpl/InfoSheets/referendums.pdf>>.

<sup>47</sup> Hughes (n 4) 170.

<sup>48</sup> Enabling laws often provide that the proposal will pass if the number of Yes votes exceeds the number of No votes: eg, *Daylight Saving Act 2006* (WA) s 2(2). In some instances, the law is silent on the relevant threshold.

<sup>49</sup> *Licensing Act 1928* (Vic) ss 297(1)–(2); *Licensing Act 1911* (WA) s 78.

<sup>50</sup> See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 30 November 1922, 3311 (Edmund Greenwood).

<sup>51</sup> *Wrest Point Casino Licence and Development Act 1968* (Tas) s 1(3).

<sup>52</sup> See, eg, *Daylight Saving Act 2006* (WA) s 2.

<sup>53</sup> *Liquor Poll Ordinance 1928* (Cth) s 48.

<sup>54</sup> Morel, ‘Types of Referendums’ (n 25) 32–3.

tells us nothing about the importance of the vote; indeed, referendums on topics as diverse as 6pm closing, daylight saving and secession have all been advisory. Moreover, the state and territory experience broadly affirms the view that advisory referendums are *effectively* binding given that governments and legislators usually find it politically difficult to act contrary to popular wishes.<sup>55</sup>

Three exceptions are worth noting. In two instances, a state has lacked constitutional authority to execute the referendum result. Following Western Australia's vote in favour of secession, the British Parliament rejected the State's petition to be recognised as an independent self-governing colony.<sup>56</sup> And, after Tasmanians voted to build the dam below the junction of the Gordon and Franklin Rivers, the Commonwealth legislated to prevent the dam's construction.<sup>57</sup> As to the third exception, in 1904 the Victorian Government chose to retain secular education after the electorate gave mixed signals on the issue. Confoundingly, majorities supported all three measures on the ballot paper: the continuation of secular education; scripture lessons in schools; and the use of certain prayers and hymns.<sup>58</sup>

Taking a wider view, it is apparent that the force of some advisory results has diminished over time. In 2005, Western Australian voters opposed the extension of Perth's weekday and Sunday retail trading hours, but by 2012 the State Parliament had enacted those same changes into law.<sup>59</sup> Similarly, the Commonwealth granted self-government to the Australian Capital Territory in 1988, even though less than a third of Territorians had backed the idea a decade earlier.<sup>60</sup> These instances raise interesting questions, too large to explore here, about the circumstances in which politicians legislate contrary to advisory referendums and their justifications for doing so.

Before turning to mandatory referendums, it is worth saying something about the significance of these optional polls. Some were major events in themselves: Tasmania's 1981 dam referendum, for example, garnered national attention and helped mobilise a burgeoning conservation movement.<sup>61</sup> Other polls are less storied, but nonetheless helped trigger significant social changes. During the First World War, voters in three states backed 6pm closing at licensed premises, a choice that created the conditions for the now infamous 'six o'clock swill'.<sup>62</sup> And in 1968, Tasmanians approved the nation's first casino license. Still other polls are memorable for different reasons. In 1956, Victorians rejected a proposal to overturn 6pm closing and, as a result, tourists visiting Melbourne for the Olympics were prohibited from enjoying an evening drink in a public bar.<sup>63</sup> And, in 1928, a year

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<sup>55</sup> Ibid 32; Michael Gallagher, 'Conclusion' in Michael Gallagher and Pier Vincenzo Uleri (eds), *The Referendum Experience in Europe* (Macmillan Press, 1996) 226, 246.

<sup>56</sup> Watt (n 3) 81.

<sup>57</sup> *World Heritage Properties Conservation Act 1983* (Cth).

<sup>58</sup> 'The Religious Instruction Referendum', *Daily Telegraph* (Sydney), 14 June 1904, 4.

<sup>59</sup> Brett Heino, 'Trading Hours Deregulation in Tasmania and Western Australia: Large Retailer Dominance and Changing Models of Development' (2017) 27(2) *Labour and Industry* 95, 104.

<sup>60</sup> See Appendix.

<sup>61</sup> Kellow (n 3).

<sup>62</sup> Phillips (n 3).

<sup>63</sup> Grazyna Zajdow, 'Producing the Market for Alcohol: The Victorian Example' (2011) 35(1) *Journal of Australian Studies* 83, 88.

after Federal Parliament had begun sitting in Canberra, the Bruce Government called a referendum on relaxing local liquor laws to authorise the sale (and not just possession) of alcohol. Residents of the Federal Capital Territory voted in favour, freeing the newly arrived politicians to drink in licensed premises.

## IV Mandatory Referendums

Of the 56 state and territory referendums, 13 have been mandatory. Most have concerned amendments to state Constitutions, while a small number have been held to resolve parliamentary deadlocks or approve new entrenchments. Additionally, a handful of states require the holding of referendums on sensitive policy issues.

### A Constitutional Amendment

#### 1 Initiation

The Constitutions of the five mainland states (NSW, Qld, SA, Vic, WA) provide that proposals to amend or repeal certain entrenched constitutional provisions cannot become law unless approved at a referendum.<sup>64</sup> The decision to entrench those provisions was made by the State Parliaments themselves at an earlier point in time. Under s 6 of the *Australia Act 1986* (Cth),<sup>65</sup> a state legislature can enact manner and form provisions that impose procedural constraints upon future law-making.<sup>66</sup> Section 6 also imposes an obligation on state legislatures to comply with those constraints when seeking to enact laws ‘respecting the constitution, powers or procedure of the Parliament of the State’.

In these five jurisdictions, a referendum is generally required to alter the structure or composition of the legislature, change the length of parliamentary terms, or dilute the legal requirement for a referendum. Beyond this, there is considerable variation. For example, in New South Wales, the rules on compulsory voting and judicial tenure are entrenched.<sup>67</sup> Victoria’s Constitution, meanwhile, stands out for entrenching certain executive offices, including the Auditor-General, Ombudsman and Electoral Commissioner.<sup>68</sup> In Queensland, the restoration of a second house

<sup>64</sup> *Constitution Act 1902* (NSW) (n 28) ss 7A–7B; *Constitution Act 1975* (Vic) (n 28) s 18(1B); *Constitution Act 1867* (Qld) (n 28) s 53; *Constitution Act Amendment Act 1934* (Qld) s 3; *Constitution of Queensland 2001* (Qld) (n 28) s 191; *Constitution Act 1934* (SA) (n 28) ss 10A, 88; *Constitution Act 1889* (WA) (n 28) s 73.

<sup>65</sup> Prior to 1986, this authority was granted by the *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, s 5.

<sup>66</sup> The ability of state legislatures to enact restrictive manner and form provisions that bind future parliaments, and to do so through the vehicle of ordinary legislation, was first recognised by the High Court of Australia and the Privy Council respectively in *Attorney-General (NSW) v Trethowan* (1931) 44 CLR 394 and *Attorney General for New South Wales v Trethowan* [1932] AC 526.

<sup>67</sup> *Constitution Act 1902* (NSW) (n 28) s 7B(1)(a).

<sup>68</sup> *Constitution Act 1975* (Vic) (n 28) ss 18(1B)(n)–(o).

(Legislative Council or other legislative body) may not occur unless it has been approved at a referendum.<sup>69</sup>

The use of the referendum to ratify state constitutional amendments is a relatively recent phenomenon. New South Wales was the first state to entrench constitutional provisions by referendum, in 1929, and held the first constitutionally mandated poll, on Legislative Council reform, in 1933.<sup>70</sup> In total, there have been 10 mandated referendums on constitutional amendment, nine of which have occurred since 1978. New South Wales has conducted seven of these. It has held referendums to ratify, among other changes, provision for direct election of members of the Legislative Council (1978) and the extension and fixing of Legislative Assembly terms (1981, 1995). Queensland has held two referendums on parliamentary terms (1991, 2016), and South Australia has held one on the process for redistributing electoral boundaries (1991). Victoria and Western Australia, by contrast, have channelled constitutional change entirely through the ordinary parliamentary process.

A few factors help explain the rarity of referendums on constitutional amendment. First, State Parliaments can alter many parts of their Constitutions through the passage of ordinary legislation.<sup>71</sup> Second, South Australia (1970), Western Australia (1978) and Victoria (2003) introduced referendum requirements relatively recently.<sup>72</sup> Third, the presence of manner and form provisions has sometimes encouraged governments to think creatively to find an alternative, less onerous pathway to achieving their goal. In 2011, for instance, Western Australia sought to fix election dates for the Legislative Assembly. On receiving legal advice that it could not do this without holding a referendum, the Government instead opted to fix the dates for Legislative Council elections as that could be achieved by ordinary legislation. The Government took the view that a referendum was unnecessary and would be ‘an expensive exercise and one that would certainly not excite the interest of the public’.<sup>73</sup>

Each Constitution articulates the requirement for a referendum in different terms. They nonetheless share a general approach, which is to preclude governments from seeking royal assent to certain proposed laws unless they have been passed by Parliament and approved by a majority of voters.<sup>74</sup> For example, s 53(1) of the *Constitution Act 1867* (Qld) provides that a Bill that ‘expressly or impliedly or in any way affects’ an entrenched provision ‘shall not be presented for assent by or in the name of the Queen unless it has first been approved by the electors in accordance

<sup>69</sup> *Constitution Act Amendment Act 1934* (Qld) (n 64) s 3.

<sup>70</sup> *Constitution (Legislative Council) Amendment Act 1929* (NSW).

<sup>71</sup> *Taylor v Attorney-General of Queensland* (1917) 23 CLR 457.

<sup>72</sup> *Constitution Act Amendment Act 1969* (SA); *Acts Amendment (Constitution) Act 1978* (WA); *Constitution (Parliamentary Reform) Act 2003* (Vic). Queensland introduced entrenchment by referendum in 1934: *Constitution Act Amendment Act 1934* (Qld) (n 64).

<sup>73</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 14 April 2011, 3062 (Norman Moore).

<sup>74</sup> In Western Australia, a Bill that alters an entrenched provision must be passed by an absolute majority of both houses of parliament: *Constitution Act 1889* (WA) (n 28) s 73(2)(f).

with this section'.<sup>75</sup> State Constitutions thus treat the referendum as part of the legislative process, rather than a standalone event, and the people are participants in that process. As Kirby P observed in relation to the operation of s 7A of the *Constitution Act 1902* (NSW), 'the electors constitute a law-making component additional to the Assembly, the Council and the Crown in the making of a valid Act of Parliament'.<sup>76</sup>

It is not always clear when the enactment of a Bill will require a referendum. There may be a question as to whether the proposed law expressly or impliedly alters, amends or repeals an entrenched provision. In 2020, for instance, a member of the Western Australian Legislative Council argued that a referendum was necessary to enact a COVID Response Bill, as it enabled Executive Council meetings to be held by remote communications in a way that altered or affected entrenched provisions relating to the office of Governor.<sup>77</sup> It fell to the Legislative Council Deputy Chair to rule against the argument, and the Bill was presented for assent without a referendum.<sup>78</sup> Even in more straightforward circumstances, such as proposals to recognise Aboriginal and Torres Strait Islander peoples in State Constitutions, governments and legislatures may seek legal advice as to whether a referendum is necessary.<sup>79</sup>

Further, a question may arise as to whether the proposed law can be characterised as one 'respecting the constitution, powers or procedure of the Parliament of the State'. If it cannot, any existing manner and form provisions — including those imposing referendum requirements — will not be binding via s 6 of the *Australia Act 1986* (Cth).<sup>80</sup> Bills that seek to alter the composition of a State Parliament, or amend or repeal a manner and form provision, are examples of laws that likely satisfy this description.<sup>81</sup> However, a proposed law on the composition or functions of the executive and judicial branches may not. It is therefore doubtful whether a referendum is legally required to amend or repeal Victoria's entrenched provisions on the roles of the State Auditor-General and other executive officers, nor

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<sup>75</sup> In Victoria, it is 'not lawful' to present for assent a Bill that alters an entrenched provision and has not been passed by the parliament and obtained majority approval at a referendum: *Constitution Act 1975* (Vic) (n 28) s 18(1B).

<sup>76</sup> *Bignold v Dickson* (1991) 23 NSWLR 683, 690 (Kirby P).

<sup>77</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 8 September 2020, 5438–9 (Simon O'Brien).

<sup>78</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 8 September 2020, 5439–40 (Martin Aldridge).

<sup>79</sup> See, eg, Western Australia Joint Select Committee on Aboriginal Constitutional Recognition, *Towards a True and Lasting Reconciliation: Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia* (Report No 1, March 2015) [4.19]–[4.29].

<sup>80</sup> Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 162. Whether manner and form provisions can be binding outside of s 6 of the *Australia Act 1986* (Cth) is open to debate. Recent High Court of Australia obiter dicta suggests some doubts about this possibility: *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 574 [80] (Gleeson CJ, Gummow, Hayne and Heydon JJ); 616–17 [214]–[215] (Kirby J) ('*Marquet*'). For discussion see Carney, 179–91.

<sup>81</sup> Carney (n 80) 165.

to alter New South Wales provisions on judicial tenure.<sup>82</sup> The need for referendums to change other entrenched rules, such as those relating to the election of members to Parliament, the qualifications of members,<sup>83</sup> the franchise and compulsory voting,<sup>84</sup> is also uncertain.

This scope for uncertainty around the legal necessity of a referendum distinguishes the state and federal spheres. At the Commonwealth level, a referendum must be held for the enactment of any ‘proposed law for the alteration’ of the *Commonwealth Constitution*.<sup>85</sup> This is far more stable as a criterion for calling a referendum. The uncertainty can present states with difficult choices: where doubt exists, is it best to be cautious and hold a referendum, or to proceed by ordinary legislation and risk a judicial challenge?

A 1981 referendum in New South Wales provides an interesting case study. In 1979, the State Parliament, by resolution, had established a scheme for the registration of members’ pecuniary interests. However, subsequent commentary by a parliamentary committee, and legal advice from the Crown Solicitor and senior counsel, indicated that the scheme altered the powers of the Legislative Council and, under the New South Wales *Constitution Act*, should have been put to a referendum.<sup>86</sup> Premier Neville Wran lamented this, blaming ‘the anachronistic and anomalous defects in the *Constitution Act* in relation to the powers of this Parliament’.<sup>87</sup> The Parliament terminated the scheme, Wran put the matter to a referendum, and voters approved it by a margin of more than 4:1.<sup>88</sup>

## 2 *Form of the Question*

The form in which proposals for constitutional amendment have been put to voters has been relatively uniform compared to that for optional referendums. State laws prescribe rules on how the question should be worded: typically, they require that the ballot paper provide the short or long title of the Bill, and that voters indicate if they approve it.<sup>89</sup> In this fashion, all referendums on constitutional amendment have presented voters with a binary Yes/No choice. The state laws also regulate the timing of referendums of this kind; typically, the Bill must be put to voters within two months of its passage through Parliament.<sup>90</sup>

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<sup>82</sup> Carolyn Evans, ‘Entrenching Constitutional Reform in Victoria’ (2003) 14(3) *Public Law Review* 133, 135; Twomey (n 3) 736.

<sup>83</sup> *Marquet* (n 80) 573 [77] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

<sup>84</sup> Twomey (n 3) 279.

<sup>85</sup> *Commonwealth Constitution* (n 19) s 128.

<sup>86</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 November 1980, 3827 (Neville Wran). Additionally, vesting the Legislative Assembly with this power required legislation.

<sup>87</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 April 1981, 5711 (Neville Wran).

<sup>88</sup> Parliament of New South Wales, *Minutes of the Proceedings of the Legislative Council* (Minutes No 27, 27 November 1980) [12], [19].

<sup>89</sup> See, eg, *Electoral Act 2002* (Vic) sch 4.

<sup>90</sup> See, eg, *Constitution Act 1867* (Qld) (n 28) s 53(2).

These rules on question wording have not eliminated the potential for controversy. There remains an incentive for governments to craft the Bill title in a populist or emotive manner. An illustrative example was put to New South Wales voters in 1995: ‘A Bill to require the Parliament of New South Wales to serve full four year terms *and to prevent politicians calling early general elections* or changing these new constitutional rules without a further referendum?’ (emphasis added). Moreover, governments retain the ability to conflate issues by cramming multiple changes into a single Bill. Hence, at Queensland’s 2016 referendum, voters were asked to respond to a single question about the introduction of fixed, four-year terms, and were thus denied the opportunity to approve one, but not the other.<sup>91</sup>

### 3 *Status of the Result*

A proposal for constitutional amendment is carried where it attracts a simple majority of votes cast. In Queensland, for instance, an amendment ‘shall be presented to the Governor’ for royal assent ‘where a majority of electors approve’ it.<sup>92</sup> The result of such a referendum is binding: a Yes vote triggers an act that will ordinarily lead to the enactment of the Bill, while a No vote leaves the status quo unaltered. A government could, conceivably, advise the Governor to withhold assent from a Bill that had been approved at a referendum, in which case the proposed law would not be enacted. This might arise, for example, where an opposition party is elected to government on the same day as the referendum and is against the proposed amendment becoming law. However, this scenario has not arisen to date, and it seems improbable that any government would seek to override the outcome of an otherwise binding popular vote on constitutional change.

### **B *Parliamentary Deadlock***

The New South Wales *Constitution Act* enables a referendum to be held to resolve deadlocks between the houses of Parliament. Section 5B of the *Constitution Act 1902* (NSW) provides that, in the event of persistent disagreement between the Legislative Assembly and Legislative Council about a Bill, the Legislative Assembly may resolve to submit that Bill to a referendum.<sup>93</sup> Just one referendum has been triggered by section 5B: in 1961 the Labor Party, in government but in minority in the upper house, utilised it to hold an unsuccessful referendum on its proposal to abolish the Legislative Council.<sup>94</sup>

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<sup>91</sup> Graeme Orr and Samara Cassar, ‘When Referendums Go Wrong: Queensland’s 2016 Fixed, Four-Year Term Proposal’ (2016) 31(2) *Australasian Parliamentary Review* 161, 166.

<sup>92</sup> *Constitution Act 1867* (Qld) (n 28) s 53(4).

<sup>93</sup> For a detailed analysis of *Constitution Act 1902* (NSW) (n 28) s 5B, see Twomey (n 3) 254–66.

<sup>94</sup> Constitution Amendment (Legislative Council Abolition) Bill 1959 (NSW).

Queensland law previously provided for referendums to resolve parliamentary deadlocks.<sup>95</sup> Its 1917 poll on abolishing the Legislative Council, also unsuccessful, was initiated using that measure.<sup>96</sup>

### C Entrenchment

In the Australian Capital Territory, new entrenchments must be approved at a referendum. The *Australian Capital Territory (Self-Government) Act 1988* (Cth) stipulates that Bills that establish manner and form requirements (including referendums) for the enactment of certain laws must be submitted to the electors for their approval.<sup>97</sup> This provides for a form of ‘symmetric entrenchment’ in that any legislature that wishes to impose a restrictive procedure on its successors must first *itself* comply with that procedure.<sup>98</sup>

The Australian Capital Territory has held one referendum of this kind. In 1995, a majority of electors approved the entrenchment of basic principles concerning the proportional representation (Hare-Clark) electoral system.<sup>99</sup> After that vote, the enactment of any law inconsistent with the electoral system’s general principles requires the approval of the Legislative Assembly plus a majority of electors at a referendum, *or* the approval of at least two-thirds of the members of the Legislative Assembly.<sup>100</sup>

The Australian Capital Territory’s arrangements for entrenchment referendums are also notable for mandating a relatively high decision threshold. Under the *Australian Capital Territory (Self-Government) Act 1988* (Cth), the proposed measure must be approved by ‘a majority of electors’ as opposed to a majority of electors voting.<sup>101</sup> This higher threshold reflects the importance of entrenchment provisions and a desire to confer special legitimacy upon them. In 1995, the question was carried after about two-thirds of voters approved the measure, equating to 55.7% of electors.<sup>102</sup>

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<sup>95</sup> *Parliamentary Bills Referendum Act 1908* (Qld).

<sup>96</sup> *Constitution Act Amendment Act 1915* (Qld). The Legislative Council was abolished in 1922 after the Queensland Parliament passed the *Constitution Act Amendment Act 1921* (Qld). The abolition of the upper house removed the need for a deadlock mechanism, although it was not formally repealed until 1968: *Acts Repeal Act 1968* (Qld) s 2.

<sup>97</sup> *Australian Capital Territory (Self-Government) Act 1988* (Cth) (n 28) s 26.

<sup>98</sup> Thomas Roszkowski and Jeffrey Goldsworthy, ‘Symmetric Entrenchment of Manner and Form Requirements’ (2012) 23(3) *Public Law Review* 216.

<sup>99</sup> *Proportional Representation (Hare-Clark) Entrenchment Act 1994* (ACT).

<sup>100</sup> *Ibid* s 5(2).

<sup>101</sup> *Australian Capital Territory (Self-Government) Act 1988* (Cth) (n 28) s 26(3); *Proportional Representation (Hare-Clark) Entrenchment Act 1994* (ACT) (n 99) s 5(1)(b).

<sup>102</sup> ‘Declaration of Result of Referendum’ in Australian Capital Territory, *Australian Capital Territory Gazette*, No S59, 16 March 1995, 2.

## D Sensitive Policy Issues

Some states have legislated to require referendums for sensitive policy changes. In Tasmania, the Government is precluded from selling prescribed electricity generating plants, including Hydro Tasmania, without first obtaining majority public approval at a referendum.<sup>103</sup> The law stipulates that a Minister's consent to a sale is of no effect without public endorsement.<sup>104</sup> In Queensland, the law facilitates the holding of a referendum on the building of federal nuclear facilities. A 2007 Act requires the responsible Minister to 'take steps for the conduct of a plebiscite' if satisfied that the Commonwealth is considering the construction of a prohibited nuclear facility in Queensland.<sup>105</sup> The outcome would have no legal consequences; at most it would make it politically awkward for the Federal Government to proceed with its planned nuclear facility.<sup>106</sup> Three other state governments introduced Bills to enable referendums on federal nuclear plans, but failed to secure their passage through the upper house.<sup>107</sup>

Some states have adopted or considered the use of referendums to ratify changes to local government. In Queensland, a Bill to end the system of local government may be presented for royal assent only if the proposal has been approved by a majority of voters at a referendum.<sup>108</sup> The provision that prescribes this procedure is not doubly entrenched, however, so it probably does not bind the Parliament. In New South Wales, non-government members have, at least twice, introduced Bills to preclude local council amalgamations unless they have been approved at a referendum.<sup>109</sup> In both instances, the Bill passed the Legislative Council, but was defeated in the Legislative Assembly.

## V Voting

We turn now to issues common to both optional and mandatory referendums run by states and territories. This Part considers voting. It looks at the franchise, compulsory voting and the method for recording a vote. Part VI then addresses referendum campaigns.

<sup>103</sup> *Hydro-Electric Corporation Act 1995* (Tas) ss 7(6), (11), inserted by *Hydro-Electric Corporation and Electricity Companies Acts (Public Ownership) Amendment Act 2001* (Tas).

<sup>104</sup> *Hydro-Electric Corporation Act 1995* (Tas) (n 103) s 7(6).

<sup>105</sup> *Nuclear Facilities Prohibition Act 2007* (Qld) ss 21(1), (3).

<sup>106</sup> Tony Koch, 'Beattie will Ban Nuclear Facilities', *The Australian* (28 November 2006).

<sup>107</sup> Nuclear Waste Storage Facility (Prohibition) (Referendum) Amendment Bill 2002 (SA) cl 15; Nuclear Activities (Prohibitions) Amendment (Plebiscite) Bill 2007 (Vic) cl 14; Nuclear Facilities Prohibition Bill 2007 (WA) cl 11.

<sup>108</sup> *Constitution of Queensland 2001* (Qld) (n 28) s 78(2).

<sup>109</sup> Local Government Amendment (No Forced Amalgamations) Bill 2003 (NSW); Local Government Amendment (Amalgamation Referendums) Bill 2017 (NSW).

## A Franchise

A key question for state and territory referendums, as with elections, has been who is entitled to vote. Exclusions from the franchise have generally mirrored those that apply to elections. Women in New South Wales were granted the right to vote in 1902, opening the way for them to cast their first ballot at the State's 1903 referendum on the size of the Legislative Assembly.<sup>110</sup> On the other hand, Victorian women, who were not included in the franchise until 1908, were unable to cast ballots at the 1904 poll on religious instruction in state schools.

Aboriginal and Torres Strait Islander peoples were disqualified from voting at Western Australian and Queensland elections until 1962 and 1965, respectively, and this also applied to referendums. First Nations peoples thus cast their first state referendum ballots in these jurisdictions in 1975 and 1991, respectively. Today, state and territory laws stipulate that the franchise for referendums is the same as that for elections.<sup>111</sup>

For a few referendums, a question has arisen as to whether the proposed measure should be put to all electors in a state, or only to residents of a certain geographical region. This matter has tended to come up where the issue at hand has arguably been of special interest to a particular part of the state.

The geographical scope of the referendum franchise has arisen twice at referendums on retail trading hours. In 1970, only residents of defined urban areas were permitted to vote at South Australia's referendum on Friday night metropolitan trading.<sup>112</sup> The narrow franchise was justified on the basis that it was not 'fair or reasonable' to require country voters to weigh in on city shopping hours.<sup>113</sup> The Referendum was defeated by a slim margin. By contrast, two questions about the extension of retail trading hours in the Perth metropolitan area were put to the entire Western Australia electorate in 2005. The Government considered it important that 'every citizen will have their say'.<sup>114</sup> Most in Parliament accepted this view, although the independent member for the Pilbara region, Larry Graham, called it 'a stupidity and a nonsense' to ask regional and remote voters for their opinion on Perth shopping rules.<sup>115</sup> In the event, the Metropolitan region, along with the South West and Agricultural regions, voted decisively against change; a marginal Yes vote was returned by electors in the Mining and Pastoral region.<sup>116</sup>

<sup>110</sup> This State Referendum was held simultaneously with a Federal Election.

<sup>111</sup> See, eg. *Referendum Procedures Act 2004* (Tas) s 13. South Australia, the only jurisdiction without standing referendum laws, provides for the franchise in each enabling Bill.

<sup>112</sup> As defined in the *Referendum (Metropolitan Area Shop Trading Hours) Act 1970* (SA) s 2.

<sup>113</sup> South Australia, *Parliamentary Debates*, Legislative Council, 25 August 1970, 951 (Alfred Kneebone).

<sup>114</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 10 November 2004, 7837 (John Kobelke).

<sup>115</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 11 November 2004, 8078 (Larry Graham).

<sup>116</sup> Black (above n 8) 387–8.

In 1968, the Tasmanian Government also favoured a wider franchise. It opted to ask the entire State about the approval of a casino license for a Hobart hotel. Its justification was unclear, but may have had something to do with the fact that the casino promised to boost tourism across the State.<sup>117</sup>

The franchise for the 1967 referendum on the creation of a new state in north-east New South Wales was particularly controversial. The issue was of potential interest to all State voters, but the Government insisted that the narrow purpose of the poll was to ‘ascertain whether the people of the northeastern corner of New South Wales want a new State’.<sup>118</sup> The chosen boundaries of the new state, which in turn determined who was entitled to vote on the matter,<sup>119</sup> likely affected the Referendum outcome. The decision to include Newcastle angered residents of northern, rural regions who worried that their interests would be overridden by those of the coastal city.<sup>120</sup> In addition, many Newcastle residents were against the proposal and their participation depressed the Yes vote.<sup>121</sup> Hughes argues that the Liberal majority in the Coalition Government, which feared the electoral repercussions of a new state, manipulated the franchise to ensure the Referendum’s defeat.<sup>122</sup>

## **B Compulsory Voting**

As with the franchise, rules on compulsory voting for referendums have generally tracked those for elections. Queensland was first to introduce compulsion, in 1915, and its 1917 referendum on abolishing the Legislative Council was the first held under compulsory voting rules.<sup>123</sup> The last state to establish mandatory voting was South Australia: in 1941 and 1985, respectively, for House of Assembly and Legislative Council elections. Today, the compulsory nature of voting is made explicit in all jurisdictions with referendum standing laws.<sup>124</sup>

There have been occasional departures from ordinary election rules, in both directions. Western Australia did not introduce compulsion for elections until 1936, but it made voting mandatory at its 1933 secession referendum. The rationale was to ensure that the vote would deliver a definitive popular verdict on an important issue.<sup>125</sup> Curiously, voting remained voluntary for the state election held on the same day.

Conversely, the South Australian Legislative Council strongly resisted compulsion for the 1965 referendum on state lotteries. The Liberal and Country League argued that it would force people to vote on a ‘matter on which they may

<sup>117</sup>Newman (n 42) 167.

<sup>118</sup>New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 December 1966, 3047 (Eric Willis).

<sup>119</sup>*New State Referendum Act 1966* (NSW) sch 1.

<sup>120</sup>Anna Rienstra and George Williams, ‘Redrawing the Federation: Creating New States from Australia’s Existing States’ (2015) 37(3) *Sydney Law Review* 357, 377.

<sup>121</sup>*Ibid.*

<sup>122</sup>Hughes (n 4) 169.

<sup>123</sup>*Elections Acts Amendment Act 1915 1914* (Qld), 5 Geo V, c 29, s 18.

<sup>124</sup>See, eg, *Referendums Act 1983* (WA) s 18.

<sup>125</sup>*Secession Referendum Act 1932* (WA) s 5; Western Australia, *Parliamentary Debates*, Legislative Assembly, 22 November 1932, 1953 (James Mitchell).

have no opinion'.<sup>126</sup> The upper chamber ultimately accepted compulsion, but only after the Government altered the wording of the ballot question and agreed that electors with a conscientious objection to referendum voting would not be penalised.<sup>127</sup> The League also raised objections to the adoption of compulsory voting for the State's retail trading poll a few years later.<sup>128</sup>

As one would expect, the average turnout at referendums has increased since the introduction of compulsory voting. The average turnout at compulsory and voluntary polls is 90.8% and 56.2%, respectively. All the same, some voluntary referendums have produced relatively high rates of electoral participation, reflecting strong interest in the issue and/or the simultaneous holding of a parliamentary election. For instance, referendums on hotel closing hours in Tasmania (1916) and South Australia (1915) attracted turnouts exceeding 70%. On the flip side, some compulsory referendums have seen relatively weak turnout. Just over four in five Queenslanders (82.8%) cast ballots on the 2016 proposal to introduce fixed, four-year terms for the Legislative Assembly, reflecting low voter engagement in the issue.

### C Recording a Vote

The method for recording a valid referendum vote varies across the Federation. Electors in some jurisdictions are required to write 'Yes' or 'No' in the space provided on the ballot paper.<sup>129</sup> In New South Wales, voters place a tick opposite the square that reflects their choice.<sup>130</sup> For multi-option polls, the voting method is left to the enabling law. Where a person fails to record their preference in the prescribed way, electoral officials may still add their vote to the count if the voter's intention is clear.<sup>131</sup>

A recurring issue at state and territory referendums has been how to interpret ticks and crosses when those markings are not expressly permitted by the governing legislation. The most common approach is to interpret ticks as an indication of support for the proposal, but to treat crosses, which are more ambiguous, as informal.<sup>132</sup> Some have argued that this puts referendum opponents at a disadvantage and, in a few instances, the issue has become a campaign flashpoint. In the lead up to Western Australia's 2009 daylight saving referendum, for example, *The West*

<sup>126</sup> South Australia, *Parliamentary Debates*, House of Assembly, 31 August 1965, 1357 (Robin Millhouse).

<sup>127</sup> *Referendum (State Lotteries) Act 1965 (SA)* ss 14(11)–(12); Alex Hester, 'The 1965 Referendum on the Promotion and Conduct of Lotteries by the Government of the State' in David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008) 50, 52–3.

<sup>128</sup> Guy Dickson, 'The 1970 Referendum on Metropolitan Shop Trading-Hours' in David Brooks, Zoe Gill and John Weste (eds), *South Australian Referenda, 1896–1991* (South Australian Parliamentary Research Library, Research Paper No 7, 2008) 44, 46–7.

<sup>129</sup> See, eg, *Electoral Act 2002 (Vic)* (n 89) s 177H.

<sup>130</sup> *Constitution Further Amendment (Referendum) Act 1930 (NSW)* s 14.

<sup>131</sup> See, eg, *ibid* s 21(1).

<sup>132</sup> Western Australian Electoral Commission ('WAEC'), *2009 Western Australian Referendum on Daylight Saving* (Report, June 2010) 17–8.

*Australian* newspaper called the different treatment of ticks and crosses ‘absurd and illogical’, while a No campaign leader accused the Electoral Commission of ‘trying to manipulate the outcome’.<sup>133</sup> This prompted a sharp response from the Electoral Commissioner, who said that the approach was legally sound and would render only a small number of ballots informal.<sup>134</sup> The Referendum ultimately delivered a decisive No vote and a tiny informality rate, and the issue was forgotten.

The interpretation of ticks and crosses was also a focal point at Tasmania’s 1981 referendum. Electoral officials made the strict decision to treat all ballots marked with ticks and crosses, rather than the number ‘1’ as provided by the legislation, as informal.<sup>135</sup> This led to the rejection of a significant number of ballots, further inflating the already massive informal vote caused by the ‘No Dams’ protest.

Voting at a referendum is relatively simple and straightforward compared to election voting, which requires people to record preferences against lists of candidates. Having said that, the task becomes more challenging when multiple electoral events are held on the same day. Governments often favour holding simultaneous polls, pointing to cost-savings and voter convenience, but they can increase complexity by requiring voters to comply with multiple voting rules. The state and territory record suggests a correlation between simultaneous polls and informality: the median percentage of informal ballots recorded at standalone referendums is 2.3%, compared to 4.0% for those held with federal or state parliamentary elections.

Perhaps the most complex polling arrangements have occurred when state referendums have been held alongside federal electoral events. New South Wales’s 1903 referendum, for instance, was conducted on the same day as a Federal Election.<sup>136</sup> Voters were required to use *numbers* to record their referendum preferences, but *crosses* to choose candidates for the House of Representatives and Senate. This probably contributed to the 12.8% informal vote.<sup>137</sup> In 1910, Queensland electors voted at a State Referendum, a Federal Election *and* a Federal Referendum on the same day. The voting methods for each referendum were different: people were required to cross out the option (Yes/No) they did not want on the State ballot paper, but place a cross in a square opposite Yes/No on the federal ballot.<sup>138</sup> Again, this likely influenced the relatively high (5.5%) informality rate.

The record therefore suggests that the simultaneous holding of referendums and elections can impede the effective exercise of the franchise. Since 1922, Commonwealth law has precluded the conduct of state or territory referendums on

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<sup>133</sup> ‘WA Short-Changed on Funding for Infrastructure’, *The West Australian* (Perth, 14 May 2009) 20; Jessica Strutt, ‘Storm Over Vote Rule on Ticks’, *The West Australian*, (Perth, 13 May 2009) 3.

<sup>134</sup> Warwick Gately, ‘Letter to the Editor of *The West Australian* Newspaper’ (14 May 2009), reproduced in WAEC (n 132) 112 (app 5).

<sup>135</sup> Orr (n 4) 129–30; Tasmanian Parliamentary Library (n 46).

<sup>136</sup> See also above n 110 and accompanying text.

<sup>137</sup> *Reduction of Members Referendum Act 1903* (NSW) s 8. A ballot paper on which no ‘figure’ had been recorded was treated as informal: s 11.

<sup>138</sup> *Religious Instruction in State Schools Referendum Act 1908* (Qld) sch; *Referendum (Constitution Alteration) 1906* (Cth) sch, form C.

the same day as a Federal Election without the permission of the Governor-General.<sup>139</sup> Such permission has been granted once, to facilitate the holding of the Northern Territory's Statehood Referendum alongside the 1998 Federal Election. It remains lawful for state and federal referendums to be held at the same time, although this has not occurred since 1911.

## VI Campaigns

The nature and intensity of state and territory referendum campaigns have varied. The Government has generally led the Yes campaign, while the No case has often been put by the Opposition and/or minor parties. At multi-option polls, the Government has typically advocated for one of the policy alternatives. Some issues have attracted significant involvement from interest groups. For instance, churches and temperance organisations mounted fierce campaigns in favour of 6pm closing for hotel bars.<sup>140</sup> More recently, labour groups and Aboriginal Land Councils urged a No vote at the Northern Territory's 1998 Statehood Referendum, whereas Western Australia's large retailers and business associations ran a well-funded advertising campaign in favour of extended trading hours at the State's 2005 poll.<sup>141</sup>

State and territory laws regulate advertising for referendums, just as they do for elections. To foster transparency and accountability, an advertisement must include the name and address of the person who authorised it.<sup>142</sup> Moreover, it is an offence to publish or distribute material that is likely to mislead a person in relation to the casting of their vote.<sup>143</sup> This rule has been interpreted narrowly to apply only to statements that might mislead a voter about the process of casting their vote, and not to misrepresentations of the substance of a referendum proposal.<sup>144</sup> South Australia regulated the content of referendum advertisements more directly at its 1991 poll on electoral redistributions. The enabling law made it an offence to publish an advertisement that contained 'a statement purporting to be a statement of fact that is inaccurate and misleading to a material extent'.<sup>145</sup> The Electoral Commission of South Australia has no record of any complaints being made during that campaign, which is not surprising given that advertising was minimal and both major parties supported a Yes vote.<sup>146</sup> In 2020, the Australian Capital Territory joined South Australia in making it an offence to publish a misleading statement of fact at elections and referendums.<sup>147</sup>

The official arguments for and against a referendum proposal are one of the main sources of information for voters during a campaign. The preparation of such

<sup>139</sup> *Commonwealth Electoral Act 1918* (Cth) s 394.

<sup>140</sup> Phillips (n 3); Samuelsson (n 3).

<sup>141</sup> Alistair Heatley and Peter McNab, 'The Northern Territory Statehood Referendum 1998' (1999) 10(1) *Public Law Review* 3, 4; Heino (n 59) 103.

<sup>142</sup> See, eg, *Referendums Act 1983* (WA) (n 124) s 48.

<sup>143</sup> *Ibid* s 46(1).

<sup>144</sup> *Evans v Crichton-Browne* (1981) 147 CLR 169, 204, 208.

<sup>145</sup> *Referendum (Electoral Redistribution) Act 1990* (SA) s 3(3), applying *Electoral Act 1985* (SA) s 113.

<sup>146</sup> Email from Electoral Commission of South Australia to Paul Kildea, 30 July 2021.

<sup>147</sup> *Electoral Act 1992* (ACT) s 297A; *Referendum (Machinery Provisions) Act 1994* (ACT) s 17.

arguments was introduced for federal referendums in 1912 and has been embraced by the states and territories. This is despite persistent criticism of the federal Yes/No pamphlet for failing to help voters improve their understanding of the issues.<sup>148</sup> Table 2 below sets out the approach taken in the seven jurisdictions that have standing rules about the dissemination of official arguments.<sup>149</sup>

It is apparent that the federal model has been influential on how the states and territories have approached this aspect of referendum campaigns. State and territory laws and practices nonetheless depart from the Commonwealth approach in interesting ways. For instance, laws in Western Australia and Tasmania do not require the dissemination of a pamphlet, but provide instead that the official arguments must be brought to the notice of voters. Other jurisdictions expressly enable distribution via the internet and broadcast media.

While most jurisdictions entrust the preparation of arguments to Members of Parliament ('MPs'), some states contemplate a role for others. In Western Australia, the Electoral Commissioner may ask a 'body, corporate or incorporate' to prepare an argument for an optional referendum where MPs have not provided one.<sup>150</sup> This opens the way for universities and non-government organisations ('NGOs'), among others, to contribute. Notably, this approach was adopted by New South Wales in 1967 for its New State Referendum; a local political science department was tasked with preparing arguments for and against the proposal.<sup>151</sup>

Northern Territory law contemplates a role for electoral officials. The arguments are put together by politicians, but the Chief Electoral Officer can require amendments where of the opinion that they are 'grossly misleading or inaccurate'.<sup>152</sup> Finally, in New South Wales, public servants customarily prepare a Yes/No case for complex referendum proposals, such as those involving constitutional amendment.<sup>153</sup> The case is 'usually vetted by relevant experts to ensure its fairness'.<sup>154</sup>

<sup>148</sup> Williams and Hume (n 1) 260–3.

<sup>149</sup> *Referendum (Machinery Provisions) Act 1984* (Cth) s 11(1); *Electoral Act 2002* (Vic) (n 89) s 177C; *Referendums Act 1997* (Qld) (n 27) pt 3; *Referendums Act 1983* (WA) (n 124) s 9; *Referendums Regulation 1984* (WA) s 3; *Referendum Procedures Act 2004* (Tas) (n 111) s 12; *Referendum (Machinery Provisions) Act 1994* (ACT) (n 147) s 8; *Referendums Act 1998* (NT) (n 27) s 10.

<sup>150</sup> *Referendums Act 1983* (WA) (n 124) s 9(5).

<sup>151</sup> *New State Referendum Act 1966* (NSW) (n 119) s 10; Hughes (n 4) 169. A similar approach was adopted for the state's 1969 poll on Sunday trading at hotels: *Liquor (Referendum) Act 1969* (NSW) s 10.

<sup>152</sup> *Referendums Act 1998* (NT) (n 27) s 10(6).

<sup>153</sup> Twomey (n 3) 320.

<sup>154</sup> *Ibid.*

**Table 2:** Standing rules on distribution of referendum arguments

	CTH	VIC	QLD	WA	TAS
Maximum length (words)	2000	2000	1000	2000	2000
Authorised by	members	members	members	members or invited body	members
Where required to be published	pamphlet posted to each elector	pamphlet posted to each elector	pamphlet posted to each elector; state-wide newspaper; ECQ website	posted to electors or otherwise brought to their notice	arguments to be brought to the notice of electors
Publication deadline	14 days	14 days	14 days	not specified	polling day
Optional publication	email	internet	–	–	–
Who is responsible for publication	Electoral Commissioner	Electoral Commission	Electoral Commission	Electoral Commissioner	Electoral Commission

Note: There are no standing rules on the distribution of referendum arguments in NSW and SA.

Governments have other tools at their disposal to advance public education. One is the distribution of neutral information on the referendum proposal. At the Australian Capital Territory's 1995 Referendum on the entrenchment of Hare-Clark, for instance, the Electoral Commission circulated a detailed official pamphlet that included basic information on the background to the Referendum and the Territory's electoral system.<sup>155</sup> South Australian electoral authorities prepared neutral, explanatory information for the State's 1991 redistribution poll and published it in newspapers.<sup>156</sup> In Victoria and Queensland, however, there are statutory limits on government expenditure that mirror federal rules and likely impede their ability to disseminate neutral information.<sup>157</sup>

The effectiveness of public education campaigns at state and territory referendums warrants further research. A recent study suggests that no single initiative is likely to optimise information on its own, and that adequate resourcing is an important factor.<sup>158</sup> Australia's most recent referendum, Queensland's 2016 poll on fixed, four-year terms for the Legislative Assembly, was, regrettably, an example of poor practice. The proposed reform was complex and bipartisan and, as such, the need for clear, balanced information was especially strong. Instead, the public was given insufficient time to learn about the issues and, notwithstanding the distribution of an official No case, the arguments against the proposal were not adequately ventilated.<sup>159</sup> Orr and Cassar argue that there was 'no serious attempt at preparing the ground with voter education'<sup>160</sup> and that the advocacy and information effort was 'weak and lop-sided'.<sup>161</sup> That experience indicates that ongoing discussions about how best to inform Australians about referendum proposals are as relevant for the states and territories as they are for the Commonwealth.

## VII The Referendum Record

Having looked in detail at the different types of state and territory referendums, and analysed their rules and practices, we are now in a position to examine the overall record of these referendums. This Part examines trends in the use and outcomes of sub-national referendums, paying particular attention to differences across time and jurisdiction. It concludes by comparing the state/territory and federal referendum records.

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<sup>155</sup> ACT Government, *A Referendum to Entrench the ACT's Proportional Representation (Hare-Clark) Electoral System* (18 February 1995) <[https://www.elections.act.gov.au/\\_data/assets/pdf\\_file/0004/831694/hareentrenchment.pdf](https://www.elections.act.gov.au/_data/assets/pdf_file/0004/831694/hareentrenchment.pdf)>.

<sup>156</sup> See, eg, 'Facts You Should Know about the Referendum', *The Advertiser* (Adelaide, 5 February 1991) 16.

<sup>157</sup> *Electoral Act 2002* (Vic) (n 89) s 177C(4); *Referendums Act 1997* (Qld) (n 27) s 14.

<sup>158</sup> Alan Renwick, Michela Palese and Jess Sargent, 'Information in Referendum Campaigns: How Can It Be Improved?' (2020) 56(4) *Representation* 521, 533.

<sup>159</sup> Orr and Cassar (n 91) 166.

<sup>160</sup> *Ibid* 162.

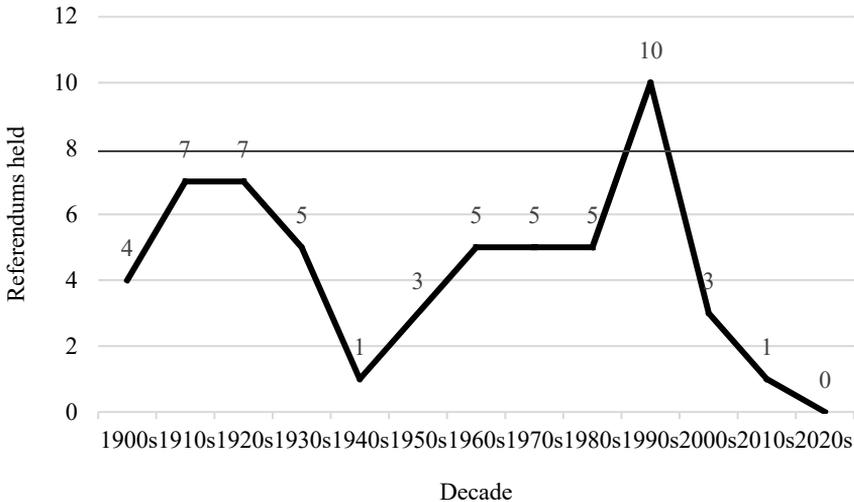
<sup>161</sup> *Ibid* 166.

## A Frequency

States and territories have together held 56 referendums. This means that, on average, a state or territory has held a referendum about once every two years, although their frequency has varied considerably over time (see Figure 1 below). The device was most popular at the beginning and end of the 20<sup>th</sup> century. The openness to direct democracy in the early decades after Federation has already been noted. The 1990s, meanwhile, saw renewed enthusiasm for various forms of participatory governance, including citizen-initiated referendums, and referendum proposals featured prominently in federal politics of the time.<sup>162</sup>

The referendum has never been less popular among states and territories than it is now. The device has fallen into relative disuse, with only two held since 2005 and six jurisdictions yet to hold one this century. Governments have continued to advance constitutional reform and address contentious policy matters, but have opted to do so through the ordinary parliamentary process. It may be that state and territory politicians, like their federal counterparts, have become reluctant to wear the cost and unpredictability of referendums. The device has not been rejected entirely, however, as evidenced by occasional referendum proposals by both government and non-government parties.<sup>163</sup>

**Figure 1:** Number of state/territory referendums held per decade, 1901–2021



<sup>162</sup> Patrick Bishop and Glyn Davis, 'Developing Consent: Consultation, Participation and Governance' in Glyn Davis and Patrick Weller (eds), *Are You Being Served?: State, Citizens and Governance* (Allen & Unwin, 2001) 175; Walker (n 2) 20; Williams and Chin (n 26) 30–8.

<sup>163</sup> See, eg, Referendum (Retail Trading) Bill 2021 (SA); State Energy and Water Utilities Protection (Referendum) Bill 2014 (NSW).

## ***B Approval Rate***

In examining the state and territory record, an obvious point of interest is how often voters have approved referendum measures. To develop an answer, it is necessary to disregard the ‘multi-option’ and ‘dual option’ referendums, as for those polls it is not possible to say whether a particular proposal has been carried. This leaves us with 41 referendums in which electors were presented with a binary, Yes/No choice. Of these, 19 have been supported by voters: an approval rate of 46.3%.

The approval rate for binary, optional referendums is lower than that for mandatory polls. About a third (9 of 28) have been carried. This reflects the multiple defeats suffered by proposals for restrictive liquor licensing and daylight saving. Governments have found little success with optional referendums in recent times — the last to return a Yes vote was South Australia’s 1982 poll on daylight saving. By contrast, voters have proven willing to support proposals for constitutional change. Nine of the 12 mandatory referendums that proposed constitutional amendments have passed.<sup>164</sup> In New South Wales, 7 out of 8 proposals for constitutional amendment have been approved by voters, with the 1961 proposal to abolish the upper house the only such measure to be defeated.

Several referendums have passed by large margins. The two proposals to receive the highest Yes votes were those requiring NSW MPs to disclose certain pecuniary interests (1981; 86.0% Yes) and providing for the direct election of the NSW Legislative Council (1978; 84.8% Yes). Conversely, prohibition has fared worst with voters. It has suffered multiple clear defeats, and in 1950 incurred the largest No vote on record when 73.6% of Western Australian electors voted against it. The most marginal result was recorded at New South Wales’s 1954 dual option poll on hotel closing hours. In the State’s third trip to the ballot box on the issue, 50.3% of voters opted for 10pm closing and helped end almost four decades of early closing.

## ***C Timing***

In terms of timing, about one-third (19) of state and territory referendums have been held simultaneously with state parliamentary elections. Such timing has become more common in recent decades; since 1980, about half of sub-national referendums have been held with elections. The record shows that voters have tended to reject proposals presented at standalone referendums. Electors have approved about a quarter (7 of 26) of binary proposals put midway through a parliamentary term. By contrast, voters have endorsed four-fifths (12 of 15) of measures put on the same day as an election. It is possible that voters have viewed the standalone referendums as *de facto* votes on the performance of the Government, and thus an opportunity to voice their displeasure. Alternatively, the campaigns surrounding mid-term referendums may have been more intense and polarised. More research could help to identify and weight possible explanations.

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<sup>164</sup>Here I include the two referendums on the abolition of the Legislative Council (QLD, 1917; NSW, 1961) that were triggered by parliamentary deadlock procedures.

## **D Jurisdiction**

New South Wales has made most use of the referendum, having put 16 proposals, followed by Western Australia (12), Victoria and Queensland (7 each), South Australia (6), the Australian Capital Territory (4), Tasmania (3) and the Northern Territory (1). Victoria has been the most indifferent in modern times, having not held a referendum since 1956. As to results, voters in New South Wales have proven most willing to approve referendum measures. They have backed 8 of 12 binary proposals, including 7 in a row since 1976. Western Australian voters, meanwhile, have been the Federation's naysayers, rejecting 9 of 10 Yes/No propositions, including four attempts to introduce daylight saving. Victorians last voted 'Yes' in 1904.

## **E Political Parties**

Labor and non-Labor parties have made equal use of the referendum device, with each putting 28 proposals to a vote. Non-Labor parties, though, have had more success. Of the 21 binary proposals they have submitted to voters, about half (11) have been approved, compared to two-fifths (8 of 20) for Labor governments. There are no obvious party differences in referendum use that might explain this relatively small difference in success rate. Governments from both sides of politics, for instance, have conducted polls on contentious social issues and put forward proposals for significant constitutional change.

## **F State/Territory and Federal Records Compared**

When we place the state/territory and federal referendum records alongside each other, some interesting points of comparison emerge. In terms of the overall use of referendums, the Commonwealth has held slightly fewer. It has conducted 48 referendums since Federation: 44 mandatory polls on constitutional amendment, and four optional votes on conscription (twice), the national song and same-sex marriage.<sup>165</sup> As with the states, the federal use of direct democracy saw a peak in the first 20 years after Federation, and a significant decline in recent decades.<sup>166</sup>

The records otherwise display important differences. The Federal Government has put many more constitutional amendments to the people, reflecting the *Commonwealth Constitution's* requirement that all textual alterations must be approved at a referendum. The states and territories, meanwhile, have been far more willing to hold optional polls to resolve contentious policy issues. That may reflect

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<sup>165</sup> *Parliamentary Handbook of the Commonwealth of Australia 2020* (Parliamentary Library, Department of Parliamentary Services, 35<sup>th</sup> ed, 2020) pt 4. The same-sex marriage poll is arguably best classified as a survey: Paul Kildea, 'Australia's Same-Sex Marriage Survey: Evaluating a Unique Popular Vote Process' (2021) 46(2) *Monash University Law Review* 85, 90–3.

<sup>166</sup> Williams and Hume (n 1) 92.

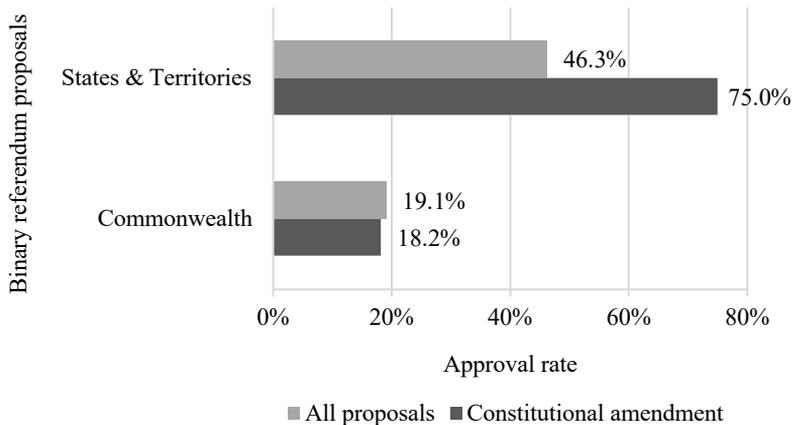
the fact that the states and territories, by their nature, have responsibility for many policy matters ‘about which Australians care most’.<sup>167</sup>

Federal governments, in contrast to the states, have gradually moved towards holding referendums mid-term, rather than with elections. And whereas standalone state and territory referendums have tended to be defeated, at the federal level the approval rate is the same irrespective of timing.<sup>168</sup>

Turning to political parties, Labor proposals have suffered defeats more often at both levels of government, but the approval rate is far lower for the federal Labor Party. Counting all binary referendums at the federal level, just one of Labor’s 26 proposals has been carried, compared to 8 of 21 non-Labor proposals.<sup>169</sup> Labor’s lower success rate, federally, can be partly explained by its numerous failed attempts, throughout the 20<sup>th</sup> century, to alter the *Commonwealth Constitution* to enhance Commonwealth powers.<sup>170</sup>

It is the difference in overall approval rates, however, that is arguably the most notable point to emerge from a comparison of the two sets of referendum records (see Figure 2 below). As is well known, just 8 of 44 Federal proposals for constitutional amendment (18.2%) have been approved by voters. If we include the three optional referendums that put a binary choice to voters, that approval rate becomes 9 of 47 (19.1%). The state and territory approval rate is about 2.5 times greater (46.3%). The rate at which state voters have approved proposals for constitutional amendment is more than four times higher (75%).

**Figure 2:** Approval rate for binary referendum proposals



<sup>167</sup> Campbell Sharman, ‘State Politics’ in Brian Galligan and Winsome Roberts (eds), *Oxford Companion to Australian Politics* (Oxford University Press, 2007) 570, 570.

<sup>168</sup> Williams and Hume (n 1) 95–6.

<sup>169</sup> The 1977 national song poll, which presented voters with four options, is excluded from this calculation.

<sup>170</sup> Williams and Hume (n 1) 103–4.

A few factors help to explain this difference. State and territory referendums have generally only required a simple majority for approval, whereas amendments to the *Commonwealth Constitution* must surpass the ‘double majority’ threshold.<sup>171</sup> In addition, many federal referendums raise questions about the balance of federal and state powers, and can mobilise opposition among state governments.<sup>172</sup> Also relevant could be the intense national spotlight that federal referendums attract and the strong temptation for oppositions to run fierce ‘No’ campaigns.

Nonetheless, the outcomes of state and territory referendums challenge the oft-expressed notion that Australians are natural ‘No’ voters, whether that is due to status quo bias, ignorance, or some other reason.<sup>173</sup> The sub-national record shows that Australians are willing to vote ‘Yes’ to referendum questions, including those that propose constitutional change.

## VIII Conclusion

This article has provided a comprehensive review of the use and regulation of referendums by Australia’s states and two mainland territories. It has demonstrated that Australia’s experience with direct democracy is richer and more extensive than what is covered in the vast literature on federal referendums. Sub-national governments have primarily used the referendum to help resolve disagreements over policy issues. Just as many Australians had their say on same-sex marriage in 2017, so have state residents voted on liquor regulation, daylight saving and other contentious matters. The states have deployed the referendum less frequently to ratify constitutional change, but it has nonetheless been a vehicle for significant reform. The states and territories have, moreover, experimented with a range of different design features, including multi-option questions, localised franchises, regulation of misleading statements and super-majority thresholds.

The experience of these largely forgotten referendums can potentially inform ongoing debates about how to improve the conduct of federal referendums. More broadly, it deepens our understanding of the role that the direct voice of the people plays in our parliamentary democracy. All the same, there is much about this experience that remains to be uncovered and explored. This article has pointed to some issues that warrant further attention, such as: the motivations that have prompted governments to hold referendums; the factors that have shaped how politicians have responded to referendum outcomes; the effectiveness of public education initiatives; and the reasons behind the high approval rate for state referendums on constitutional amendment.

The referendum has, during certain periods, been put to relatively frequent use to help settle important questions. Its use has declined in recent years, though, and the place of the referendum in future state and territory democratic politics is unclear. It is possible that the recent turning away from the referendum will become further entrenched. On the other hand, the occasional calls for popular votes on

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<sup>171</sup> *Commonwealth Constitution* (n 19) s 128.

<sup>172</sup> Orr and Cassar (n 91) 164.

<sup>173</sup> For analysis along similar lines, see Orr (n 4) 119; Twomey (n 3) 320–1.

policy issues, and continuing interest in constitutional reform, suggest that direct democracy will remain in the picture. The referendum remains an important tool for state and territory governments. We should expect that its use will continue to evolve in response to new political circumstances.

## Appendix: State and Territory Referendums, 1901–2021

Jurisdiction	Date	Issue	Result	In favour
NSW	16.12.1903	<b>Size of Legislative Assembly ('LA')</b> To ascertain voter preferences on the size of the LA: 125, 100 or 90 members	90 members	72.9%
	10.06.1916	<b>Hotel closing hours</b> To ascertain voter preferences on the closing hour for licensed premises: 6, 7, 8, 9, 10 or 11pm	6pm	62.4%
	01.09.1928	<b>Prohibition</b> To ascertain whether voters are in favour of prohibition with compensation	Defeated	28.5%
	13.05.1933	<b>Reform of Legislative Council ('LC')</b> To amend the State Constitution to, inter alia, reduce and limit the number of members of the LC and to provide for indirect election of members	Carried	51.5%

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
NSW (cont.)	15.02.1947	<b>Hotel closing hours</b> To ascertain voter preferences on the closing hour for licensed premises and clubs: 6, 9 or 10pm	6pm	62.4%
	13.11.1954	<b>Hotel closing hours</b> To ascertain voter preferences on the closing hour for licensed premises and clubs: 6pm or 10pm	10pm	50.3%
	29.04.1961	<b>Abolition of Legislative Council</b> To abolish the LC and require a referendum for its restoration	Defeated	42.4%
	29.04.1967	<b>New state in north-east NSW</b> To ascertain whether voters in north-east NSW are in favour of the establishment of a new state in north-east NSW	Defeated	45.8%
	29.11.1969	<b>Sunday trading at licensed premises</b> To ascertain whether voters favour the law being amended to permit licensed premises to trade generally on Sundays	Defeated	42.0%

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
NSW (cont.)	01.05.1976	<b>Daylight saving</b> To ascertain whether voters are in favour of daylight saving	Carried	68.4%
	17.06.1978	<b>Reform of Legislative Council</b> To amend the State Constitution to, inter alia, provide for direct election of LC members, reduce its size and set maximum terms of office	Carried	84.8%
	19.09.1981	<b>Disclosure of pecuniary interests</b> To approve amendments to the State Constitution to require MPs to disclose certain pecuniary interests	Carried	86.0%
	19.09.1981	<b>Legislative Assembly terms</b> To amend the State Constitution to extend the maximum period between LA elections from 3 years to 4 years	Carried	69.0%
	25.05.1991	<b>Reform of Legislative Council</b> To amend the State Constitution to, inter alia, reduce its size and reduce members' maximum term of office	Carried	57.7%

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
NSW (cont.)	25.03.1995	<b>Legislative Assembly terms</b> To amend the State Constitution to fix a date for LA general elections	Carried	75.5%
	25.03.1995	<b>Judicial independence</b> To amend the State Constitution to entrench a law providing for judicial tenure	Carried	65.9%
VIC	01.06.1904	<b>Keep public education secular</b> To ascertain whether voters are in favour of education remaining secular	Carried	58.6%
	01.06.1904	<b>Scripture lessons in schools</b> To ascertain whether voters are in favour of religious instruction in state schools with parental consent	Carried	53.0%
	01.06.1904	<b>Use of certain prayers and hymns</b> To ascertain whether voters are in favour of the use in scripture lessons of certain prayers and hymns	Carried	53.2%

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
VIC (cont.)	21.10.1920	<b>Sale of liquor, local option</b> To ascertain voter preferences on the number of liquor licenses in their local district: continuance, reduction, none	Continuance <sup>1</sup>	52.9%
	29.03.1930	<b>Abolition of liquor licenses</b> To ascertain whether voters are in favour of the abolition of liquor licenses	Defeated	43.1%
	08.10.1938	<b>Abolition of liquor licenses</b> To ascertain whether voters are in favour of the abolition of liquor licenses	Defeated	33.8%
	24.03.1956	<b>Hotel closing hours</b> To ascertain whether voters are in favour of extending hotel weekday trading hours to 10pm	Defeated	39.7%

<sup>1</sup> Number of districts in which No-License was carried: 2.

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
QLD	13.04.1910	<b>Religious instruction in state schools</b> To ascertain whether voters are in favour of the introduction of religious instruction in state schools	Carried	56.7%
	05.05.1917	<b>Abolition of Legislative Council</b> To abolish the LC and require a referendum for its restoration	Defeated	39.4%
	30.10.1920	<b>Prohibition</b> To ascertain whether voters are in favour of state management of liquor, prohibition, or continuance	Continuance	50.3%
	03.10.1923	<b>Prohibition</b> To ascertain whether voters are in favour of state management of liquor, prohibition, or continuance	Continuance	59.3%

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
QLD (cont.)	23.03.1991	<b>Legislative Assembly terms</b> To amend the State Constitution to extend the maximum LA term from 3 years to 4 years	Defeated	48.8%
	22.02.1992	<b>Daylight saving</b> To ascertain whether voters in favour of daylight saving	Defeated	45.5%
	19.03.2016	<b>Legislative Assembly terms</b> To amend the State Constitution to provide for fixed, four-year terms for the LA	Carried	53.0%

<sup>ii</sup> Polling day enrolment for this referendum has not been located. An approximate turnout figure has been calculated using enr

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
SA	26.04.1911	<b>Members' salaries</b> To ascertain whether voters are in favour of increasing the salaries of Members of Parliament to £300 p.a.	Defeated	32.5%
	27.03.1915	<b>Hotel closing hours</b> To ascertain voter preferences on closing times for bar rooms in licensed premises: 6, 7, 8, 9, 10 or 11pm	6pm	56.9%
	20.11.1965	<b>State lotteries</b> To ascertain whether voters are in favour of promotion and conduct of lotteries by the State Government	Carried	70.8%
	19.09.1970	<b>Retail trading hours</b> To ascertain whether voters in certain districts are in favour of Friday night trading in metropolitan and Gawler shops	Defeated	48.2%
	06.11.1982	<b>Daylight saving</b> To ascertain whether voters are in favour of daylight saving	Carried	71.6%

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
SA (cont.)	09.02.1991	<b>Electoral boundaries</b> To amend the State Constitution to effect changes to how electoral redistributions are undertaken	Carried	76.7%
WA	26.04.1911	<b>Liquor licensing, local option</b> To ascertain voter preferences, by district, on whether: - the number of liquor licenses should increase - new publicans' licenses should be held by the state - there should be state management in the district	No increase <sup>iii</sup> Yes Yes	79.5% 65.3% 64.1%

<sup>iii</sup> Number of districts in favour of increase: 1; number in favour of no increase: 41.

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
WA (cont.)	30.04.1921	<b>Liquor licensing, local option</b>		
		To ascertain voter preferences, by district, on whether:		
		– the number of liquor licenses should continue, increase, be reduced or whether no licenses be granted/renewed	Continuance <sup>IV</sup>	48.3%
	– new publicans' licenses should be held by the state	Yes <sup>V</sup>	55.3%	
		– there should be state management in the district	Yes <sup>VI</sup>	53.7%
	04.04.1925	<b>Prohibition</b>	Defeated	34.9%
		To ascertain whether voters are in favour of prohibition coming into force		
	08.04.1933	<b>Secession – Yes/No</b>	Carried	66.2%
		To ascertain whether voters are in favour of withdrawing from the Federal Commonwealth		

<sup>IV</sup> Number of districts in which Continuance was carried: 32; number in which Reduce was carried: 10; number in which No-Lic

<sup>V</sup> Number of districts in favour: 28; number opposed: 14.

<sup>VI</sup> Number of districts in favour: 23; opposed: 19.

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
WA (cont.)	08.04.1933	<b>Secession – Convention</b> To ascertain whether voters are in favour of holding a convention of state representatives to consider options for constitutional alteration	Defeated	42.6%
	09.12.1950	<b>Prohibition</b> To ascertain whether voters agree with the proposal that prohibition should come into force	Defeated	26.5%
	08.03.1975	<b>Daylight saving</b> To ascertain whether voters are in favour of WA standard time being advanced one hour from October to March	Defeated	46.3%
	07.04.1984	<b>Daylight saving</b> To ascertain whether voters are in favour of WA standard time being advanced one hour from October to March	Defeated	45.6%

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
WA (cont.)	04.04.1992	<b>Daylight saving</b> To ascertain whether voters are in favour of WA standard time being advanced one hour from October to March	Defeated	46.9%
	26.02.2005	<b>Retail trading hours</b> To ascertain whether voters believe the WA community would benefit from weeknight retail trading in Perth	Defeated	41.3%
	26.02.2005	<b>Retail trading hours</b> To ascertain whether voters believe the WA community would benefit from Sunday retail trading in Perth	Defeated	38.6%
	16.05.2009	<b>Daylight saving</b> To ascertain whether voters are in favour of WA standard time being advanced one hour from October to March	Defeated	45.4%

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
TAS	25.03.1916	<b>Hotel closing hours</b> To ascertain voter preferences on closing times for hotels, public houses and clubs: 6, 7, 8, 9, 10 or 11pm	6pm	58.7%
	14.12.1968	<b>Casino license for Wrest Point Hotel</b> To ascertain whether voters are in favour of the granting of a casino licence to Wrest Point Hotel	Carried	53.0%
	12.12.1981	<b>Construction of hydro-electricity dam</b> To ascertain voter preferences on the location for construction of a hydro-electricity dam on the Gordon River	Below junction with Franklin River	85.6%
ACT	01.09.1928	<b>Prohibition</b> To ascertain voter preferences on liquor regulation: prohibition of possession; continuance (prohibition of sale); sale under public control; private sale	Private sale	50.7%

<b>Jurisdiction</b>	<b>Date</b>	<b>Issue</b>	<b>Result</b>	<b>In favour</b>
ACT (cont.)	25.11.1978	<b>Self-government</b> To ascertain voter preferences on ACT governance: self-government; locally elected legislative body; status quo	Status quo	63.7%
	15.02.1992	<b>Electoral system</b> To ascertain voter preferences on ACT electoral system: single member electorates or PR (Hare-Clark)	Hare-Clark	65.3%
	18.02.1995	<b>Electoral system</b> To approve a law to entrench the principles of the Hare-Clark electoral system	Carried	65.0%
NT	03.10.1998	<b>Statehood</b> To ascertain whether voters agree that the NT should become a state	Defeated	48.1%

Note: Votes in favour are expressed as a percentage of formal votes cast.

# *Reforming Australian Criminal Laws against Persistent Child Sexual Abuse*

**Elizabeth Dallaston\* and Ben Mathews†**

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## ***Abstract***

Criminal offences enabling prosecution of repeated instances of child sexual abuse exist in all Australian states and territories. These laws were developed to overcome the inherent difficulties presented by the requirement for particulars of individual crimes when prosecuting repeated or persistent sexual offending against children. In 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse reviewed these provisions, resulting in a series of recommendations for criminal law reform and a model law that defined the offence as maintaining an unlawful relationship with a child. This article critically analyses the implementation of reforms across Australian states and territories, drawing on public advocacy against this framing of the offence, and provides further suggestions for reform.

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## I Introduction

The Royal Commission into Institutional Responses to Child Sexual Abuse (‘Royal Commission’) made 85 recommendations for reform of the criminal justice system to ensure justice for victims of child sexual abuse.<sup>1</sup> This article provides a critical analysis of the implementation of the Royal Commission’s proposed reforms to criminal laws that prohibit persistent child sexual abuse (‘persistent CSA’). These laws exist in all Australian states and territories,<sup>2</sup> but have been widely regarded as ineffectual in achieving their underlying policy objective.<sup>3</sup> We explain the key features of the proposed reforms, identify to what extent those features have been implemented in each state or territory, and evaluate whether reforms have achieved the underlying policy objective of the laws. Based on this analysis, we draw conclusions about future reforms required to achieve an optimal legislative model.

To situate this analysis, in Part II we outline the features of child sexual abuse that create challenges for criminal prosecution in general, and we then identify additional defects in the law that persistent CSA laws are intended to address. We explain the ‘perverse paradox’ that arises when legal principles directed towards ensuring a fair trial hamper an effective criminal justice response, most acutely in cases of extensive and persistent sexual offending against children. In Part III, we discuss the Royal Commission’s approach, their analysis of the legislative response to this issue, and their recommendations for reform. In Part IV, we identify and critically analyse six relevant aspects of the Royal Commission’s proposed legislative model:

- (A) reform to the actus reus of the offence;
- (B) reducing the number of unlawful sexual acts involved in an offence;
- (C) including sexual offences against young people in a relationship of care or authority with the accused;
- (D) removing the requirement for jury unanimity regarding individual acts or occasions of abuse;

<sup>1</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report* (Report, August 2017).

<sup>2</sup> *Crimes Act 1900* (ACT) s 56; *Crimes Act 1900* (NSW) s 66EA; *Criminal Code Act 1983* (NT) sch 1 (‘*Criminal Code* (NT)’) s 131A; *Criminal Code Act 1899* (Qld) sch 1 (‘*Criminal Code* (Qld)’) s 229B; *Criminal Law Consolidation Act 1935* (SA) s 50; *Criminal Code Act 1924* (Tas) sch 1 (‘*Criminal Code* (Tas)’) s 125A; *Crimes Act 1958* (Vic) s 49J; *Criminal Code Act Compilation Act 1913* (WA) app B (‘*Criminal Code* (WA)’) s 321A.

<sup>3</sup> See, eg. Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response (Volume 1)* (Report No 114, October 2010) 1143 [25.56]; Liesl Chapman, *Review of South Australian Rape and Sexual Assault Law: Discussion Paper* (2006) 35 [52]; ACT Law Reform Commission, *Report on the Laws relating to Sexual Assault* (Report No 18, April 2001) 48–51; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children (Part 1)* (Report No 55, June 2000) 74. See also Alannah Brown, ‘A Comparative Study on the Offence of “Maintaining a Sexual Relationship with a Child” in the Northern Territory and Queensland’ (2015) 39(3) *Criminal Law Journal* 148; Martine Powell, Kim Roberts and Belinda Guadagno, ‘Particularisation of Child Abuse Offences: Common Problems When Questioning Child Witnesses’ (2007) 19(1) *Current Issues in Criminal Justice* 64.

- (E) introducing retrospective application of persistent CSA offences; and
- (F) removing the requirement for consent or approval by the Director of Public Prosecutions before the laying of a persistent CSA charge.

Our analysis of the implementation of each of these reform elements in the Australian states and territories (current to April 2022) demonstrates substantial inconsistency, including a failure to implement many of the recommendations, and enactment of reforms that have a different legal effect despite being a formal implementation of the model laws. In particular, reforms in several jurisdictions to make the *actus reus* of the offence an ‘unlawful sexual relationship’ have departed significantly from how that concept was understood at the time of the Royal Commission’s analysis. Given the inherent legal and normative problems of conceptualising persistent CSA in terms of a ‘sexual relationship’, we argue that further reforms should abandon this nomenclature. Our argument is informed by and strongly supports the advocacy undertaken by campaigners and survivors with lived experience, including #LetHerSpeak founder Nina Funnell and 2021 Australian of the Year Grace Tame. Their efforts have influenced specific legislative reforms, especially in Tasmania, concerning the capacity of survivors to identify themselves in the public domain, but also to amend the name of the maintaining offence, and their ongoing work has transformed national discourse about child sexual abuse.<sup>4</sup>

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<sup>4</sup> As a result of sustained campaigning by Nina Funnell, Grace Tame, Tameka Ridgeway, and others, including through the #LetHerSpeak media campaign, the *Evidence Act 2001* (Tas) s 194K was amended to allow publication of a survivor’s name if they were over the age of 18, had freely provided consent in writing and if there were no ongoing proceedings. The relevant provisions in the *Evidence Amendment Act 2020* (Tas) commenced on 6 April 2020. Previously, s 194K prohibited the publication of identifying particulars, including a complainant’s name, in relation to court proceedings. The intention of the provision was to protect the individual’s privacy, but it had the effect of preventing publication of a complainant’s name. For many survivors, this silencing was contrary to their own preference and desire to be able to tell their story. Before reform, the only way to be able to be fully heard on their terms in the public domain was to gain a court order, which was costly, time-consuming, added further trauma, and had an uncertain outcome. Created and managed by journalist and sexual assault survivor advocate Nina Funnell, in partnership with Marque Lawyers, News Corp, and End Rape on Campus Australia, the #LetHerSpeak campaign aimed to abolish laws preventing sexual assault survivors from speaking about their experience and identifying themselves as survivors. Grace Tame’s legal case was a catalyst for the #LetHerSpeak Tasmania campaign, and other arms of the campaign were then established in the Northern Territory, and Victoria: see #LetHerSpeak (Website) <<https://www.letusspeak.com.au/>>. See also generally for accounts of these reforms: Nina Funnell, ‘Let Her Speak Campaign Aims to Ensure All Victims Can Take Back Their Voices’ *ABC* (online, 13 August 2019) <<https://www.abc.net.au/news/2019-08-13/let-her-speak-campaign-tasmania-nt/11405050>>; Lorna Knowles, ‘Finally, She Can Speak’, *ABC* (online, 12 August 2019) <<https://www.abc.net.au/news/2019-08-12/grace-tame-speaks-about-abuse-from-schoolteacher/11393044>>.

At the same time as these reforms, Tasmanian criminal law was amended by the *Criminal Code Amendment (Sexual Abuse Terminology) Act 2020* (Tas) s 5. These reforms, which also commenced on 6 April 2020, renamed some sexual offences to better reflect the seriousness of the crime, and the true nature of the conduct. The offence of ‘maintaining a sexual relationship with a person under the age of 17’ in s 125A was renamed ‘persistent sexual abuse of a child’. However, problematically, despite this change in the name of the offence and the charge, the offence provision itself still refers to ‘maintains a sexual relationship with a young person’ as the act constituting the crime: *Criminal Code* (Tas) (n 2) s 125A(2). Grace Tame emphasised the importance of the change in nomenclature in her 2021 address to the National Press Club, which also provided an unforgettably powerful and insightful call for structural and social reform that should stand as an eternal reminder for the nation:

Given the outstanding need for further reforms, in Part V we outline a path for future reform of Australian persistent CSA laws that achieves the underlying policy objectives of the provisions through a legislative model that defines the offence as ‘persistent sexual abuse’.

## II Child Sexual Abuse: Natural Challenges for Prosecution and the ‘Perverse Paradox’ of Persistent Abuse

### A Natural Features of Child Sexual Abuse and Challenges in Criminal Prosecution

Criminal justice responses to all forms of child sexual abuse are hindered by low rates of reporting, charging, and prosecution, high attrition, fewer guilty pleas and fewer convictions.<sup>5</sup> Several natural features of the phenomenon of child sexual abuse contribute to these poor outcomes, and some of these are particularly salient in foregrounding the analysis in this article. First, as established by a substantial body of evidence, delayed disclosure of child sexual abuse is common in all contexts of sexual abuse.<sup>6</sup> A comprehensive review found that 60–70% of adult survivors did not disclose during childhood.<sup>7</sup> Significantly, studies have consistently found that the tendency towards delayed disclosure is even stronger in cases where the perpetrator is a family member, a close family acquaintance, or an authority figure such as a person occupying a religious or institutional role.<sup>8</sup>

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Grace Tame, ‘Share Your Truth, It Is Your Power’, *The Guardian* (online, 4 March 2021) <<https://www.theguardian.com/commentisfree/2021/mar/04/share-your-truth-it-is-your-power-grace-tames-address-to-the-national-press-club>>. This advocacy has led to proposed amendments in the Australian Capital Territory that would change the heading of the offence from ‘sexual relationship with child or young person under special care’ to ‘persistent sexual abuse of child or young person under special care’: Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 10 February 2022, 218 (Shane Rattenbury, Attorney-General); Family Violence Legislation Amendment Bill 2022 (ACT) cl 36.

<sup>5</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report — Executive Summary and Parts I–II* (Report, 2017) 164–5 (‘*Criminal Justice Report Executive Summary and Parts I–II*’); Judith Cashmore, Alan Taylor and Patrick Parkinson, ‘Fourteen-Year Trends in the Criminal Justice Response to Child Sexual Abuse Reports in New South Wales’ (2020) 25(1) *Child Maltreatment* 85.

<sup>6</sup> See, eg, Kamala London, Maggie Bruck, Stephen J Ceci and Daniel W Shuman ‘Disclosure of Child Sexual Abuse: A Review of the Contemporary Empirical Literature’ in Margaret-Ellen Pipe, Michael E Lamb, Yael Orbach and Ann-Christin Cederborg (eds), *Child Sexual Abuse: Disclosure, Delay, and Denial* (Routledge, 2007) 11; Scott D Easton, ‘Disclosure of Child Sexual Abuse among Adult Male Survivors’ (2013) 41(4) *Clinical Social Work Journal* 344.

<sup>7</sup> London et al (n 6) 18–19.

<sup>8</sup> See, eg, Ramona Alaggia, Delphine Collin-Vézina and Rusan Lateef, ‘Facilitators and Barriers to Child Sexual Abuse (CSA) Disclosures: A Research Update (2000–2016)’ (2019) 20(2) *Trauma, Violence, and Abuse* 260; Charlotte Lemaigre, Emily P Taylor and Claire Gittoes, ‘Barriers and Facilitators to Disclosing Sexual Abuse in Childhood and Adolescence: A Systematic Review’ (2017) 70 *Child Abuse & Neglect* 39; Patrick Parkinson, Kim Oates and Amanda Jayakody, ‘Breaking the Long Silence: Reports of Child Sexual Abuse in the Anglican Church of Australia’ (2010) 6(2) *Ecclesiology* 183; Daniel Smith, Elizabeth J Letourneau, Benjamin E Saunders, Dean G Kilpatrick, Heidi S Resnick, Connie L Best, ‘Delay in Disclosure of Childhood Rape: Results from a National Survey’ (2000) 24(2) *Child Abuse & Neglect* 273.

Second, the reasons for delayed disclosure are related to the dynamics of sexual abuse, which are particularly heightened in cases of persistent victimisation by a known offender. Familial offenders and other offenders who have a close personal relationship with the child, or with whom the child is in a relationship of dependence, exploit this emotional and psychological bond to deter disclosure and keep the abuse secret. In these cases, which are common and represent the archetypical situation of persistent CSA, the child is often systematically groomed<sup>9</sup> at a deep psychological level and may be made to feel special and loved, and given privileges. Offenders often instil in survivors a sense of blame or shared responsibility for the acts, and warn of the child's guilt should any adverse outcome befall the offender as a result of disclosure. Non-disclosure and delays in disclosure are frequently a product of direct threats from the offender, causing the child to fear reprisals either to themselves or to others they care for, such as siblings. Where the offender is a family member, the survivor can fear breakdown of the family. In institutional cases, the survivor will often fear the consequences of disclosing for themselves, such as reprisals, exclusion or the denial of opportunities, and will legitimately fear not being believed because of the offender's status and the institution's culture. In all such cases, the power dynamic between offender and victim exerts a pervasive silencing effect, which magnifies other factors at both the individual level<sup>10</sup> and the societal level,<sup>11</sup> which also tend towards non-disclosure and delayed disclosure. Even where disclosure does occur, it is infrequently to law enforcement agencies.<sup>12</sup> This delay in disclosure creates a natural impediment to the commencement of a criminal prosecution, and the likelihood of a successful prosecution even if commenced.<sup>13</sup>

Third, the potential impact of traumatic events on memory can be significant for criminal prosecution prospects. This arises because of the features of the criminal trial process, including the rigours of cross-examination in an adversarial system, and the high standard of proof where the elements of the offence must be proved beyond reasonable doubt and accepted as such by the jury. Scientific evidence indicates the effects of trauma on memory are not straightforward: some individuals with a trauma history demonstrate deficits in memory performance, but others have superior memory, and in general, survivors of such trauma do not have such

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<sup>9</sup> For a detailed model and explanation of the grooming process, see Georgia M Winters, Elizabeth L Jeglic and Leah E Kaylor, 'Validation of the Sexual Grooming Model of Child Sexual Abusers' (2020) 29(7) *Journal of Child Sexual Abuse* 855.

<sup>10</sup> Although they are never, in reality, to blame for their experience, survivors are often made to feel responsible for the abuse by the offender: see, eg, Lucy Berliner and Jon R Conte, 'The Process of Victimization: The Victims' Perspective' (1990) 14(1) *Child Abuse & Neglect* 29. In addition, survivors may often feel an unwarranted sense of responsibility for the abuse as a way of coping with the experience and maintaining an image of the offender as a good person and the world as a safe place: see, eg, Judith L Herman, *Trauma and Recovery: The Aftermath of Violence — From Domestic Abuse to Political Terror* (Basic Books, 1997) 103–5.

<sup>11</sup> Delphine Collin-Vézina, Mireille De La Sablonnière-Griffin, Andrea M Palmer and Lise Milne, 'A Preliminary Mapping of Individual, Relational and Social Factors that Impede Disclosure of Childhood Sexual Abuse' (2015) 43 *Child Abuse & Neglect* 123.

<sup>12</sup> See, eg, Smith et al (n 8); David Finkelhor, Janis Wolak and Lucy Berliner, 'Police Reporting and Professional Help Seeking for Child Crime Victims: A Review' (2001) 6(1) *Child Maltreatment* 17.

<sup>13</sup> Defence counsel, for example, will seek to cast doubt on the complainant's testimony and credibility, by questioning why the complainant did not tell anyone immediately or earlier than they did, and why they did not take other protective action.

impaired memories to contraindicate involvement in legal processes.<sup>14</sup> Importantly, lapse of time alone has minimal impact on the reliability of memories of significant long-past events, including traumatic events.<sup>15</sup> There is also substantial evidence regarding the validity of memory evidence about events that may have been lost or forgotten.<sup>16</sup> The overall accuracy of such memories means the application of legal processes to such cases remains entirely legitimate, and this applies also to the memory of traumatic events.

Yet, in some circumstances, the recollection of some details of traumatic events can be made more difficult. Some survivors may adopt mechanisms of coping with the traumatic event and the memory of it, which involve avoiding or forgetting memories of specific events and details. That is, while having sound generalised memory of the traumatic events, survivors of childhood trauma may experience difficulty in memory specificity, such that they cannot clearly recall some specific details of a specific episode. These coping mechanisms have been interpreted and referred to in different ways in the scientific literature, including through concepts such as ‘distancing coping’,<sup>17</sup> ‘functional avoidance’,<sup>18</sup> and ‘motivated forgetting’.<sup>19</sup> Studies have indicated that as a natural defence mechanism, individuals are more likely to forget some details of abuse or to have periods of forgetting when they are abused by parents or caregivers.<sup>20</sup> Yet, at the same time, memories are thought to have even greater accuracy where they involve greater traumatic impact.<sup>21</sup>

<sup>14</sup> Gail S Goodman, Deborah Goldfarb, Jodi A Quas, Rachel K Narr, Helen Milojevich and Ingrid M Cordon, ‘Memory Development, Emotion Regulation, and Trauma-Related Psychopathology’ in Dante Cicchetti (ed), *Developmental Psychopathology (Volume 3): Maladaptation and Psychopathology* (John Wiley, 3<sup>rd</sup> ed, 2016) 555 (‘Memory Development’); Gail S Goodman, Jodi A Quas, Deborah Goldfarb, Lauren Gonzalves, Alejandra Gonzalez, ‘Trauma and Long-Term Memory for Childhood Events: Impact Matters’ (2019) 13(1) *Child Development Perspectives* 3 (‘Trauma and Long-Term Memory’).

<sup>15</sup> Goodman et al, ‘Memory Development’ (n 14) 577; Goodman et al, ‘Trauma and Long-Term Memory’ (n 14) 4.

<sup>16</sup> See, eg, Deborah Goldfarb, Gail S Goodman, Rakel P Larson, Mitchell L Eisen, Jianjian Qin, ‘Long-Term Memory in Adults Exposed to Childhood Violence: Remembering Genital Contact Nearly 20 Years Later’ (2019) 7(2) *Clinical Psychological Science* 381; Christin M Ogle, Stephanie D Block, Latonya S Harris, Gail S Goodman, Annarheen Pineda, Susan Timmer, Anthony Urquiza, Karen J Saywitz, ‘Autobiographical Memory Specificity in Child Sexual Abuse Victims’ (2013) 25(2) *Development and Psychopathology* 321; Simona Ghetti, Robin S Edelman, Gail S Goodman, Ingrid M Cordón, Jodi A Quas, Kristen Weede Alexander, Allison D Redlich and David PH Jones, ‘What can Subjective Forgetting Tell Us About Memory for Childhood Trauma?’ (2006) 34(5) *Memory & Cognition* 1011; Kristen Weede Alexander, Jodi A Quas, Gail S Goodman, Simona Ghetti, Robin S Edelman, Allison D Redlich, Ingrid M Cordon, David PH Jones, ‘Traumatic Impact Predicts Long-Term Memory for Documented Child Sexual Abuse’ (2005) 16(1) *Psychological Science* 33.

<sup>17</sup> Latonya S Harris, Stephanie D Block, Christin M Ogle, Gail S Goodman, Else-Marie Augusti, Rakel P Larson, Michelle A Culver, Annarheen R Pineda, Susan G Timmer and Anthony Urquiza, ‘Coping Style and Memory Specificity in Adolescents and Adults with Histories of Child Sexual Abuse’ (2016) 24(8) *Memory* 1078, 1079–80.

<sup>18</sup> J Mark G Williams, Thorsten Barnhofer, Catherine Crane, Dirk Hermans, Filip Raes, Ed Watkins and Tim Dalgleish, ‘Autobiographical Memory Specificity and Emotional Disorder’ (2007) 133(1) *Psychological Bulletin* 122, 134–5.

<sup>19</sup> Michael C Anderson and Simon Hanslmayr, ‘Neural Mechanisms of Motivated Forgetting’ (2014) 18(6) *Trends in Cognitive Sciences* 279.

<sup>20</sup> Jennifer J Freyd, Anne P Deprince and Eileen L Zurbriggen, ‘Self-Reported Memory for Abuse Depends upon Victim-Perpetrator Relationship’ (2001) 2(3) *Journal of Trauma and Dissociation* 5.

<sup>21</sup> Goodman et al, ‘Trauma and Long-Term Memory’ (n 14) 4.

Overall, while individuals' memories of events including traumatic events vary, what is clear is that some survivors of child sexual abuse may, as a result of the lapse of time, protective psychological processes and neuropsychiatric mechanisms, not have comprehensive and consistent memories of specific details of specific abusive events, even where they have strong memories of the general context and other specific details.

## **B A Perverse Paradox: Challenges in Prosecuting Persistent Offending**

The challenge for criminal prosecution posed by these natural features of child sexual offending has been acknowledged since at least the late 1980s by both the judiciary and governments.<sup>22</sup> In the context of persistent CSA, the requirement to provide particulars — the specific details of an alleged crime, sufficient to ensure the accused has fair opportunity to defend the charges — presents significant difficulties for complainants and prosecutors.<sup>23</sup> The result is what Sulan and Stanley JJ of the Supreme Court of South Australia have called 'the perverse paradox that the more extensive the sexual exploitation of a child, the more difficult it can be proving the offence'.<sup>24</sup> *S v The Queen*, a decision by the High Court of Australia in 1989, exemplifies the operation of the criminal justice system in the absence of persistent CSA laws.<sup>25</sup> The appellant had been convicted of three charges of unlawful carnal knowledge on the basis of his daughter's evidence of repeated sexual assaults occurring every couple of months over a number of years. On appeal to the Western Australia Court of Criminal Appeal, Brinsden J had summarised the difficulty confronting the Court:

In a nutshell the problem is this. The appellant having been convicted of three counts of unlawful carnal knowledge (incest), one in each year, and there having been, on the daughter's evidence, at least in every year three acts of intercourse, in respect of what act of intercourse in each year was the appellant convicted?<sup>26</sup>

The majority of the Court of Criminal Appeal dismissed that first appeal. However, the High Court disagreed, holding that the trial amounted to a miscarriage of justice, since the state of the particulars had deprived the defendant of an opportunity to raise a defence, the complainant's evidence did not have a clear relationship with the charged acts, and that evidence was not sufficient to assure the Court that the jurors had unanimously agreed on the same three acts.<sup>27</sup> The High Court quashed the convictions and sent the matter for retrial.

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<sup>22</sup> See, eg, DG Sturgess, *An Inquiry into Sexual Offences involving Children and Related Matters* (Office of the Director of Prosecutions (Qld), 1986); Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children (Part 1)* (Report No 55, June 2000) ch 4; and below (n 26) and accompanying text.

<sup>23</sup> See Powell, Roberts and Guadagno (n 3) 64; Brown (n 3) 150–1; Dayna M Woiwod and Deborah A Connolly, 'Continuous Child Sexual Abuse: Balancing Defendants' Rights and Victims' Capabilities to Particularize Individual Acts of Repeated Abuse' (2017) 42(2) *Criminal Justice Review* 206, 207.

<sup>24</sup> *R v Johnson* [2015] SASFC 170, [2].

<sup>25</sup> *S v The Queen* (1989) 168 CLR 266.

<sup>26</sup> *S* (1988) 39 A Crim R 288, 297.

<sup>27</sup> *S v The Queen* (n 25) 274–6 (Dawson J), 279–81 (Toohey J), 287 (Gaudron and McHugh JJ).

The tendency of this application of the law to produce unjust outcomes in cases of persistent CSA was acknowledged almost immediately in subsequent decisions. In *Podirsky v The Queen*, the Western Australia Court of Criminal Appeal acknowledged that an effect of *S v The Queen* was that ‘notwithstanding clear and cogent evidence of a course of conduct involving repeated acts of sexual intercourse’<sup>28</sup> the requirement of particularisation had not been met, since:

the Crown have found it impossible to identify any particular act with sufficient precision to enable any one offence to be charged. This means that unless the law is changed there is a possibility that the more acts of intercourse or other acts of sexual abuse and the greater the length of time over which they occur, the more difficult it may be to establish that any one of a series of multiple offences has been committed. Some reform would seem desirable to cover cases where there is evidence of such a course of conduct.<sup>29</sup>

Subsequently, between 1989 and 1998 all Australian states and territories enacted offences enabling multiple alleged acts to be particularised as a single persistent CSA offence.<sup>30</sup> Despite subsequent reviews and reforms, those offences have generally not been successful in achieving this objective.<sup>31</sup> Most recently, the Royal Commission examined this issue, and made recommendations for law reform to establish a nationally consistent, effective legislative regime to enable the prosecution of persistent CSA.

### III The Royal Commission into Institutional Responses to Child Sexual Abuse

On 12 November 2012, the then Prime Minister, Julia Gillard, announced the establishment of a royal commission to address mounting public concern about the endemic failings of Australian institutions to respond to allegations and incidents of child sexual abuse.<sup>32</sup> The Royal Commission became the largest in Australia’s history, and its size and scope provided an unprecedented opportunity for examination of the topic.<sup>33</sup> The Commission’s three-volume *Criminal Justice Report*

<sup>28</sup> *Podirsky v The Queen* (1990) 3 WAR 128, 136 (Malcolm CJ, Wallace and Walsh JJ).

<sup>29</sup> *Ibid* 135 (Malcolm CJ, Wallace and Walsh JJ).

<sup>30</sup> *Crimes (Amendment) Act (No 3) 1991* (ACT) s 3; *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* (NSW) sch 1 [2]; *Criminal Code Amendment Act (No 3) 1994* (NT) s 7; *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 23; *Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 1994* (SA) s 3; *Criminal Code Amendment (Sexual Offences) Act 1994* (Tas) s 4; *Crimes (Sexual Offences) Act 1991* (Vic) s 3; *Acts Amendment (Sexual Offences) Act 1992* (WA) s 6.

<sup>31</sup> See above n 3.

<sup>32</sup> Phillip Coorey and Josephine Tovey, ‘Gillard Acts on Sex Abuse Claims: Nationwide Royal Commission: No Organisation Will Escape Investigation’, *The Sydney Morning Herald* (Sydney, 13 November 2012) 1; Department of the Prime Minister and Cabinet (Cth), ‘Establishment of Royal Commission into Child Sexual Abuse’ (Media Release, 12 November 2012) <<https://pmtranscripts.pmc.gov.au/release/transcript-18905>>.

<sup>33</sup> For further discussion of the significance and legacy of the Royal Commission, see Katie Wright, Shurlee Swain and Kathleen McPhillips, ‘The Australian Royal Commission into Institutional Responses to Child Sexual Abuse’ (2017) 74 *Child Abuse & Neglect* 1; Katie Wright and Shurlee Swain, ‘Speaking the Unspeakable, Naming the Unnameable: The Royal Commission into

focused on ‘ensuring justice for victims through ... processes for referral for investigation and prosecution’,<sup>34</sup> in accordance with paragraph (d) of the Royal Commission’s Letters Patent. In keeping with the scope of its remit, the Royal Commission reviewed the operation of persistent CSA laws in the context of institutional child sexual abuse.<sup>35</sup> However, it expected implementation of its recommendations ‘to improve the response to all forms of child sexual abuse in all contexts’.<sup>36</sup>

The Royal Commission heard evidence demonstrating scant progress in resolving the legal difficulties of prosecuting persistent CSA over a number of decades, even while knowledge of the dynamics of this type of offending has improved. The Commission considered a 2016 trial on charges of child sexual offences alleged to have occurred in the 1980s, which resulted in an acquittal.<sup>37</sup> Conducting the trial by judge alone, Frearson DCJ displayed sympathetic awareness of the difficulties faced by complainants providing evidence of persistent CSA, saying that although the complainant’s evidence was ‘replete with confusion and inconsistency ... confusion and inconsistency is probably what one would expect had he been sexually abused as he says.’<sup>38</sup> His Honour concluded that he was ‘well satisfied that the accused did sexually abuse the complainant at school and I reject his blanket denial as a reasonable possibility.’<sup>39</sup> However, for the purposes of the criminal trial, Frearson DCJ was required to ask not whether the abuse occurred, but whether he was satisfied beyond reasonable doubt ‘of the particular instances that are said to found the particular charges’.<sup>40</sup> The Royal Commission concluded that the resulting acquittal:

raises the issue of whether a criminal justice response can be said to be reasonably available to condemn and punish child sexual abuse if an accused is acquitted in circumstances where the judge was ‘well satisfied’ that the accused sexually abused the complainant.<sup>41</sup>

The Royal Commission’s legal analysis was complemented by a review of empirical research on the effects of CSA on memory and the ability of complainants to draw on memory to provide evidence in criminal proceedings.<sup>42</sup> Reflecting the findings of research discussed above, the review of empirical research concluded that the

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Institutional Responses to Child Sexual Abuse’ (2018) 42(2) *Journal of Australian Studies* 139; Michael Mintrom, Deirdre O’Neill and Ruby O’Connor, ‘Royal Commissions and Policy Influence’ (2021) 80(1) *Australian Journal of Public Administration* 80; Michael Salter, ‘The Transitional Space of Public Inquiries: The Case of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse’ (2020) 53(2) *Australian & New Zealand Journal of Criminology* 213.

<sup>34</sup> *Criminal Justice Report Executive Summary and Parts I–II* (n 5) 7.

<sup>35</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report — Parts III–VI* (Report, 2017) ch 11 (‘*Criminal Justice Report Parts III–VI*’).

<sup>36</sup> *Criminal Justice Report Executive Summary and Parts I–II* (n 5) 7.

<sup>37</sup> *R v Rafferty* (New South Wales District Court, Frearson DCJ, 25 August 2016) (‘*Rafferty*’), discussed in *Criminal Justice Report Parts III–VI* (n 35) 12–16.

<sup>38</sup> *Rafferty* (n 37) 8.

<sup>39</sup> *Ibid* 16.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Criminal Justice Report Parts III–VI* (n 35) 65.

<sup>42</sup> Jane Goodman-Delahunty, Mark A Nolan and Evianne L Van Gijn-Grosvenor, *Empirical Guidance on the Effects of Child Sexual Abuse on Memory and Complainants’ Evidence* (Royal Commission into Institutional Responses to Child Sexual Abuse, July 2017).

requirement for particulars distinguishing distinct events in the context of repeated, ongoing abuse, places unjustifiable and unrealistic expectations on complainants.<sup>43</sup>

The Royal Commission concluded that specific criminal offences were necessary in each state and territory to achieve the policy objective of enabling prosecution and conviction, where warranted by the evidence, in cases of persistent CSA. Those offences would be ones that:

do not require particularisation in a manner inconsistent with the ways in which complainants remember the child sexual abuse they suffered  
allow for the effective charging and successful prosecution of repeated but largely indistinguishable occasions of child sexual abuse.<sup>44</sup>

### *A The Royal Commission's Law Reform Recommendations*

Based on this legal and social science analysis, the Royal Commission proposed a legislative model intended to implement a nationally consistent and effective approach to the prosecution of persistent CSA.<sup>45</sup> Its model was the Queensland offence,<sup>46</sup> ‘maintaining an unlawful sexual relationship with a child’.<sup>47</sup> At the time of the Royal Commission, Queensland was the leading jurisdiction measured by use of the charge.<sup>48</sup> The Royal Commission identified several features of the Queensland offence that, in its view, provided effective framing of a persistent CSA offence. First, the Queensland provision defines the actus reus as the maintenance of an unlawful sexual relationship. What the jury must agree on is the existence of that unlawful sexual relationship, rather than specific acts or occasions of sexual offending.<sup>49</sup> Second, the Queensland law expressly provides that particulars of any unlawful sexual acts are not required to be alleged or proven.<sup>50</sup> Finally, since the 2003 reforms, the Queensland provision has specified that the jury need not unanimously agree that the same unlawful sexual acts occurred.<sup>51</sup> Together, these

<sup>43</sup> *Ibid* 144–5.

<sup>44</sup> *Criminal Justice Report Parts III–VI* (n 35) 66.

<sup>45</sup> *Royal Commission into Institutional Responses to Child Sexual Abuse: Criminal Justice Report — Parts VII–X and Appendices* (Report, 2017) Appendix H (‘*Criminal Justice Report Parts VII–X and Appendices*’).

<sup>46</sup> *Criminal Justice Report Parts III–VI* (n 35) 71.

<sup>47</sup> *Criminal Code* (Qld) (n 2) s 229B.

<sup>48</sup> *Criminal Justice Report Parts III–VI* (n 35) 30–4. Based on publicly available data, this remains the case, with consent to prosecute given in 104 matters in 2019–20: Office of the Director of Public Prosecutions (Qld), *Annual Report 2019–20*, 17. By comparison, the Northern Territory reported no indictments in that year: Director of Public Prosecutions (NT), *Annual Report 2019–2020*, 18. Further direct comparison is difficult, with Victoria and Tasmania publishing information on the number of people sentenced, rather than charged. Victoria reported that nine people were sentenced for the charge in 2019–20: Sentencing Advisory Council (Vic), *Persistent Sexual Abuse of a Child under 16: Sentencing Trends in the Higher Courts of Victoria 2015–16 to 2019–20* (Sentencing Snapshot 257, August 2021). Tasmania reports more frequent use, averaging 14 sentences per year for the period 2001–14: see Sentencing Advisory Council (Tas), ‘Supreme Court Sentencing Statistics’ <<https://www.sentencingcouncil.tas.gov.au/statistics/supremecourt>>. No more recent information appears to be available. The ACT, NSW, SA, and WA do not appear to publish information on the use of their persistent CSA charge.

<sup>49</sup> *Criminal Code* (Qld) (n 2) s 229B(3).

<sup>50</sup> *Ibid* s 229B(4).

<sup>51</sup> *Ibid* s 229B(4)(c).

elements allow for evidence of multiple unparticularised acts to prove an offence, consistent with the type of evidence complainants were able to provide.<sup>52</sup>

The Royal Commission compared the Queensland offence to the South Australian offence in effect at the time (persistent sexual exploitation of a child),<sup>53</sup> which had proven effective in the prosecution of persistent CSA, but had recently been read down effectively to exclude cases where the jury was unable to delineate specific acts of sexual exploitation.<sup>54</sup> The Queensland offence was also preferable to the Victorian course of conduct charge, since that provision only captures repetitive offending of the same type.<sup>55</sup> In the view of the Royal Commission, the main legal defect with the Queensland offence was the absence of retrospective effect.<sup>56</sup> Accordingly, the Royal Commission recommended that each state and territory government should amend its persistent CSA offence to adopt a legislative model,<sup>57</sup> based on the Queensland offence, where:

- a. the actus reus is the maintaining of an unlawful sexual relationship
- b. an unlawful sexual relationship is established by more than one unlawful sexual act
- c. the trier of fact must be satisfied beyond reasonable doubt that the unlawful sexual relationship existed but, where the trier of fact is a jury, jurors need not be satisfied of the same unlawful sexual acts
- d. the offence applies retrospectively but only to sexual acts that were unlawful at the time they were committed
- e. on sentencing, regard is to be had to relevant lower statutory maximum penalties if the offence is charged with retrospective application.<sup>58</sup>

## ***B The ‘Sexual Relationship’ Problem***

Despite endorsing the Queensland model, the Royal Commission had clear reservations about the use of the term ‘sexual relationship’, with its positive connotations of mutuality and romance, to denote persistent sexual offending against children.<sup>59</sup> Nevertheless, the Royal Commission preferred that the term be adopted in all states and territories because there was substantial precedent from the Queensland courts regarding its effective interpretation, and the operation of the offence in Queensland satisfactorily dealt with concerns that modifying the requirement for particulars created an inherent risk of unfairness to the accused.<sup>60</sup>

<sup>52</sup> *Criminal Justice Report Parts III–VI* (n 35) 39.

<sup>53</sup> *Criminal Law Consolidation Act 1935* (SA) s 50, as at 23 November 2008.

<sup>54</sup> *Criminal Justice Report Parts III–VI* (n 35) 68, referring to *R v Johnson* (n 24).

<sup>55</sup> *Criminal Justice Report Parts III–VI* (n 35) 70, referring to *Criminal Procedure Act 2009* (Vic) sch 1, cl 4A.

<sup>56</sup> *Criminal Justice Report Parts III–VI* (n 35) 68.

<sup>57</sup> *Criminal Justice Report Parts VII–X and Appendices* (n 45) Appendix H.

<sup>58</sup> *Criminal Justice Report Parts III–VI* (n 35) 74 (Recommendation 21).

<sup>59</sup> *Ibid* 71.

<sup>60</sup> *Ibid* 24, 71, 73. The Royal Commission noted that the High Court of Australia had twice declined to grant special leave to appeal to applicants arguing that the Queensland provision inherently results

We maintain there is a compelling case for not using the term ‘sexual relationship’ in either the title of the provisions or their content, and that reform of this nomenclature would achieve congruence with social science understandings of child sexual abuse and secure subsequent benefits in jurisprudential logic and consistency. As we have argued elsewhere, these reservations are firmly grounded in theory, including recognition that the concept of a ‘sexual relationship’ embeds harmful myths about child sexual abuse into the law.<sup>61</sup> As will be seen in the analysis below, particularly in Pt IV(A) regarding reform to the actus reus, the use of the term has resulted in legislative inefficiency and lack of clarity, and has required contorted judicial reasoning to overcome its inherent problems. The departure of other state and territory courts from the Queensland Court of Appeal’s interpretation of the term undermines the Royal Commission’s reasoning in favour of its adoption. Moreover, abandoning use of this term has high social policy value and restores public confidence in the criminal justice system, as shown by the justifiably trenchant opposition to the use of ‘relationship’ terminology in these provisions. These considerations underpin our proposal for a legislative model that achieves the policy objectives identified by the Royal Commission without perpetuating the use of the term ‘sexual relationship’ to describe persistent sexual offending against children. The creation of such an offence will require comprehensive reform not just of the parts of the provisions that describe the offence, but to each of the remaining elements considered below.

#### IV Implementing Reform to Persistent Child Sexual Abuse Laws

Table 1 summarises key features of the laws in each Australian state and territory compared to the Royal Commission’s recommended legislative model. This shows that four of the eight Australian states and territories now have persistent CSA laws where the actus reus is a ‘relationship’, in line with the Royal Commission’s recommendations. However, critical analysis of those reforms demonstrates the ongoing challenge of drafting an effective persistent CSA law conceptualised as an ‘unlawful sexual relationship’, as the recent tranche of legislative amendments has resulted in offences that operate substantially differently to the Queensland offence that formed the basis of the recommendation. As a result, new issues arise, such as the distinction between *acts* and *occasions* of abuse.

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in unfairness to the accused: at 24, see *MAW v The Queen* [2008] HCATrans 335; *CAZ v The Queen* [2012] HCATrans 244.

<sup>61</sup> See Elizabeth Dallaston and Ben Mathews, “‘Unlawful Sexual Relationships’: A Comparative Analysis of Criminal Laws against Persistent Child Sexual Abuse in Queensland and South Australia” (2021) 42(1) *Adelaide Law Review* 1, 19–20.

**Table 1:** Implementation of key Royal Commission recommendations (as at April 2022)

<b>Jurisdiction*</b>	<b>Actus reus</b>	<b>Number of acts/ occasions</b>	<b>Age of young person in a relationship of authority or special care</b>	<b>Removal extended, unanimous</b>
<b>Model Provisions</b>	<b>Relationship</b>	<b>2</b>	<b>&lt;18</b>	<b>Yes</b>
ACT	✓	✓	✓	✓
NSW	✓	✓	✗	✓
NT	✗	✗	✗	✗
Qld	✓	✓	✗	✓
SA	✓	✓	✓	✓
Tas	✗	✗	✗	✓
Vic	✗	✗	✗	✗
WA	✗	✗	✗	✗

\* Australian Capital Territory ('ACT'); New South Wales ('NSW'); Northern Territory ('NT'); Queensland ('Qld'); South Australia ('SA'); Tasmania ('Tas'); Victoria ('Vic'); Western Australia ('WA').

Meanwhile, multiple recommended reforms remain overdue. Failure to implement reforms in a cohesive manner has resulted in offences in several jurisdictions that use the terminology of an ‘unlawful sexual relationship’, but do not operate as ‘relationship’ offences. Substantive inequalities persist between states and territories, such as a higher number of instances of sexual offending required to constitute the offence, and the absence of retrospective effect that would enable the prosecution of historic crimes. Even where substantial reform has been implemented, the recommendation that a higher age should apply for complainants where there is a relationship of authority between the complainant and the accused has not been widely adopted, for reasons that are unclear. Other features of earlier persistent CSA laws that did not feature in the Royal Commission’s recommendations, such as the requirement for prosecutorial consent, have persisted. Our critical analysis in Part IV examines these problems and informs our recommendations for reform in Part V.

### ***A Reforming the Actus Reus: ‘Maintaining an Unlawful Sexual Relationship’***

Australian persistent CSA offences may broadly be categorised depending on whether the actus reus is an unlawful sexual relationship, or multiple occasions of sexual offending. Queensland’s offence, ‘maintaining an unlawful sexual relationship’, is an example of the former category.<sup>62</sup> In contrast, the Victorian offence ‘persistent sexual abuse of a child’ is committed if an adult ‘sexually abuses’ a child under 16 ‘on at least 3 occasions during a particular period’.<sup>63</sup> Reform to the actus reus was a fundamental feature of the Royal Commission’s recommendations. Significant legislative reforms to implement this recommendation have occurred in South Australia, the Australian Capital Territory, and New South Wales.<sup>64</sup> The result of these reforms has been the creation of ‘relationship’ offences that operate substantially differently to Queensland’s, while four states and territories have retained offences comprising multiple occasions of offending. A comparison of the actus reus of each current offence is provided in Table 2. It is not immediately clear from the wording alone how the actus reus in each jurisdiction is defined, and further explanation is provided in the following three sections.

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<sup>62</sup> *Criminal Code* (Qld) (n 2) s 229B.

<sup>63</sup> *Crimes Act 1958* (Vic) s 49J(1).

<sup>64</sup> *Crimes Legislation Amendment Act 2018* (ACT) s 4; *Royal Commission Criminal Justice Legislation Amendment Act 2020* (ACT) s 6; *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 cl 20; *Statutes Amendment (Attorney-General’s Portfolio) (No 2) Act 2017* (SA) s 6.

**Table 2:** Actus reus of Australian persistent child sexual abuse offences (as at April 2022)

Actus reus	Jurisdiction	Offence provision	Defin
An unlawful sexual relationship (maintained by continuity or habituality of sexual contact) involving more than one unlawful sexual act	Qld	Any adult who maintains an unlawful sexual relationship with a child under the age of 16 years commits a crime.	An un that in any pe
A relationship involving more than one unlawful sexual act	ACT	A person commits an offence if the person—  (a) is an adult; and  (b) engages in a relationship with a child, or a young person under the special care of the adult, that involves more than 1 sexual act.	A rela interac nature
	NSW	An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.	An un which sexual period
	SA	An adult who maintains an unlawful sexual relationship with a child is guilty of an offence.	An un which sexual period

Actus reus	Jurisdiction	Offence provision	Defin
Unlawful sexual acts committed on three or more occasions	NT	Any adult who maintains a relationship of a sexual nature with a child under the age of 16 years is guilty of an offence...	A pers against offence an off child
	Tas	A person who maintains a sexual relationship with a young person who is under the age of 17 years... is guilty of a crime.	An acc partic unlaw on at l
	Vic	A person (A) commits an offence if...	(a) A least 3  (b) B the wh
	WA	A person who persistently engages in sexual conduct with a child under the age of 16 years is guilty of a crime...	[A] pe with a relatio which

### 1 *The Queensland Offence: An ‘Unlawful Sexual Relationship’*

The original Queensland provision was intended to make it an offence to maintain an unlawful sexual relationship with a child, but a historical analysis demonstrates that the offence must be precisely drafted to have this effect. As the High Court of Australia concluded in the 1997 decision *KBT v The Queen*, it is not sufficient to provide that it is an offence to maintain an unlawful sexual relationship if the fact of that relationship is proven by multiple occasions of abuse.<sup>65</sup> At that time, the *Criminal Code Act 1899* (Qld) (*‘Criminal Code (Qld)’*) relevantly provided that:

(1) Any adult who maintains an unlawful relationship of a sexual nature with a child under the age of 16 years is guilty of a crime and is liable to imprisonment for 7 years.

(1A) A person shall not be convicted of the offence defined in subsection (1) unless it is shown that the offender ... has, during the period in which it is alleged that the offender maintained the relationship in issue with the child, done an act defined to constitute an offence of a sexual nature in relation to the child ... on 3 or more occasions ...<sup>66</sup>

In the view of the High Court, the terms of s 229B(1A) required that what must be proven were acts on three or more occasions. This, and not the maintenance of an unlawful sexual relationship, formed the actus reus of the offence. The evidence must therefore permit a jury to unanimously agree which occasions have been proven.<sup>67</sup> This requirement undermined the fundamental purpose of persistent CSA laws, to make conviction possible even when the evidence provided by a complainant does not enable discrete offences to be particularised.<sup>68</sup> Although *KBT* concerned the Queensland law, the legislation in all other states and territories was substantially similar and was construed accordingly.<sup>69</sup>

The Queensland offence was redrafted in 2003 to restore the original legislative intention.<sup>70</sup> The law expressly provides that a jury must be satisfied beyond reasonable doubt that the ‘unlawful sexual relationship’ existed,<sup>71</sup> but need not agree on which alleged unlawful sexual acts were done by the accused during the period of the relationship,<sup>72</sup> removing the need for what has been called ‘extended’<sup>73</sup> jury unanimity. Crucially, however, judicial decisions have established that the prosecution must also demonstrate the accused maintained the relationship

<sup>65</sup> *KBT v The Queen* (1997) 191 CLR 417, 423 (Brennan CJ and Toohey, Gaudron and Gummow JJ), 431 (Kirby J) (*‘KBT’*).

<sup>66</sup> *Criminal Code* (Qld) (n 2) s 229B, as at 26 March 1994.

<sup>67</sup> *KBT* (n 65) 422–3 (Brennan CJ and Toohey, Gaudron and Gummow JJ).

<sup>68</sup> Brown (n 3) 155; *Criminal Justice Report Parts III–VI* (n 35) 18–20.

<sup>69</sup> Brown (n 3) 155; *Criminal Justice Report Parts III–VI* (n 35) 18–20. The operation of offences in other states and territories after the decision in *KBT* is discussed in the following sections.

<sup>70</sup> Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 13–14. See also Table 2 in this article.

<sup>71</sup> *Criminal Code* (Qld) (n 2) s 229B(3).

<sup>72</sup> *Ibid* s 229B(4).

<sup>73</sup> *R v Little* (2015) 123 SASR 414, 417 [12].

by sexual contact that is *continuous* and *habitual*.<sup>74</sup> This limits the scope of the provision and, most problematically, appears to draw from characteristics of (consensual) sexual relationships between adults to delineate a course of criminal sexual offending against children.<sup>75</sup>

## 2 Reformed 'Relationship' Offences

South Australia, the Australian Capital Territory, and New South Wales now have persistent CSA offences framed as a 'relationship'. The experience in the Australian Capital Territory, where initial reforms encountered a similar difficulty to that identified in *KBT*, demonstrate the ongoing challenges of effectively drafting an offence of this type. A notable outcome in each of these jurisdictions is a departure from the Queensland approach. The key difference is that there is no requirement to prove that the relationship has been maintained through continuous and habitual sexual contact.

### (a) South Australia

South Australia reformulated its persistent CSA provision in 2017, with an express intention to effect the recommendations of the Royal Commission.<sup>76</sup> Initially, the offence was applied in a manner reflecting the Queensland position, where proof was required of a relationship in which the adult engaged in unlawful sexual acts, and that the relationship was maintained by the accused through continuity or habituality of sexual contact.<sup>77</sup> However, in two significant decisions of the South Australian Court of Criminal Appeal, this construction was categorically rejected.<sup>78</sup> Instead, the relationship that must be proved, and which the jury must unanimously agree existed, may be *any* relationship falling within a wide and open category including familial, domestic, working, recreational, and professional relationships between adults and children.<sup>79</sup> Maintenance of a relevant relationship is proven by the accused's knowledge of the circumstances that constituted the relationship, which includes all interactions between the accused and the complainant and any positions of authority held by the accused in relation to the complainant.<sup>80</sup> This provides the South Australian offence with a much wider scope compared to the Queensland offence.

<sup>74</sup> See, eg, *R v Kemp (No 2)* [1998] 2 Qd R 510, 511–12 (Macrossan CJ), 518 (Mackenzie J); *R v S* [1999] 2 Qd R 89, 94; *R v DAT* [2009] QCA 181, [12]–[13] (Holmes JA, Muir JA agreeing at [20]), [22] (McMurdo J); *R v CAZ* [2012] 1 Qd R 440, 457 [46] (Fraser JA, Chesterman and White JJA agreeing at 460 [57]–[58]); *R v SCE* [2014] QCA 48, [5] (McMurdo P).

<sup>75</sup> The problems with this are fully articulated in Dallaston and Mathews (n 61).

<sup>76</sup> *Criminal Law Consolidation Act 1935* (SA) s 50, as at 24 October 2017, substituted by the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) s 6; South Australia, *Parliamentary Debates*, Legislative Council, 19 October 2017, 8021 (Kyam Maher).

<sup>77</sup> See, eg, *R v Hamra* [2018] SADC 33, 2 [2]; *R v Keyte* [2018] SADC 22, 2 [10]; *R v F, KV* [2019] SADC 53, 22 [78].

<sup>78</sup> *R v M, DV* (2019) 133 SASR 470; *R v Mann* (2020) 135 SASR 457.

<sup>79</sup> *R v Mann* (n 78) 465–6 [26]–[28], [32] (Kourakis CJ, Kelly J agreeing at 468 [36], Peek J agreeing at 468 [37]).

<sup>80</sup> *Ibid* 464 [20] (Kourakis CJ).

(b) *Australian Capital Territory*

The Australian Capital Territory has twice enacted reforms intended to implement the Royal Commission's recommendations, after a first attempt proved ineffective.<sup>81</sup> In *KN v The Queen*, the Australian Capital Territory Court of Appeal was required to interpret the new offence.<sup>82</sup> The provision before the Court made it an offence for an adult to 'maintain a sexual relationship with a young person or a person under special care', and specified that 'the trier of fact must be satisfied beyond reasonable doubt that a sexual relationship existed', but also 'baldly'<sup>83</sup> stated that an adult maintains such a relationship 'if on two or more occasions ... the adult engages in a sexual act'.<sup>84</sup> The clarity of this latter expression, reminiscent of the Queensland version of the offence considered in *KBT*, did not allow the Court to construct the actus reus as anything other than those two or more occasions of sexual offending.<sup>85</sup> Murrell CJ and Rangiah J acknowledged the failure of this construction to give effect to the express intention to implement a 'relationship' offence as recommended by the Royal Commission.<sup>86</sup>

Subsequently, a revised provision was enacted to ensure a relationship formed the actus reus of the offence.<sup>87</sup> The new offence appears to embed the South Australian approach, defining a 'relationship' as including 'repeated contact, interaction, engagement or association, of a sexual nature or otherwise'.<sup>88</sup> This definition is intended to 'to refer to the way in which the perpetrator and complainant are connected, rather than to connote any particular class or kind of relationship'.<sup>89</sup> In a further departure from the Queensland approach, the revised provision removes the word 'maintaining', requiring that the relationship has simply been engaged in, rather than maintained.<sup>90</sup> References to an 'unlawful sexual relationship' or a 'sexual relationship' have been replaced by the unqualified term 'relationship'.<sup>91</sup> This appears to exclude the imposition of a requirement that the relationship must be one that involves habitual sexual contact. A Bill presented on 10 February 2022 would

<sup>81</sup> Regarding the first reforms, see *Crimes Act 1900 (ACT)* s 56, as at 2 March 2018, substituted by *Crimes Legislation Amendment Act 2018 (ACT)* s 4; Explanatory Memorandum, Crimes Legislation Amendment Bill (No 2) 2017 (ACT).

<sup>82</sup> *KN v The Queen* (2019) 14 ACTLR 289 ('*KN*').

<sup>83</sup> *Ibid* 294 [22] (Murrell CJ and Rangiah J).

<sup>84</sup> *Crimes Act 1900 (ACT)* s 56, as at 2 March 2018.

<sup>85</sup> *KN* (n 82) 302 [63] (Murrell CJ and Rangiah J); 307 [90] (Mossop J).

<sup>86</sup> *Ibid* 303 [70] (Murrell CJ and Rangiah J). Mossop J attributed this result to an 'unexplained' (at 307 [90]) drafting decision to incorporate wording from the earlier provision rather than adopting the language of either the model provisions or the Queensland offence on which they were based: *ibid* 306–7 [89]–[90].

<sup>87</sup> *Crimes Act 1900 (ACT)* s 56, as at 1 September 2020; Explanatory Statement, Royal Commission Criminal Justice Legislation Amendment Bill 2020 (ACT) 31 ('ACT Explanatory Statement').

<sup>88</sup> *Crimes Act 1900 (ACT)* s 56(2)(a).

<sup>89</sup> Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 2 July 2020, 1473 (Gordon Ramsay, Attorney-General).

<sup>90</sup> ACT Explanatory Statement (n 87) 32.

<sup>91</sup> *Ibid* 33, referring to the new s 56(8), which replaced s 56(9). For example, while the previous provision specified that there was no requirement for 'members of the jury to agree on which sexual acts constitute the sexual relationship', the current provision specifies there is no need for 'members of the jury to agree on the same sexual acts involved in the relationship': *Crimes Act 1900 (ACT)* s 56(5)(c), as at 2 March 2018; *Crimes Act 1900 (ACT)* s 56(4)(c).

remove the remaining reference to an ‘unlawful sexual relationship’ in the heading to the section.<sup>92</sup>

(c) *New South Wales*

New South Wales introduced its original offence, persistent sexual abuse of a child, in 1998.<sup>93</sup> No reform was made to overcome the result of *KBT* until 2018, when the offence was substituted to implement the Royal Commission’s recommendations.<sup>94</sup> The new offence adopts the wording of the Royal Commission’s model provisions to define the actus reus as ‘maintaining an unlawful sexual relationship with a child’.<sup>95</sup>

These reforms have not yet been the subject of extensive judicial consideration, and it is unclear whether the offence will operate in a similar manner to South Australia’s counterpart offence. The provision is expressed in similar terms to the South Australian offence, and in a recent criminal trial, the New South Wales District Court held that:

‘A relationship’ is a way of describing the nature of the connection between two or more people. Here, it is whether there was a relationship between the accused and the complainant ...

In determining whether the relationship was an unlawful sexual relationship, the Court must also be satisfied beyond reasonable doubt that the accused committed two or more unlawful sexual acts with or toward the complainant during the period identified ...

‘Maintained’ has its ordinary everyday meaning. That is, carried on, kept up or continued.<sup>96</sup>

This expression of the offence echoes the South Australian approach, and contains no reference to the kinds of considerations regarding habituality or continuity of sexual contact that apply in Queensland. However, Mahony SC DCJ also directed himself that there must be ‘an ongoing relationship of a sexual nature between [the accused] and [each complainant]’ and proof of ‘some continuity or habituality of sexual conduct’.<sup>97</sup> In the only available appellate decision, the Court of Criminal Appeal accepted that ‘maintaining an unlawful sexual relationship’ was a distinct element of the offence, but did not address its interpretation.<sup>98</sup> The construction of this provision therefore remains unclear.

<sup>92</sup> Family Violence Legislation Amendment Bill 2022 (ACT) cl 36.

<sup>93</sup> *Crimes Act 1900* (NSW) s 66EA, as at 15 January 1999, inserted by the *Crimes Legislation Amendment (Child Sexual Offences) Act 1998* (NSW) sch 1 [2].

<sup>94</sup> *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 cl 20; New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, 5 (Mark Speakman, Attorney-General).

<sup>95</sup> *Crimes Act 1900* (NSW) ss 66EA(1)–(2).

<sup>96</sup> *R v O’Toole* [2020] NSWDC 431, [5]. See also *R v CEM* [2020] NSWDC 537, [76]–[79].

<sup>97</sup> *R v O’Toole* (n 96) [362].

<sup>98</sup> *Xerri v R* [2021] NSWCCA 268, [93]–[97] (Price J; Bell P agreeing at [1]).

### 3 ‘Multiple Occasions’ Offences

The Northern Territory, Tasmania, Victoria, and Western Australia have retained their offences largely as they existed before the Royal Commission. Although the provisions are diverse, and have followed different reform pathways, in each case the actus reus is multiple occasions of sexual offending. A notable feature is that three of these states — Tasmania, Victoria, and Western Australia — have amended their legislation to avoid labelling the crime an ‘unlawful sexual relationship’.

#### (a) ‘Relationship’ Offences in Name Only: The Northern Territory and Tasmania

The Northern Territory’s persistent CSA provision closely follows the wording of the original Queensland provision and is in substantially the same form as first enacted in 1994.<sup>99</sup> Citing *KBT*, the Northern Territory’s Court of Criminal Appeal has held the actus reus to be the commission of unlawful sexual acts on three or more occasions.<sup>100</sup> A draft Bill that would have implemented the current Queensland approach in the Northern Territory was released for consultation in 2014, but does not appear to have progressed further.<sup>101</sup>

A similar situation exists in Tasmania, where the offence is expressed as maintaining an unlawful relationship with a young person,<sup>102</sup> but has been treated as requiring proof only of multiple occasions of abuse.<sup>103</sup> Reforms in 2020 renamed the charge from ‘maintaining a sexual relationship with a young person’ to ‘persistent sexual abuse of a child or young person’ to better reflect the nature of the crime.<sup>104</sup> This reform took place after a review of the language used generally in the *Criminal Code Act 1924* (Tas) sch 1 (‘*Criminal Code* (Tas)’) to describe sexual offences and complainants,<sup>105</sup> but did not include amendment to the wording of the provision.

<sup>99</sup> *Criminal Code* (NT) (n 2) s 131A. Minor amendments were made by the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT) s 8.

<sup>100</sup> *Kelly v The Queen* (2010) 27 NTLR 181, 183 [3]; *PDW v The Queen* (2009) 25 NTLR 72, 79 [9]–[10]. See also *PW v The Queen* [2020] NTCCA 1, [3]; Brown (n 3) 156–7.

<sup>101</sup> Criminal Code Amendment (Sexual Offences) Bill 2014 (NT) cl 11.

<sup>102</sup> *Criminal Code* (Tas) (n 2) s 125A(2).

<sup>103</sup> See, eg, the statement of Blow CJ that ‘the crime of maintaining a sexual relationship with a young person under the age of 17 years is committed when an offender commits an unlawful sexual act in relation to a particular young person on at least three occasions’: *DJT v Tasmania* (2018) 28 Tas R 109, 112 [6]. See also *Director of Public Prosecutions (Tas) v Harington*, in which Pearce J said that ‘the crime of maintaining a sexual relationship with a young person ... requires proof of at least three unlawful sexual acts against a young person’,<sup>103</sup> and did not identify any further requirement to prove the maintenance of a relationship: *DPP (Tas) v Harington* (2017) 27 Tas R 128, 141 [42]. It is also an element of the offence that the young person is not married to the accused: *Criminal Code* (Tas) (n 2) s 125A(3)(b).

<sup>104</sup> *Criminal Code Amendment (Sexual Abuse Terminology) Act 2020* (Tas) s 5; Tasmania, Legislative Assembly, *Parliamentary Debates*, 18 March 2020, 39 (Elise Archer, Minister for Justice).

<sup>105</sup> Department of Justice (Tasmania), *Renaming Sexual Offences: Removing Outdated Language in Chapter XIV of the Criminal Code Act 1924* (Proposal Paper, December 2019) 8–9 <[https://www.justice.tas.gov.au/\\_data/assets/pdf\\_file/0008/554840/Proposal-Paper-for-Renaming-of-Chapter-XIV-Sexual-Offences-FINAL.pdf](https://www.justice.tas.gov.au/_data/assets/pdf_file/0008/554840/Proposal-Paper-for-Renaming-of-Chapter-XIV-Sexual-Offences-FINAL.pdf)>.

(b) *'Persistent Sexual Abuse of a Child': Victoria and Western Australia*

Reforms in both Victoria and Western Australia have replaced their original 'relationship' offences with offences framed as 'persistent sexual abuse of a child', but which continue to require proof of multiple occasions of sexual offending. As a result, these provisions do not achieve the substantive goal of the actus reus recommended by the Royal Commission. However, along with the Tasmanian law, they avoid the problematic use of 'relationship' terminology.

Victoria's original persistent CSA offence made it an offence to maintain a sexual relationship with a child under the age of 16.<sup>106</sup> This offence initially differed in several respects from the original Queensland offence, but most of those differences were removed from 1998.<sup>107</sup> As in other states and territories, the actus reus of the crime was held to be the commission of acts on three or more occasions.<sup>108</sup> In 2006, the offence was amended to remove 'relationship' terminology, becoming 'persistent sexual abuse of a child under the age of 16',<sup>109</sup> in recognition that the offence was 'actually sexual abuse not a "sexual relationship"'.<sup>110</sup> Subsequent reforms have retained the name 'persistent sexual abuse of a child', and largely retained the elements of the earlier offence.<sup>111</sup>

Western Australia's original persistent CSA offence made it a crime to have a sexual relationship with a child under the age of 16, defined as doing an act that would constitute a prescribed offence in relation to the child on three or more occasions, each of which is on a different day.<sup>112</sup> The offence was reformed in 2008 with the aim of overcoming the effect of *KBT*.<sup>113</sup> The reformed provision prohibits persistent sexual conduct with a child under 16 years of age,<sup>114</sup> which is defined similarly to the previous offence (that is, the doing of a sexual act on three or more occasions, each on a different day).<sup>115</sup> It also amended the title to remove the term

<sup>106</sup> *Crimes Act 1958* (Vic) s 47A, as at 5 August 1991, inserted by *Crimes (Sexual Offences) Act 1991* (Vic) s 3.

<sup>107</sup> Unlike Queensland, this offence was proven by three or more occasions of the *same kind* of sexual act: *Crimes Act 1958* (Vic) s 47A(2)(a) (at 5 August 1991). Subsequent amendments removed the requirement that the child had been under the care, supervision, or authority of the accused, that the sexual offences be of the same kind, and that the accused and the complainant were not married: *Crimes (Amendment) Act 1997* (Vic) s 5, effective 1 January 1998; *Crimes Amendment (Sexual Offences and Other Matters) Act 2014* (Vic) s 5, effective 22 October 2014.

<sup>108</sup> *KRM v The Queen* (2001) 206 CLR 221, 236 [41] (McHugh J), 245 [67] (Gummow and Callinan JJ), 256 [102] (Kirby J), 265 [137] (Hayne J).

<sup>109</sup> *Crimes (Sexual Offences) Act 2006* (Vic) s 11.

<sup>110</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 16 November 2005, 2185 (Rob Hulls, Attorney-General).

<sup>111</sup> *Crimes Amendment (Sexual Offences) Act 2016* (Vic) s 16, commencing 1 July 2017; Explanatory Memorandum, Crimes Amendment (Sexual Offences) Bill 2016 (Vic) 30. This reform included the renumbering of the offence provision, which is now *Crimes Act 1958* (Vic) s 49J.

<sup>112</sup> *Criminal Code* (WA) (n 2) s 321A, as at 1 August 1992, inserted by *Acts Amendment (Sexual Offences) Act 1992* (WA) s 6.

<sup>113</sup> *Criminal Law and Evidence Amendment Act 2008* (WA) s 10; Western Australia, *Parliamentary Debates*, Legislative Assembly (22 June 2006) 4212 (James (Jim) McGinty, Attorney-General).

<sup>114</sup> *Criminal Code* (WA) (n 2) s 321A.

<sup>115</sup> *Ibid* s 321A(2).

‘relationship with’ from the title of the offence, which, it was said, implied ‘an element of mutuality or consent and [is] considered inappropriate’.<sup>116</sup>

#### 4 *Further Reforms to the Actus Reus*

Further reform to the actus reus is required in the Northern Territory, Tasmania, Victoria, and Western Australia to achieve the legislative model recommended by the Royal Commission. However, we would argue that a return to the language of an ‘unlawful sexual relationship’ in Tasmania, Victoria, and Western Australia would be a retrograde step and is not necessary. Instead, we argue that the intended purpose of reform may be achieved by an offence that defines the actus reus as ‘persistent sexual abuse’.<sup>117</sup>

### ***B Reducing the Number of Unlawful Acts***

The Royal Commission recommended that ‘an unlawful sexual relationship is established by more than one unlawful sexual act’.<sup>118</sup> In the model laws, this was expressed through the definition of an unlawful sexual relationship as ‘a relationship in which an adult engages in 2 or more unlawful sexual acts with or towards a child over any period.’<sup>119</sup> A historical analysis of the provisions demonstrate a trend towards a lower number of unlawful acts as jurisdictions undertake reform. This occurred in Queensland in 2003, South Australia in 2008, and in New South Wales and the Australian Capital Territory in reforms following the Royal Commission.<sup>120</sup> Meanwhile, offending conduct on at least three occasions is still required under the unreformed provisions of the Northern Territory, Tasmania, Victoria, and Western Australia.<sup>121</sup> The imposition of a higher number of instances of CSA in some jurisdictions represents a substantive legal inequality, and its continuance is difficult to justify.

#### *‘Acts’ or ‘Occasions’*

Notably, the Royal Commission’s recommendations elided the distinction between ‘acts’ and ‘occasions’ of offending conduct. While the purpose of the reforms was to enable a criminal justice response to ‘repeated but largely indistinguishable occasions of child sexual abuse’,<sup>122</sup> the resulting recommendations specified more than one *act*, and this approach has been adopted in the reforms of the Australian Capital Territory, New South Wales, and South Australia. The distinction is not

<sup>116</sup> Explanatory Memorandum, Criminal Law and Evidence Amendment Bill 2006 (WA) 3.

<sup>117</sup> See below Part V(A).

<sup>118</sup> *Criminal Justice Report Parts III–VI* (n 35) 74 (Recommendation 21(b)).

<sup>119</sup> *Criminal Justice Report Parts VII–X and Appendices* (n 45) 552 (Appendix H, cl 3(2)).

<sup>120</sup> *Crimes Legislation Amendment Act 2018* (ACT) s 4; *Royal Commission Criminal Justice Legislation Amendment Act 2020* (ACT) s 6; *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* (NSW) sch 1 cl 20; *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 18; *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 7.

<sup>121</sup> *Criminal Code* (NT) (n 2) s 131A(3); *Criminal Code* (Tas) (n 2) s 125A(3)(a); *Crimes Act 1958* (Vic) s 49J(1)(a); *Criminal Code* (WA) (n 2) s 321A(2).

<sup>122</sup> *Criminal Justice Report Parts III–VI* (n 35) 66 (emphasis added).

often in issue, and the terms may be used interchangeably even where legislation expressly requires evidence that unlawful sexual acts occurred on multiple occasions.<sup>123</sup> This distinction no longer exists under the Queensland law and, arguably, is unnecessary because proof of the maintenance of a relationship requires evidence of sexual conduct that is habitual and continuous.<sup>124</sup>

The significance of this distinction may be illustrated by considering that some cases of child sexual abuse involve multiple ‘acts’ occurring once only, at one particular time; for example, in the same event, the offender may expose themselves, touch the child, and force the child to touch them. These various acts involve several offences, but do not constitute the type of persistent sexual abuse occurring at different times to which these offence provisions are directed.

The distinction between acts and occasions has renewed significance in jurisdictions with reformed ‘relationship’ offences where the construction of a ‘relationship’ has departed from the Queensland example. In those jurisdictions, it appears possible that multiple unlawful sexual acts occurring on a single occasion, where there is a relationship (which need not be sexual) between the accused and the complainant, would theoretically satisfy the elements of the offence.

In the remaining jurisdictions where there is a requirement for multiple occasions of offending,<sup>125</sup> this is understood as requiring ‘a clear separation in time or circumstance between the acts’<sup>126</sup> or acts that are not ‘proximate in time and circumstance’.<sup>127</sup> Thus, in the Northern Territory case *Kelly v The Queen*, the Court of Criminal Appeal allowed an appeal on the basis that only two occasions of offending, involving four unlawful sexual acts, had been proven.<sup>128</sup>

The prospect of an offence that operates without any requirement for abuse persisting over time — and not within a single event — is not justified by, or congruent with, the policy rationale of the offences. The current laws in South Australia, the Australian Capital Territory, and New South Wales, theoretically enable this inappropriate outcome. Accordingly, we would recommend that further reforms provide that unlawful sexual acts must occur *on two or more occasions*.

<sup>123</sup> See, eg, Pearce J’s summary of the Tasmanian offence as comprising multiple constituent acts that met the legislative definition of an unlawful sexual act, and reference to the restricted particularisation requirement regarding ‘the dates on which any of the unlawful sexual acts were committed or the exact circumstances in which any of the unlawful sexual acts were committed’: *DPP (Tas) v Harington* (n 103) 141–2 [42]–[43] (emphasis added).

<sup>124</sup> See above Part IV(A)(1).

<sup>125</sup> The current provisions of the Northern Territory and Tasmania continue to require evidence of unlawful sexual acts on at least three occasions: *Criminal Code* (NT) (n 2) s 131A(3); *Criminal Code* (Tas) (n 2) s 125A(3)(a). The Victorian offence (persistent sexual abuse of a child) requires evidence of sexual abuse on at least three occasions (*Crimes Act 1958* (Vic) s 49J(1)(a)). In Western Australia (persistent sexual conduct with a child), the sexual acts must be done on three or more occasions, and it is simply stated that each must be on a different day: *Criminal Code* (WA) (n 2) s 321A(2).

<sup>126</sup> *Tognolini v The Queen* (2011) 32 VR 104, 106.

<sup>127</sup> *Kelly v The Queen* (n 100) 186 [20].

<sup>128</sup> *Ibid* 186–7 [16]–[21] (Riley J, Martin CJ agreeing at 182 [1], Kelly J agreeing at 187 [22]).

### **C The Age of ‘a Child’ or Young Person under Care or Authority**

It is clearly an element of all persistent CSA offences that the complainant is a child at the time of the offending conduct. The model provisions extend the definition of a child to include all children under the age of 16, as well as those under the age of 18 where the accused is an adult in a special relationship of trust or authority with the child.<sup>129</sup> This is phrased in the model provisions as applicable where the complainant, during the period of the alleged offence, is ‘under the special care of’ the accused.<sup>130</sup> In the model provisions, a person (the child) will be under the special care of an adult if:

- (a) the adult is the parent, step-parent, guardian or foster parent of the child or the de facto partner of a parent, step-parent, guardian or foster parent of the child, or
- (b) the adult is a school teacher and the child is a pupil of the school teacher, or
- (c) the adult has an established personal relationship with the child in connection with the provision of religious, sporting, musical or other instruction to the child, or
- (d) the adult is a custodial officer of an institution of which the child is an inmate, or
- (e) the adult is a health professional and the child is a patient of the health professional, or
- (f) the adult is responsible for the care of the child and the child has a cognitive impairment.<sup>131</sup>

The maximum age of a complainant at the time of the alleged offence varies between jurisdictions in line with the general age of consent to sexual intercourse.<sup>132</sup> The relevant age is 16 in the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Victoria, and Western Australia,<sup>133</sup> and 17 in South Australia and Tasmania.<sup>134</sup> Only the Australian Capital Territory and South Australia have increased the relevant age of the complainant to 18 in the context of a relationship of special care or authority.<sup>135</sup>

This cannot be explained by differences in the general criminal law regarding the age of consent, since the majority of states and territories have a higher age of consent where there is a relationship of care or authority between the accused and

<sup>129</sup> *Criminal Justice Report Parts VII–X and Appendices* (n 45) 552 (Appendix H, Jurisdictional note).

<sup>130</sup> *Ibid* 551 (Appendix H, cl 2(1)(b) (definition of ‘child’)).

<sup>131</sup> *Ibid* 551 (Appendix H, cl 2(2)).

<sup>132</sup> *Crimes Act 1900* (ACT) s 55(2); *Crimes Act 1900* (NSW) s 66C; *Criminal Code* (NT) (n 2) s 127; *Criminal Code* (Qld) (n 2) s 215; *Criminal Law Consolidation Act 1935* (SA) s 49; *Criminal Code* (Tas) (n 2) s 124; *Crimes Act 1958* (Vic) s 49B; *Criminal Code* (WA) (n 2) s 321.

<sup>133</sup> *Crimes Act 1900* (ACT) s 55; *Crimes Act 1900* (NSW) s 66C; *Criminal Code* (NT) (n 2) s 127; *Criminal Code* (Qld) (n 2) s 215; *Crimes Act 1958* (Vic) s 49B; *Criminal Code* (WA) (n 2) s 321.

<sup>134</sup> *Criminal Law Consolidation Act 1935* (SA) s 49; *Criminal Code* (Tas) (n 2) s 124.

<sup>135</sup> *Crimes Act 1900* (ACT) ss 56(1)(b), 56(12) (definition of ‘young person’); *Criminal Law Consolidation Act 1935* (SA) ss 50(12), (13).

the complainant.<sup>136</sup> This is the case in every jurisdiction except Queensland and Tasmania, and even in those states the exercise of authority over another may vitiate consent.<sup>137</sup> The result is that New South Wales, the Northern Territory, Victoria, and Western Australia have a higher age of consent to sexual intercourse in the context of a relationship of care or authority, but the persistent CSA offence only applies to conduct before the complainant reaches the age of 16.

It is not clear why this aspect of the reforms has not been widely implemented, given the widespread adoption and apparent acceptance of the policy rationale for position of authority offences. While some differences between jurisdictions is to be expected, as for the general age of consent, discrepancies within jurisdictions are more difficult to reconcile. This element of the model provisions should be implemented, most clearly in those states and territories where a higher age of consent already applies within relationships of authority or care.

### **D Removing the Requirement for ‘Extended Jury Unanimity’**

The Royal Commission’s view was that persistent CSA offences must ‘not require particularisation in a manner inconsistent with the ways in which complainants remember the child sexual abuse they suffered’.<sup>138</sup> All persistent CSA laws in Australia expressly provide for a modification of the common law requirement for particulars of any alleged unlawful sexual acts, which is intended to achieve this objective.<sup>139</sup> However, this modification alone has been demonstrably inadequate when all members of a jury are required to reach unanimous agreement that the same occasions of sexual offending occurred.<sup>140</sup> Consequently, the Royal Commission’s recommendation was that the law in each jurisdiction should also specify that ‘jurors need not be satisfied of the same unlawful sexual acts’.<sup>141</sup> At the time, this had only been effected in Queensland.<sup>142</sup>

Since the Royal Commission published its recommendations, the High Court has indicated a greater willingness to accept a deductive process of reasoning in cases of persistent, undifferentiated offending of the same type. This arose in *Hamra v The Queen*, which concerned the South Australian law immediately preceding the 2017 reforms.<sup>143</sup> The High Court affirmed the position of the South Australian Court of Criminal Appeal that, while a jury must be able to delineate two or more acts in order to reach agreement, those acts need not be differentiated by reference to the

<sup>136</sup> *Crimes Act 1900* (ACT) s 55A; *Crimes Act 1900* (NSW) s 73; *Criminal Code* (NT) (n 2) s 128; *Criminal Law Consolidation Act 1935* (SA) s 49(5) (a person in a position of authority in relation to the person under 18); *Crimes Act 1958* (Vic) s 49C (‘under care, supervision or authority’); *Criminal Code* (WA) (n 2) s 322.

<sup>137</sup> See *Criminal Justice Report Parts III–VI* (n 35) 99–101.

<sup>138</sup> *Ibid* 66.

<sup>139</sup> *Crimes Act 1900* (ACT) s 56(5); *Crimes Act 1900* (NSW) ss 66EA(4), (5)(b); *Criminal Code* (NT) (n 2) s 131A(3); *Criminal Code* (Qld) (n 2) ss 229B(4)(a)–(b); *Criminal Law Consolidation Act 1935* (SA) s 50(4)(a), (b); *Criminal Code* (Tas) (n 2) s 125A(4)(a); *Crimes Act 1958* (Vic) s 49J(4); *Criminal Code* (WA) (n 2) s 321A(5)(b).

<sup>140</sup> Or a statutory majority: eg, *Juries Act 1927* (SA) s 57(1).

<sup>141</sup> *Criminal Justice Report Parts III–VI* (n 35) 74 (Recommendation 21).

<sup>142</sup> *Ibid* 25.

<sup>143</sup> *Hamra v The Queen* (2017) 260 CLR 479.

circumstances of each occasion.<sup>144</sup> The opinion of the High Court was that nothing in ‘the common law nor s 50 ... precludes a judge or jury from deducing a conclusion by simple and obvious logic’.<sup>145</sup> Therefore, in the case before the Court:

It was open to conclude that there were two or more acts of sexual exploitation committed if, for instance, the judge concluded beyond reasonable doubt that the appellant committed the [same type of] acts of sexual exploitation every time he stayed over, which was nearly every weekend for months, and possibly years, from when B was thirteen or possibly fourteen.<sup>146</sup>

Shortly after this decision, the South Australian law was replaced with the current offence. It remains unclear whether unreformed persistent CSA offences in other states or territories could now accommodate conviction by a judge or jury on the basis of evidence of undifferentiated offending in some instances.<sup>147</sup> Implementation of the Royal Commission’s recommendation in those jurisdictions would resolve this uncertainty.

In most jurisdictions, removing the requirement for extended jury unanimity operates in concert with the establishment of an alternative element which becomes the actus reus of the offence. In Queensland, jury unanimity rests on the existence of a relationship that must be maintained by the accused through continuity or habituality of sexual contact.<sup>148</sup> The reformed ‘relationship’ offences created after the Royal Commission have operated similarly, although the requirements of proof of that relationship are different.<sup>149</sup>

The removal of extended jury unanimity may take on a different complexion in jurisdictions where the actus reus remains multiple occasions of sexual offending. In the Australian Capital Territory, Murrell CJ and Rangiah J were disquieted by the result of the first attempted reforms that no jury unanimity was required on the conduct comprising the offence, especially given the severity of punishment of up to 25 years’ imprisonment.<sup>150</sup> In South Australia, only Blue J was prepared to countenance a construction of the reformed offence as a multiple occasions offence without extended jury unanimity.<sup>151</sup> Kourakis CJ described that result as a ‘radical

<sup>144</sup> Ibid 497–8, citing *R v Hamra* (2016) 126 SASR 374, 389 [47] (Kourakis CJ, Kelly J agreeing at 393 [67], Nicholson J agreeing at 413 [135], Lovell J agreeing at 414 [137]).

<sup>145</sup> *Hamra v The Queen* (n 143) 493 [28].

<sup>146</sup> Ibid 494 [33].

<sup>147</sup> See, eg, the *Victorian Criminal Charge Book*, which cautions that the conclusion in *Hamra v The Queen* (n 143) was at odds with the Victorian position but that, since the High Court’s decision concerned the South Australian offence, ‘it is not known whether [*Crimes Act 1958* (Vic)] s 49J is relevantly similar to s 50 of the *Criminal Law Consolidation Act 1935* (SA) such that previous Victorian decisions on s 47A and s 49J have been qualified or overruled’: Judicial College of Victoria, *Victorian Criminal Charge Book* (online at 17 February 2021) [7.3.22] <<https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#64929.htm>>.

<sup>148</sup> See cases cited above n 74.

<sup>149</sup> See above Part IV(A)(2). In Western Australia, jury unanimity is not required only if there is evidence of sexual acts on four or more occasions and as long as ‘the jury is satisfied that the accused person persistently engaged in sexual conduct in the period specified’: *Criminal Code* (WA) (n 2) s 321A(11).

<sup>150</sup> *KN* (n 82) 294 [22], 302 [63] (Murrell CJ and Rangiah J).

<sup>151</sup> *R v M, DV* (n 78) 488 [62].

departure<sup>152</sup> from the ‘cardinal principle’<sup>153</sup> of criminal law that there be a conduct element proved beyond reasonable doubt to the satisfaction of the jury. The current Tasmanian provision is therefore an anomaly, since the requirement for extended jury unanimity regarding occasions of abuse was removed without further amendment to the actus reus, which remains the commission of unlawful sexual acts against a young person on three or more occasions.<sup>154</sup>

Therefore, while the Royal Commission’s recommendations in this area should be implemented in the Northern Territory, Victoria, and Western Australia to provide certainty and equitable access to an effective means of prosecuting persistent CSA, this reform should not be implemented without attention to the appropriate definition of the actus reus.

### ***E Introducing Retrospectivity***

Evidence heard by the Royal Commission in case studies and in testimony from prosecutors indicated that modern persistent CSA provisions could, if made retrospective, enable prosecutions of historic child sexual offences that would otherwise not have a reasonable prospect of success.<sup>155</sup> The Royal Commission therefore recommended that persistent CSA provisions should be made retrospective, subject to caveats described below.

The recommendation is significant, since it is an entrenched principle of Australian law that criminal liability should not be imposed retrospectively.<sup>156</sup> While Australian legislatures are constitutionally empowered to impose such liability,<sup>157</sup> the courts regard this exercise of legislative power as exceptional and require unambiguous expression that this is the legislative intention.<sup>158</sup> This principle reflects values of fairness and justice,<sup>159</sup> and protection from retrospective criminal liability may be regarded as a human right.<sup>160</sup> Retrospectivity is less offensive when

<sup>152</sup> Ibid 476 [15].

<sup>153</sup> Ibid 475 [14], quoting *R v McCarthy* (2015) 124 SASR 190, 197 [5].

<sup>154</sup> See above n 103 and accompanying text.

<sup>155</sup> *Criminal Justice Report Parts III–VI* (n 35) 30; Royal Commission, Transcript of Public Hearing Case Study 11 (Day WA18): Examination of B Fiannaca (Deputy Director of Public Prosecutions (WA)) (5 May 2014) WA2023; Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No 33: The Response of The Salvation Army (Southern Territory) to Allegations of Child Sexual Abuse at Children’s Homes That It Operated* (July 2016) 136; Royal Commission, Transcript of Public Hearing Case Study 33 (Day C112): Examination of A Kimber (Director of Public Prosecutions (SA)) (14 October 2015) T11758:20–T11759:9.

<sup>156</sup> See, eg, William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1<sup>st</sup> ed, 1765) vol 1, 46; *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 534 (Mason CJ) (‘*Polyukhovich*’).

<sup>157</sup> *R v Kidman* (1915) 20 CLR 425, 451 (Higgins J).

<sup>158</sup> *Maxwell v Murphy* (1957) 96 CLR 261, 267 (Dixon CJ); *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 478 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). See generally D Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2019) 357 [10.1].

<sup>159</sup> Dan Meagher, ‘Two Reflections on Retrospectivity in Statutory Interpretation’ (2018) 29(3) *Public Law Review* 224, 229.

<sup>160</sup> See, eg, *Human Rights Act 2019* (Qld) s 35(1); *Charter of Human Rights and Responsibilities* (Vic) s 27(1); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 15(1).

the wrongfulness of the conduct, regardless of its legality, ought to have been apparent at the time.<sup>161</sup>

Appropriately, the Royal Commission's recommendation was that retrospective application should only apply to sexual acts that were unlawful at the time they were committed.<sup>162</sup> Given concerns about the imposition of modern penalties to historic offences,<sup>163</sup> the Royal Commission also recommended that crimes committed before the introduction of the relevant original persistent CSA offence should be sentenced according to the lower maximum penalties applicable to those earlier offences.<sup>164</sup>

At the time of the Royal Commission, only South Australia and Tasmania had laws that operated retrospectively.<sup>165</sup> Subsequently, reforms giving retrospective effect to the provisions have been implemented in the Australian Capital Territory, New South Wales, and Queensland.<sup>166</sup> The effect of retrospectivity for persistent CSA offences is not to criminalise previously permissible conduct, nor is it to impose modern sentencing standards on earlier times. Rather, it makes it possible to provide a criminal justice response to historic crimes, reflecting a better understanding of the dynamics of such offending.<sup>167</sup> This reform is clearly justified and should be implemented in the Northern Territory, Victoria, and Western Australia.

### ***F The Requirement for Director of Public Prosecutions Approval***

In most states and territories, the approval of the Director of Public Prosecutions ('DPP') or Attorney-General is legislatively required before a persistent CSA offence may be charged.<sup>168</sup> The only exception is South Australia, where it was required under the original formulation of the offence, but was omitted in the reforms of 2008 and 2017.<sup>169</sup> The Royal Commission made no specific recommendation on this issue, but, notably, its model provisions do not require such approval. Evidence suggests the additional requirement impedes appropriate prosecution of offences, and there is no compelling evidence to date that absence of the requirement leads to unjust or inefficient outcomes.

Generally, the requirement for DPP consent for prosecution is an exceptional requirement, imposed to avoid the inappropriate laying of charges. This is justified, for example, for crimes involving sensitive or controversial events, or where

<sup>161</sup> See *R v Snow* (1915) 20 CLR 315, 335 (Isaacs J); *Polyukhovich* (n 156) 643 (Dawson J).

<sup>162</sup> *Criminal Justice Report Parts III–VI* (n 35) 74 (Recommendation 21(d)).

<sup>163</sup> See, eg, testimony from Legal Aid NSW quoted in *ibid* 59. See also *ibid* 69.

<sup>164</sup> *Criminal Justice Report Parts III–VI* (n 35) 69–70, 74 (Recommendation 21(e)).

<sup>165</sup> *Ibid* 21; *Criminal Law Consolidation Act 1935* (SA) s 50(6), as at 23 November 2008, and in the current form of the offence; *Criminal Code* (Tas) (n 2) s 125A(1).

<sup>166</sup> *Crimes Act 1900* (ACT) s 56(2)(b); *Crimes Act 1900* (NSW) s 66EA(7); *Criminal Code* (Qld) (n 2) ss 746–8.

<sup>167</sup> *Criminal Justice Report Parts III–VI* (n 35) 69. See also New South Wales, *Parliamentary Debates*, Legislative Assembly, 6 June 2018, 5 (Mark Speakman, Attorney-General).

<sup>168</sup> *Crimes Act 1900* (ACT) s 56(10); *Crimes Act 1900* (NSW) s 66EA(14); *Criminal Code* (NT) (n 2) s 131A(9); *Criminal Code* (Qld) (n 2) s 229B(6); *Criminal Code* (Tas) (n 2) s 125A(7); *Crimes Act 1958* (Vic) s 49J(9); *Criminal Code* (WA) (n 2) s 321A(7).

<sup>169</sup> See *Criminal Law Consolidation Act 1935* (SA) s 74(10), as at 28 July 1994.

prosecution raises significant public policy considerations.<sup>170</sup> In the case of persistent CSA laws, this requirement is theoretically underpinned by a recognition that these laws must navigate a tension between preserving a defendant's right to a fair trial while enabling an effective criminal justice response.<sup>171</sup> For example, when the requirement was first imposed in South Australia, it was explained that requiring that the decision to prosecute be made solely by the DPP in accordance with best charging practices was the least complicated and most effective way of answering criticism that the laws eroded the rights of the accused and created the potential for abuse.<sup>172</sup>

However, all prosecutorial decisions are made under guidelines where the paramount criterion is the public interest, including whether the admissible evidence is capable of establishing the offence, whether there is a reasonable prospect of conviction, and whether other discretionary factors indicate prosecution should not proceed.<sup>173</sup> The other discretionary factors include consideration of whether the proceedings would be unduly harsh or oppressive. It is not clear that these comprehensive guidelines are insufficient to protect against inappropriate prosecution decisions.<sup>174</sup> Moreover, while the practical effect of the requirement for DPP approval is not entirely clear, there is concern it impedes use of the provision,<sup>175</sup> and it plainly presents another step that must be taken to facilitate prosecution and may implicitly deter its use. It has been argued that the requirement treats complainants in persistent CSA matters with unjustified suspicion and hostility.<sup>176</sup>

<sup>170</sup> See, eg, Director of Public Prosecutions (ACT), *The Prosecution Policy of the Australian Capital Territory* (1 April 2021) 14 [3.10]; Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (19 July 2021) 8 [2.24].

<sup>171</sup> For example, the Tasmanian policy suggests that if the particulars are sufficient, it is preferable to charge the alleged unlawful sexual acts as individual crimes: Director of Public Prosecutions (Tas), *Prosecution Policy and Guidelines* (16 December 2021) 25.

<sup>172</sup> South Australia, *Parliamentary Debates*, Legislative Council, 20 April 1994, 541 (Trevor Griffin, Attorney-General).

<sup>173</sup> Director of Public Prosecutions (ACT) (n 170); Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines* (March 2021); Office of the Director of Public Prosecutions (NT), *Guidelines of the Director of Public Prosecutions* (2016); Department of Justice and Attorney-General (Qld), *Director's Guidelines* (30 June 2016); Director of Public Prosecutions (SA), *Statement of Prosecution Policy & Guidelines* (October 2014); Director of Public Prosecutions (Tas) (n 171); Director of Public Prosecutions (Vic), *Policy of the Director of Public Prosecutions for Victoria* (24 January 2022); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1 September 2018). See also Natalie Hodgson, Judy Cashmore, Nicholas Cowdery, Jane Goodman-Delahunty, Natalie Martschuk, Patrick Parkinson, Martine B Powell and Rita Shackel, 'The Decision to Prosecute: A Comparative Analysis of Australian Prosecutorial Guidelines' (2020) 44(3) *Criminal Law Journal* 155, 158–9.

<sup>174</sup> Similarly, other checks are built into the criminal justice system to protect the defendant's right to a fair trial. For example, judicial officers presiding over criminal trials have the power to stay proceedings if they determine the state of particulars available will result in unfairness to the accused: *Walton v Gardiner* (1993) 177 CLR 378, 393 (Mason CJ, Deane and Dawson JJ).

<sup>175</sup> For example, the Office of the Director of Public Prosecutions (NSW) informed the earlier Family Violence inquiry that the novelty of the provisions had originally justified this requirement, but in the light of experience it was no longer needed: Australian Law Reform Commission and New South Wales Law Reform Commission (n 3) 1144 [25.61].

<sup>176</sup> For example, the then Shadow Attorney-General of South Australia Chris Sumner stated in relation to the original provision in that State:

As suggested by its omission from the Royal Commission's model law, there seems no compelling justification for the requirement of DPP approval to continue in future reforms.

## V Future Reforms to Australian Persistent Child Sexual Abuse Laws

Two overarching themes emerge from this account of the current state of persistent CSA law in Australian jurisdictions. First, many necessary reforms have not been undertaken. The consequence is that in several states and territories, it is doubtful whether, in the words of the Royal Commission, 'a criminal justice response can be said to be reasonably available to condemn and punish child sexual abuse'.<sup>177</sup> Second, it is now clear that persistent CSA reforms in Australia cannot be regarded as a national implementation of the Queensland approach. As a result, much of the Royal Commission's reasoning for basing its recommendations on the Queensland offence no longer apply. In the eyes of the Royal Commission, it was a strength of the Queensland offence that it had been the subject of substantial judicial interpretation. This factor was significant enough that the Royal Commission was prepared to set aside the inappropriate connotations of the term 'relationship' to conceptualise persistent CSA. The newly reformed provisions in South Australia, the Australian Capital Territory, and New South Wales do not have that advantage.

The operation of the reformed 'relationship' offences highlights the limited value of this terminology. The interpretation of the offence in those jurisdictions results from the sound application of principles of legislative interpretation and avoids the interpolation of concepts more appropriate to consensual sexual relationship between adults into the criminal law of persistent CSA. There is no clear advantage to labelling the actus reus of a persistent CSA charge a 'relationship', since the existence of a relationship will rarely be in issue, and does not represent the essence of the offending conduct. As a result, there is little justification for the continued use of this terminology in future reforms.

### *Achieving an Optimal Legislative Model*

Based on this analysis, we propose that an optimal legislative model is one where:

#### **1. The actus reus is persistent sexual abuse of a child.**

The most significant element of the Royal Commission's recommendations, that the actus reus of each persistent CSA offence should be maintaining an unlawful sexual relationship, remains outstanding in the Northern Territory, Tasmania, Victoria, and

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given the philosophical concerns about the sidelining of victims in the criminal justice process, and given that in some other jurisdictions victims can go along in tandem with the prosecutor (with the State), it would be a retrograde step in our system to take away a right that a victim currently has of bringing a person before a court during a committal hearing. That is why I oppose it.

South Australia, *Parliamentary Debates*, Legislative Council, 20 April 1994, 541.

<sup>177</sup> *Criminal Justice Report Parts III–VI* (n 35) 65.

Western Australia. However, we argue that the Royal Commission's conclusion that this is the better formulation of the offence can no longer be supported. A preferable definition of the actus reus that achieves the policy objective of the laws without the significant legal and normative shortcomings of 'relationship' terminology is 'persistent sexual abuse of a child'.

**2. Persistent sexual abuse is established by sexual abuse committed against a child on more than one occasion.**

Reform to require only two instances of abuse has been implemented in all states with 'relationship' offences, but remains outstanding in the Northern Territory, Tasmania, Victoria, and Western Australia. However, where reforms have eliminated the need for more than one *occasion* of abuse, this element should be restored. This could be expressed in the legislation by describing the relevant conduct as an accused engaging in sexual abuse of a child on 'two or more occasions'.

**3. Sexual abuse is any act that constitutes, or would constitute (if sufficiently particularised), a sexual offence against a child or young person.**

While it is appropriate that the maximum age of 'a child' for the purposes of a persistent CSA offence varies in line with the statutory age of consent in different states and territories, all jurisdictions other than Queensland and Tasmania now recognise that relationships of care and authority over a young person create a power imbalance that negates their consent to sexual activity. Most jurisdictions do not recognise this type of offending as an unlawful sexual act for the purposes of their persistent CSA provision. This creates a legal anomaly that should be addressed in further reforms.

**4. The trier of fact must be satisfied beyond reasonable doubt that the accused engaged in persistent sexual abuse of a child but, where the trier of fact is a jury, jurors need not be satisfied of the same occasions of abuse.**

The requirement for extended jury unanimity regarding individual occasions of abuse must be removed to enable the intended operation of these laws, bearing in mind that this reform must be accompanied by the definition of an alternative actus reus.

**5. The offence applies retrospectively, encompassing sexual acts that were unlawful at the time.**

The argument for retrospective application of persistent CSA laws is clear, and this recommendation of the Royal Commission should be implemented in all jurisdictions. Reservations about the fairness and legality of retrospective application are addressed by the courts' existing powers to ensure a fair trial, the limitation of retrospective application to behaviour that was criminal at the time, and consideration of changing sentencing standards.

**6. There is no requirement to obtain prosecutorial consent before laying a charge of persistent sexual abuse.**

The continued imposition of this requirement is not justified on policy grounds and has been identified as a barrier to the use of the provisions. It has persisted in all states and territories except South Australia, and should be removed in further reforms.

## **VI Conclusion**

The prosecution of persistent CSA has long posed a challenge to the criminal justice system. The analysis of the Royal Commission into Institutional Responses to Child Sexual Abuse revealed substantial differences in the scope and operation of persistent CSA offences between the Australian states and territories. Over the preceding decades, some Australian states had undertaken substantial reform to ensure their laws achieved the intended objective, while others had not made any substantial amendments since the first creation of the offence. The Royal Commission proposed a nationally consistent approach to provide access to an effective criminal justice response to all Australians. Our analysis current to April 2022 shows that the implementation of the Royal Commission's recommendations has continued the history of uneven reform in this area, and identifies key elements of those reforms that remain overdue. We have identified problematic aspects entrenched in the continued use of the terminology of an 'unlawful sexual relationship' to conceptualise persistent sexual abuse. This forms the basis of our proposed legislative model that accurately defines the offence as persistent sexual abuse of a child, and provides greater scope for victims of this type of offending to obtain justice through the criminal law.



# “Doing the Job That’s Required”?: Social Licence to Operate and Directors’ Duties

Vivienne Brand\* and Rosemary Teele Langford†

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## Abstract

Reactions to Rio Tinto Limited’s blasting activities in Western Australia’s Juukan Gorge in 2020 demonstrated the significance of social licence to operate (‘SLO’) for Australian companies, illustrating the dramatic reputational damage that can flow from lawful but controversial company decisions. Since SLO was first used at a World Bank meeting in 1997, its prominence has grown rapidly. A highly controversial proposal by the Australian Securities Exchange to encourage SLO reporting by listed entities brought the concept into sharp focus for Australian companies. While it has become increasingly clear that stakeholder concerns are part of the matrix of issues directors must, and indeed do, take into account when making decisions, uncertainty has continued to surround the contours of the evolving relationship between directors’ duties and stakeholder interests. This article offers a doctrinal and empirical analysis of the current relationship between directors’ duties in Australia and SLO, elucidating the increasing relevance of SLO for contemporary director practice, but also the complexity of the decisions that directors are called on to make. Judgements on SLO-related issues are among the hardest that directors face, but nonetheless may have become an essential part of ‘doing the job that’s required’ of a director.

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## I Introduction

Reactions to the blasting activities of Rio Tinto Limited ('Rio Tinto') in Western Australia's Juukan Gorge in 2020 have demonstrated the significance of social licence to operate ('SLO') and related concepts for Australian company directors, illustrating the dramatic reputational damage that can flow from lawful but controversial company decisions.<sup>1</sup> The controversy has led to a Federal Parliamentary Inquiry into the destruction of the Gorge's 46,000 year old caves,<sup>2</sup> with recommendations for legislative reform.<sup>3</sup> Notably, the Chair of the Inquiry stated that 'corporate Australia can no longer ignore the link between its social licence to operate and responsible engagement with Indigenous Australia'.<sup>4</sup> In the wake of the destruction of the Juukan Gorge, Rio Tinto has reportedly been attempting to rebuild its relationship with local Indigenous owners, undertaking 'arguably the most closely watched and high-profile "stakeholder engagement" between a global mining company and Indigenous owners of land in the world'.<sup>5</sup> Rio Tinto's experience has been described as 'the ultimate case study for defining a social licence to operate'.<sup>6</sup>

<sup>1</sup> 'Timeline: Rio Tinto's Sacred Indigenous Caves Blast Scandal', *Reuters* (online, 3 December 2020) <<https://www.reuters.com/article/us-australia-mining-indigenous-timeline-idUSKBN28D00C>>. The power of SLO factors to influence corporate conduct was similarly evident in Woolworths Ltd's 2021 decision to abandon highly contentious plans to develop a Dan Murphy's alcohol outlet in Darwin. Woolworths Ltd's action followed extensive controversy over the proposed store's location close to Aboriginal communities, and despite approval for the development having been given by the Northern Territory's Liquor Licensing Commissioner: Dominic Powell, 'Woolworths Axes Dan Murphy's Store in Darwin After Review', *The Sydney Morning Herald* (online, 29 April 2021) <<https://www.smh.com.au/business/companies/woolworths-axes-controversial-darwin-store-after-review-finds-failings-20210429-p57ncm.html>>. The Dan Murphy development was reportedly linked to Rio Tinto's Juukan Gorge actions by community groups: Dominic Powell, "'No Different to Juukan Gorge": Controversial Darwin Dan Murphy's Store Approved', *The Sydney Morning Herald* (online, 18 December 2020) <<https://www.smh.com.au/business/companies/no-different-to-juukan-gorge-controversial-darwin-dan-murphy-s-store-approved-20201218-p5660oh.html>>; Sue Mitchell, 'Woolworths Dumps Plan for Dan Murphy's Store in Darwin, For Now', *The Australian Financial Review* (online, 29 April 2021) <<https://www.afr.com/companies/retail/woolworths-dumps-dan-murphy-s-mega-store-in-darwin-20210429-p57ndi>>. A full independent report is now available: Danny Gilbert, Nigel Browne, Heather D'Antoine, Roland Houareau and Neil Westbury, *Independent Panel Review into the Proposed Dan Murphy's Development in Darwin* (Report, 28 April 2021) <<https://www.woolworthsgroup.com.au/page/community-and-responsibility/corporate-responsibility-news-updates/people/independent-panel-review-into-the-proposed-dan-murphy%E2%80%99s-development-in-darwin/>>.

<sup>2</sup> Joint Standing Committee on Northern Australia, Parliament of Australia, *Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia*; Joint Standing Committee on Northern Australia, Parliament of Australia, *A Way Forward: Final Report into the Destruction of Indigenous Sites at Juukan Gorge* (October 2021) ('*Final Juukan Gorge Report*').

<sup>3</sup> Among other recommendations, the Final Report recommended urgent amendment of Commonwealth legislation on Aboriginal and Torres Strait Islander heritage protection and biodiversity legislation, and legislation of a new framework for cultural heritage protection at national level: see *Final Juukan Gorge Report* (n 2) xxv–xxvii [7.13]–[7.89], 186–209 [7.7]–[7.125].

<sup>4</sup> Warren Entsch, 'Juukan Gorge: Investing in Social Responsibility' (Media Release, Joint Standing Committee on Northern Australia, 16 November 2020).

<sup>5</sup> Tony Boyd, 'Apologetic Rio Works on Social Licence to Operate', *The Australian Financial Review* (online, 19 January 2021) <<https://www.afr.com/chanticleer/regaining-rio-s-social-license-to-operate-20210119-p56v4y>>.

<sup>6</sup> *Ibid.*

SLO became a major concern for Australian business in the wake of a proposal by the Australian Securities Exchange ('ASX') to integrate an SLO reporting obligation in its 2019 revision of the *ASX Corporate Governance Principles*.<sup>7</sup> Despite the ultimate removal of SLO references from the ASX's revision, SLO and related ideas such as reputational risk remain a significant regulatory trend. In replacing the phrase 'social licence' with 'reputation' and 'standing in the community', the ASX Corporate Governance Council ('ASX CGC') commented that these concepts were 'essentially synonymous',<sup>8</sup> pointing to the continued relevance of these underlying concepts. Judicial authority is now available to demonstrate the significance of reputation concepts for the purposes of Australian directors' statutory duty of care. Other recent developments in the law have also reinforced the importance of SLO concepts.<sup>9</sup> At an international level, the Trust in Business Initiative of the Organisation for Economic Co-operation and Development ('OECD') has asserted that 'maintaining the social licence to operate [has] never been higher on the business agenda'.<sup>10</sup>

Given the growing significance of SLO for corporate decision-making in Australia, both doctrinal and empirical examination of the relationship between SLO and directors' duties is timely.<sup>11</sup> Little is known about the perceptions of Australian directors as to the relationship between the duties they owe and SLO concepts.<sup>12</sup> Drawing on doctrinal analysis and the findings of a qualitative investigation of director perceptions,<sup>13</sup> this article provides novel insight into the role of social licence concepts in contemporary director practice. It demonstrates that the law is increasingly aligning itself with SLO concepts, particularly through the vector of reputation. It reports director perspectives that are consistent with the law's trajectory, showing that for many (but not all) directors, SLO judgements are now a matter of 'doing the job that's required of you' (I02).<sup>14</sup> Director responses also make clear the complexity of the highly discretionary, situational judgements that directors

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<sup>7</sup> ASX CGC, *Corporate Governance Principles and Recommendations* (4<sup>th</sup> ed, 27 February 2019) ('*ASX Corporate Governance Principles* (2019)').

<sup>8</sup> Elizabeth Johnstone, 'Launch of the 4<sup>th</sup> Edition of the Corporate Governance Principles & Recommendations: Address by the Chair of the ASX Corporate Governance Council' (Speech, 27 February 2019) 4 <<https://www.asx.com.au/documents/asx-compliance/ej-speech-press-version.pdf>>.

<sup>9</sup> See Part III of this article.

<sup>10</sup> Organisation for Economic Co-operation and Development ('OECD'), *OECD Trust in Business Initiative* (Web Page) <<https://www.oecd.org/investment/trust-business.htm>> (as of 10 March 2021).

<sup>11</sup> For earlier doctrinal work on this issue see Rosemary Teele Langford, 'Social Licence to Operate and Directors' Duties: Is There a Need for Change?' (2019) 37(3) *Company and Securities Law Journal* 200 ('Need for Change'); Pamela Hanrahan, 'Corporate Governance, Financial Institutions and the "Social Licence"' (2016) 10(3) *Law and Financial Markets Review* 123 ('Corporate Governance'); Pamela Hanrahan, 'Corporate Governance in These "Exciting Times"' (2017) 32(2) *Australian Journal of Corporate Law* 142 ('Exciting Times'); Pamela Hanrahan, 'On Compliance' in Pamela Hanrahan and Ashley Black (eds), *Contemporary Issues in Corporate and Competition Law Essays in Honour of Professor Robert Baxt AO* (LexisNexis Butterworths, 2019) 182.

<sup>12</sup> This point is developed in Part IV of this article.

<sup>13</sup> A collaborative study co-funded by Flinders University and CSIRO (Flinders University OH-00222-Reciprocal Ethics Clearance, 10 July 2019), described further in Part IV. Details are available from the first author. Use of that data here does not imply that CSIRO or Flinders University endorse the views expressed by the authors in this article.

<sup>14</sup> Where participants in the Flinders University–CSIRO study are quoted in this article, that source is indicated in the text by '(I##)'. The number refers to the anonymous designation given to each interviewee. See Part IV of this article for further information.

are called on to make in relation to SLO factors, and provide valuable insights into the controversy caused by the ASX's SLO proposals. This empirical data on how directors understand and operationalise their legal duties is especially insightful for understanding these important issues. There is limited empirical research on the work of company directors, particularly from qualitative, context-sensitive methods of investigation, so this research presents an original and novel perspective on directors' duties scholarship.

Part II of this article reviews the development of social licence concepts in Australia and internationally, describing the definitional issues associated with the term and illustrating significant growth in its use in recent years. Part III provides a doctrinal analysis of current Australian directors' duties in relation to SLO, with a detailed explication of both the statutory and general law duty of care and duty to act in good faith in the interests of the company. Part IV reports the directors' duties-related findings of an empirical study and provides an analysis of those findings in light of the doctrinal analysis. The article then concludes.

## II Social Licence to Operate

An agreed description of SLO is problematic; despite significant increase in the use of the term, ongoing debate has occurred as to its precise meaning.<sup>15</sup> At its broadest, SLO has been described by an OECD official as the public's expectation of business that it will 'do the right thing'.<sup>16</sup> In academic terms, more than two decades of attention to the concept of SLO has not generated a comprehensive definition.<sup>17</sup> SLO has been linked to concepts of corporate citizenship, social sustainability, the social contract, reputation and legitimacy.<sup>18</sup> The dynamic nature of SLO has also been identified, given its capacity to reflect 'the quality and strength of the relationship between an industry and a community of stakeholders' over a period of time.<sup>19</sup> It has been said that it is important that companies are 'responsive to the changing nature of societal approval and acceptance' if they wish to maintain their SLO.<sup>20</sup> These dynamic reputational components of SLO are particularly relevant in the context of

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<sup>15</sup> John R Owen and Deanna Kemp, 'Social Licence and Mining: A Critical Perspective' (2012) 38(1) *Resources Policy* 29, 30; Langford, 'Need for Change' (n 11) 200–2.

<sup>16</sup> Greg Medcraft, 'Panel Remarks' (Speech, Panel Discussion on the Human Centred Business Model, IMF/World Bank Spring Meeting, 11 April 2019), quoted in Justin O'Brien, 'Editorial: Corporate Culture and the Search for Authenticity' (2019) 13(2–3) *Law and Financial Markets Review* 77, 77.

<sup>17</sup> Jim Cooney, 'Reflections on the 20th Anniversary of the Term "Social Licence"' (2017) 35(2) *Journal of Energy & Natural Resources Law* 197; Peter Edwards, Justine Lacey, Stephen Wyatt and Kathryn JH Williams, 'Social Licence to Operate and Forestry: An Introduction' (2016) 89(5) *Forestry: An International Journal of Forest Research* 473.

<sup>18</sup> Nina Hall, Justine Lacey, Simone Carr-Cornish and Anne-Maree Dowd, 'Social Licence to Operate: Understanding How a Concept Has Been Translated into Practice in Energy Industries' (2015) 86 *Journal of Cleaner Production* 301; Justine Lacey, Peter Edwards and Julian Lamont, 'Social Licence as Social Contract: Procedural Fairness and Forest Agreement-Making in Australia' (2016) 89(5) *Forestry: An International Journal of Forest Research* 489; Richard Parsons, Justine Lacey and Kieren Moffat, 'Maintaining Legitimacy of a Contested Practice: How the Minerals Industry Understands Its "Social Licence to Operate"' (2014) 41 *Resources Policy* 83.

<sup>19</sup> Kieren Moffat, Justine Lacey, Airong Zhang and Sina Leipold, 'The Social Licence to Operate: A Critical Review' (2016) 89(5) *Forestry: An International Journal of Forest Research* 477, 480–1.

<sup>20</sup> Hall et al (n 18) 302.

evolving Australian directors' duties and the implications of reputation risks, as is shown in Part III.

Part of the reason for SLO's lack of definitional clarity is its relatively rapid evolution. Since the phrase was first coined at a World Bank meeting in 1997 it has been used in an ever-widening range of contexts.<sup>21</sup> Although SLO emerged first in mining discourse, its usage expanded quickly,<sup>22</sup> including into regulatory spaces. The Parliamentary Joint Committee ('PJC') on Corporations and Financial Services noted in its 2006 report on *Corporate Responsibility: Managing Risk and Creating Value*<sup>23</sup> ('PJC Corporate Responsibility Report') that

[t]he concept of a company's "community" or "social" "license to operate" was raised in several submissions. By effectively engaging with the communities in which they operate, companies gain tacit permission to continue in operation.<sup>24</sup>

The PJC on Corporations and Financial Services included the concept of SLO as one of an enumerated list of drivers of corporate responsibility decision-making.<sup>25</sup> Subsequent regulatory,<sup>26</sup> academic<sup>27</sup> and journalistic<sup>28</sup> attention has been given to the SLO concept at an international level as well as within Australia. In particular, the 2018–19 Banking Royal Commission operated as an 'an impetus for heightened shareholder focus on matters such as social licence to operate and community

<sup>21</sup> Geert Demuijnck and Björn FASTERLING, 'The Social License to Operate' (2016) 136(4) *Journal of Business Ethics* 675; Justine Lacey, Richard Parsons and Kieren Moffat, *Exploring the Concept of a Social Licence to Operate in the Australian Minerals Industry: Results from Interviews with Industry Representatives* (CSIRO Report EP125553, October 2012) <<https://doi.org/10.4225/08/5852dc54dc765>>.

<sup>22</sup> John Morrison, *The Social License: How to Keep Your Organization Legitimate* (Springer, 2014); Justin O'Brien, *Trust, Accountability and Purpose: The Regulation of Corporate Governance* (Cambridge University Press, 2019); David Rouch, *The Social Licence for Financial Markets: Reaching for the End and Why It Counts* (Palgrave Macmillan, 2020).

<sup>23</sup> Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Responsibility: Managing Risk and Creating Value* (Final Report, June 2006) ('PJC Corporate Responsibility Report').

<sup>24</sup> *Ibid* 32 [3.62]. Shortly afterwards, the analogous concept of 'licence to operate' was used in the Corporations and Markets Advisory Committee's report: Corporations and Markets Advisory Committee (Cth), *The Social Responsibility of Corporations* (Report, December 2006) 43, 46 fn 81, 110.

<sup>25</sup> *PJC Corporate Responsibility Report* (n 23) 32 [3.62].

<sup>26</sup> Karin Buhmann, 'Public Regulators and CSR: The "Social Licence to Operate" in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2016) 136(4) *Journal of Business Ethics* 699. See also, for instance, O'Brien et al who have described social licence to operate as 'emerging as the preferred strategy of the Bank of England': Justin O'Brien, George Gilligan, Alex Roberts and Roger McCormick, 'Professional Standards and the Social Licence to Operate: A Panacea for Finance or an Exercise in Symbolism?' (2015) 9(4) *Law & Financial Markets Review* 283, 283.

<sup>27</sup> See, eg, Sally Wheeler, 'Global Production, CSR and Human Rights: The Courts of Public Opinion and the Social Licence to Operate' (2015) 19(6) *The International Journal of Human Rights* 757; O'Brien (n 16); Langford, 'Need for Change' (n 11); Hanrahan, 'Corporate Governance' (n 11); Hanrahan, 'Exciting Times' (n 11); Vicky Comino, "'Corporate Culture" is the "New Black": Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions?' (2021) 44(1) *University of New South Wales (UNSW) Law Journal* 295.

<sup>28</sup> William Wright and Tracy Blackwell, 'Stock Exchanges Can Reunite Society with Capitalism', *The Daily Telegraph* (London, 12 June 2019), citing concerns 'over the social licence to operate that is fundamental to sustainable capitalism'; Patrick Durkin, 'Purpose is the Business Buzzword of 2018: Here's Why', *The Australian Financial Review* (online, 3 July 2018) <<https://www.afr.com/work-and-careers/management/purpose-the-business-buzzword-of-2018-20180605-h10zr7>>.

expectations'.<sup>29</sup> It appears SLO has now moved into the mainstream corporate sphere.<sup>30</sup>

In Australia, this shift was most evident in draft 2019 revisions to Australia's *ASX Corporate Governance Principles*. The proposal by the ASX CGC to include a SLO component in the 4<sup>th</sup> edition of the *ASX Corporate Governance Principles* represented a watershed moment in the use of SLO as a corporate governance concept, and drew sustained attention to the term.<sup>31</sup> Its adoption would have represented the first formal reliance on SLO in a national corporate regulatory structure internationally.<sup>32</sup> The ASX CGC proposed to revise the Principles 'to recognise the fundamental importance of a listed entity's social licence to operate and the need for it to act lawfully, ethically and in a socially responsible manner in order to preserve that licence'.<sup>33</sup> Principle 3 had previously provided that '[a] listed entity should act ethically and responsibly'.<sup>34</sup> The ASX CGC proposed 'substantial changes to Principle 3 and the supporting recommendations and commentary to address matters to do with values, culture and social licence to operate'.<sup>35</sup> The ASX CGC suggested Principle 3 be reworded as '[a] listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and in a socially responsible manner'.<sup>36</sup> The ASX CGC also proposed that the commentary accompanying Principle 3 be amended 'to acknowledge that a listed entity's social licence to operate is one of its most valuable assets and that it can be lost or seriously damaged if the entity or its officers or employees are perceived to have acted unlawfully, unethically or in a socially irresponsible manner'.<sup>37</sup>

The ASX CGC sought feedback specifically on 'whether the proposed amendments to Principle 3 and the accompanying commentary deal adequately with governance-related concerns related to an entity's values, culture and social licence to operate'.<sup>38</sup> Amendments were also proposed to the commentary accompanying

<sup>29</sup> Australian Securities and Investments Commission ('ASIC'), *Annual General Meeting Season 2018* (ASIC Report No 609, 31 January 2019) 3. See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1; Tony Boyd, 'It's the Social Licence, Stupid', *The Australian Financial Review* (Melbourne, 22 May 2018) 40.

<sup>30</sup> See, eg, Buhmann (n 26); ASX CGC, *Review of the ASX Corporate Governance Council's Principles and Recommendations: Public Consultation* (Consultation Paper, 2 May 2018) <<https://www.asx.com.au/documents/asx-compliance/consultation-paper-cgc-4th-edition.pdf>> ('*Public Consultation*'); OECD (n 10). For industry comment, see Bryan Horrigan, 'Does Corporate Performance Now Include a Social Licence to Operate?', *Australian Institute of Company Directors* (Comment, 20 December 2018) <<http://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/governance-driving-performance/does-corporate-performance-now-include-a-social-licence-to-operate>>.

<sup>31</sup> The 2018 Banking Royal Commission created a simultaneous set of demands for Australian corporations to pay more regard to reputational issues in particular: see *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (n 29) vol 1, 15–16.

<sup>32</sup> Australia has for some time been a leading jurisdiction for corporate governance reform: Bernard Mees and Sherene A Smith, 'Corporate Governance Reform in Australia: A New Institutional Approach' (2019) 30(1) *British Journal of Management* 75.

<sup>33</sup> ASX CGC, *Public Consultation* (n 30) 6.

<sup>34</sup> ASX CGC, *Corporate Governance Principles and Recommendations* (3<sup>rd</sup> ed, 27 March 2014) 19.

<sup>35</sup> ASX CGC, *Public Consultation* (n 30) 15.

<sup>36</sup> *Ibid* 15.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Ibid* 10.

Principle 7 in relation to recognising and managing risk. It was proposed that the commentary to Recommendation 7.4 include acknowledgement 'that a listed entity's "social licence to operate" is one of its most valuable assets'.<sup>39</sup> Commentary accompanying Principle 8, dealing with companies' obligations to remunerate fairly and responsibly, was also to be amended by 'adding a reference to the impact on the entity's social licence to operate if it is seen to pay excessive remuneration to directors and senior executives'.<sup>40</sup>

These proposals attracted significant negative commentary. In particular, SLO's lack of definitional certainty led to criticism of its use in a regulatory context. Opponents argued that the concept of 'social licence' was 'highly subjective and will be interpreted differently by different stakeholders',<sup>41</sup> and that the lack of an agreed objective definition of SLO would add unnecessary complexity and uncertainty to the work of directors.<sup>42</sup> The Law Council of Australia submitted that the concept of SLO 'is too vague and uncertain to serve as the touchstone for an important piece of regulatory policy',<sup>43</sup> arguing that commentary in the Principles should use precise language and settled concepts in order to avoid the risk of 'undermining the normative force of the Principles'.<sup>44</sup> Concern was also expressed that use of the social licence phrase could cause 'particular difficulties ... for listed entities legitimately operating in particular sectors that some parts of society are opposed to'.<sup>45</sup> The SLO concept was labelled 'politically correct nonsense'<sup>46</sup> and attention was drawn to the potential for the commentary on Principle 3 to risk 'creating confusion'.<sup>47</sup>

Following intense industry pressure,<sup>48</sup> all references to SLO were removed from the final version of the ASX CGC's Principles. At the time, Council Chair Elizabeth Johnstone, described the SLO proposals as '[o]verwhelmingly, the most

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<sup>39</sup> Ibid 18.

<sup>40</sup> Ibid 19.

<sup>41</sup> AICD, Submission to ASX CGC, *Review of ASX Corporate Governance Principles & Recommendations* (27 July 2018) 6 [4.1].

<sup>42</sup> Patrick Durkin, 'Governance Council Retreats on Industry Super's "Social Licence" Push', *The Australian Financial Review* (online, 7 August 2018) <<https://www.afr.com/work-and-careers/management/governance-council-backs-down-on-industry-supers-social-licence-push-20180806-h13lc7>> ('Governance Council Retreats').

<sup>43</sup> Law Council of Australia, Submission to ASX CGC, *Review of ASX Corporate Governance Principles & Recommendations* (30 July 2018) 8 [45].

<sup>44</sup> Ibid 2 [6].

<sup>45</sup> Johnstone (n 8) 4.

<sup>46</sup> Attributed to senior director David Murray, in Joanna Mather, 'ASX Governance Council Dumps "Social Licence to Operate" from Guidance', *The Australian Financial Review* (online, 27 February 2019) <<https://www.afr.com/work-and-careers/management/asx-governance-council-dumps-social-licence-to-operate-from-guidance-20190225-h1bp43>>.

<sup>47</sup> AICD (n 41) 6 [4.2].

<sup>48</sup> Patrick Durkin, 'Board Outrage over Push to Have a Social Licence', *The Australian Financial Review* (online, 1 August 2018) <<https://www.afr.com/work-and-careers/management/board-outrage-over-push-to-have-a-social-licence-20180731-h13doa>>; Jennifer Hewett, 'Murray Dares to Say What Others Won't', *The Australian Financial Review* (Melbourne, 3 August 2018) 4; Simon Evans and Patrick Durkin, "'Social Licence' Threatens Corporations', *The Australian Financial Review* (Melbourne, 3 August 2018) 1. See also Michael Roddan, 'Resist Social Obligation Push: Bradley', *The Australian* (Canberra, 3 October 2019) 17; Scott Atkins and Kai Luck, 'ESG Could Paralyse Firms', *The Australian* (Canberra, 28 October 2019) 22.

commented upon and polarising’ of the suggested revisions.<sup>49</sup> Principle 3 of the Council’s final Principles was instead reworded to provide that a ‘listed entity should instil and continually reinforce a culture across the organisation of acting lawfully, ethically and responsibly’.<sup>50</sup> Rather than referencing social licence, the accompanying commentary instead notes ‘the need for the entity to preserve and protect its *reputation and standing in the community* and with key stakeholders, such as customers, employees, suppliers, creditors, law makers and regulators’.<sup>51</sup>

Notwithstanding the ASX CGC’s response to the controversy caused by the proposed amendments, the wider evidence of SLO’s general significance for Australian directors remains clear,<sup>52</sup> and the need for directors to have regard to social licence and related concepts when discharging their duties has been widely commented on.<sup>53</sup> The following Part analyses the evolving contours of those obligations in the context of SLO.

### III Directors’ Duties and Social Licence to Operate

The interaction between directors’ duties and social licence to operate is most relevant in the context of the core duties to act with care and diligence and to act in good faith in the interests of the company. This Part briefly outlines the contours of these duties before critically analysing the connection between these duties and considerations that are encompassed within the concept of SLO (‘SLO considerations’). It should be noted at the outset that there is no separate duty (in a legal sense) on directors to ensure that a company maintains its SLO or to make decisions consistent with the concept of SLO. In this respect, there is an important role for laws dealing with matters connected with SLO such as occupational health and safety, the environment, human rights, modern slavery, consumer protection and protection of Indigenous heritage.<sup>54</sup> Directors should be cognisant of such laws given the potential liability that may be imposed upon breach.

#### A Duty of Care and Diligence

The duty of care and diligence arises at common law and equity and under s 180 of the *Corporations Act 2001* (Cth). Section 180(1) provides:

<sup>49</sup> Johnstone (n 8) 4.

<sup>50</sup> ASX CGC, *ASX Corporate Governance Principles* (2019) (n 7) 16.

<sup>51</sup> *Ibid* 16 (emphasis added).

<sup>52</sup> See the discussion in Part III of this article.

<sup>53</sup> Langford, ‘Need for Change’ (n 11). See also Hanrahan, ‘Corporate Governance’ (n 11); Hanrahan, ‘Exciting Times’ (n 11). Similarly, in October 2019 ASIC’s Corporate Governance Taskforce released its report on director oversight of non-financial risk in large financial services companies, drawing attention to the very significant financial implications of inadequate supervision of reputational risk, among other factors: ASIC Corporate Governance Taskforce, *Director and Officer Oversight of Non-Financial Risk* (ASIC Report 631, October 2019) <<https://asic.gov.au/regulatory-resources/find-a-document/reports/corporate-governance-taskforce-director-and-officer-oversight-of-non-financial-risk-report/>>.

<sup>54</sup> The legislation proposed by the *Final Juukan Gorge Report* (n 2) is a case in point: see above n 3.

A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:

- (a) were a director or officer of a corporation in the corporation's circumstances; and
- (b) occupied office held by, and had the same responsibilities within the corporation as, the director or officer.

As can be seen from the wording of s 180, the duty of care is situational in that courts will take into account factors such as the corporation's circumstances, as well as the director or officer's office and responsibilities.<sup>55</sup> The duty thus has objective and subjective elements. Compliance with the duty of care is not measured by the outcome of a decision — it has long been recognised that directors are not liable for breach of the duty of care merely by reason of making a mistake and that risk-taking is part of directorial decision-making.<sup>56</sup>

A prevalent use of s 180 is a form of liability known as 'stepping stones', which applies where a company breaches (or risks breaching) the law and a director or officer allows, or fails to prevent, the breach.<sup>57</sup> Stepping stones liability highlights the importance of directors and officers complying with legal requirements pertaining to SLO factors. Failure to do so may result in liability under specific legislation or potentially under s 180.

A popular approach to the application of the duty of care is to weigh the potential benefits of a contemplated course of action against the potential risks.<sup>58</sup> In this respect, it is increasingly recognised that non-financial factors and risks must be taken into account. The relevance of non-financial factors was recognised by Edelman J in *Australian Securities and Investments Commission v Cassimatis (No 8)* in his Honour's consideration of what the interests of the company can be considered to encompass:

A corporation has a real and substantial interest in the *lawful or legitimate* conduct of its activity independently of whether the illegitimacy of that conduct will be detected or would cause loss. One reason for that interest is the corporation's reputation. Corporations have reputations, independently of any financial concerns, just as individuals do. Another is that the corporation itself exists as a vehicle for lawful activity. For instance, it would be hard to imagine examples where it could be in a corporation's interests for the

<sup>55</sup> See, eg, *Australian Securities and Investments Commission v Maxwell* (2006) 59 ACSR 373, 397 [100] (Brereton J); *Trilogy Funds Management Ltd v Sullivan (No 2)* (2015) 331 ALR 185, 229 [201] (Wigney J); *Australian Securities and Investments Commission v Healey* (2011) 196 FCR 291, 330 [165] (Middleton J).

<sup>56</sup> See, eg, *Australian Securities and Investments Commission v Lindberg* (2012) 91 ACSR 640, 654 [72] (Robson J); *Termite Resources NL (in liq) v Meadows (No 2)* (2019) 370 ALR 191, 228 [184] (White J). Note also *Corporations Act 2001* (Cth) s 180(2).

<sup>57</sup> See, eg, *Australian Securities and Investments Commission v Avestra Asset Management Ltd (in liq)* (2017) 348 ALR 525, 567 [216] (Beach J).

<sup>58</sup> See *Australian Securities and Investments Commission v Mariner Corporation Ltd* (2015) 241 FCR 502, 584 [450]–[451] (Beach J). See also *Australian Securities and Investments Commission v Cassimatis (No 8)* (2016) 336 ALR 209, 301–3 [479]–[487] (Edelman J) ('*Cassimatis (No 8)*'); *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 140 [7238] (Austin J); *Australian Securities and Investments Commission v Warrenmang Ltd* (2007) 63 ACSR 623, 628–9 [22]–[23] (Gordon J).

corporation to engage in serious unlawful conduct even if that serious unlawful conduct was highly profitable and was reasonably considered by the director to be virtually undetectable during a limitation period for liability.<sup>59</sup>

Edelman J's comments also demonstrate the fact that recent years have seen increased recognition of the importance of a company's reputation in the application of the duty of care, particularly in light of the increasing relevance of social media. His Honour's comments should not be confined to the application of the duty of care, but are also pertinent in the application of the duty to act in good faith in the interests of the company (discussed in the Part IIIB below).

Edelman J also clarified that, in balancing the risk of harm against the potential benefit of a particular act or omission, a court will not balance or weigh these factors as though by a common metric. Thus, an economically justifiable decision to release a large amount of toxic waste based on the fact that the cost of disposing of the waste lawfully outstripped the cost of a penalty could still result in a breach of s 180 by the director(s) concerned.<sup>60</sup> Edelman J's judgment was upheld on appeal.<sup>61</sup>

## ***B Duty to Act in Good Faith in the Interests of the Company***

The duty to act in good faith in the interests of the company (the 'best interests duty'), which arises at general law and under s 181(1)(a) of the *Corporations Act 2001* (Cth), requires directors to act in good faith in what they consider to be the interests of the company. The duty regulates the exercise of discretion by directors<sup>62</sup> — it is not an absolute duty to act in the interests of the company, dependent on the success of a particular transaction or transactions.<sup>63</sup>

There has been debate as to whether the duty is subjective, objective or a combination of both. The better view is that the duty is subjective in that it is for directors to identify the interests of the company. In so doing, they must give actual consideration to the interests of the company. Objective factors can be used to determine whether the director honestly believes the decision is in the interests of the company (that is, to test credibility). The court is also entitled to inquire if the decision is one that no reasonable director would consider to be in the interests of the company — in which case the court may find that there is a breach of duty.<sup>64</sup> This allows directors leeway and reflects courts' reluctance to interfere in directors' decision-making.

<sup>59</sup> *Cassimatis (No 8)* (n 58) 301 [482]. See also 302 [483].

<sup>60</sup> *Ibid* 302 [485].

<sup>61</sup> *Cassimatis v Australian Securities and Investments Commission* (2020) 275 FCR 533 (Greenwood, Rares and Thawley JJ) ('*Cassimatis (FCAFC)*'). Special leave to appeal was refused: *Cassimatis v Australian Securities and Investments Commission* [2020] HCASL 158.

<sup>62</sup> In *Re Smith and Fawcett Ltd* the Court held that directors 'must exercise their discretion bona fide in what they consider — not what a court may consider — to be the interests of the company': [1942] Ch 304, 306 (Lord Greene MR, Luxmore and Asquith LJ agreeing at 309).

<sup>63</sup> See *Australian Securities and Investments Commission v Lewski* (2018) 266 CLR 173, 202 [71] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

<sup>64</sup> See *Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* (2008) 39 WAR 1, 583–4 [4619] (Owen J); Rosemary Teele Langford and Ian M Ramsay, 'Directors' Duty to Act in the Interests of the Company: Subjective or Objective?' [2015] (2) *Journal of Business Law* 173.

There is increasing recognition of the permissibility, and in fact necessity, of directors considering and at times protecting the interests of stakeholders other than shareholders in acting in good faith in the interests of the company.<sup>65</sup> Indeed, in many cases, the company's interests align with those of stakeholders so that it is in the interests of the company as a commercial entity and in the interests of shareholders to consider, and even protect, stakeholder interests in many situations. Moreover, many SLO considerations have now become financial factors. As stated by Keay:

There is significant literature on the fact that having regard for stakeholders can benefit the company. Take, for instance, having regard for employee interests. Human resources are critical to all companies and consideration for employee interests can be key in attracting, retaining and motivating good employees. All this could lead to greater employee loyalty, morale, motivation, retention and identification with the company itself which can benefit the company, in that it is likely to lead to higher productivity and less costs in addressing employee discontent and the need to replace employees leaving the company ...<sup>66</sup>

However, the best interests duty does not permit promotion of stakeholder interests with no link to corporate benefit. This bottom line ensures accountability so that directors are not at liberty to pursue their own interests or favour their own favourite social or political causes using company funds. This also ensures that directors' decisions are not based on which stakeholder voices are loudest and most persistent.

### ***C Differences between Statutory and General Law Duties***

Although the content of each of the general law duty of care and diligence and duty to act in good faith in the interests of the company is similar to the content of the equivalent statutory duties, the public aspects of the statutory duties have been increasingly recognised and emphasised.<sup>67</sup> Courts have recognised that these duties do not just protect shareholders — they protect the public as well.<sup>68</sup> This is reflected in the fact that civil penalty consequences (including pecuniary penalties and disqualification) flow from breach and that there is public enforcement of the duties by the corporate regulator, the Australian Securities and Investments Commission

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<sup>65</sup> See, eg, see *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (n 29) vol 1, 401–2.

<sup>66</sup> Andrew Keay, *Directors' Duties* (LexisNexis, 4<sup>th</sup> ed, 2020) 166 [6.99].

<sup>67</sup> See, eg, Jason Harris, Anil Hargovan and Janet Austin, 'Shareholder Primacy Revisited: Does the Public Interest Have Any Role in Statutory Duties?' (2008) 26(6) *Company and Securities Law Journal* 355; Michelle Welsh, 'Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia' (2014) 42(1) *Federal Law Review* 217; Dimity Kingsford Smith, 'Australian Directors' Duties: Are They Public Duties?' (Conference Paper, Supreme Court of New South Wales, Corporate and Commercial Law Conference, 2018); Rosemary Teele Langford, 'Statutory Duties and Ratification: Untangling the Maze' (2021) 15(1) *Journal of Equity* 126.

<sup>68</sup> See, eg, *Forge v Australian Securities and Investments Commission* (2004) 213 ALR 574, 654–5 [381] (McColl JA); *Angas Law Services Pty Ltd (in liq) v Carabelas* (2005) 226 CLR 507, 523 [32] (Gleeson CJ and Heydon J); *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd (No 2)* (2005) 53 ACSR 305, 315 [33]–[34] (Palmer J); *International Swimwear Logistics Ltd v Australian Swimwear Co Pty Ltd* [2011] NSWSC 488, [106], [109] (Ward J).

(‘ASIC’).<sup>69</sup> The extent of the public nature of the duties has been subject to scrutiny and debate recently,<sup>70</sup> with key aspects including ensuring high standards of behaviour by directors and protecting the public who deal with companies (from loss). This gives rise to the possibility that stakeholder interests and SLO considerations may well be more relevant in the application of the statutory duties, although the extent of this relevance is still unclear.

### ***D Relevance of Social Licence to Operate Factors in the Application of the Duties***

Among the factors and interests that directors need to consider in complying with these duties are SLO considerations. These are now an integral part of decision-making that complies with the duty of care and diligence and the best interests duty. In some circumstances, it will also be necessary to investigate such factors and interests including by commissioning expert advice. However, decision-making still needs to be grounded in the interests of the company — there still needs to be a nexus with corporate benefit. The yardsticks have, however, widened in terms of what is of benefit to (and in the interests of) the company and how close the nexus with corporate benefit must be. This widening is due to changes in societal values and attitudes, and changes in investor demand, which in turn affect the boundaries of the concept of SLO. In addition, information about companies is more readily available, particularly with the advent of social media.

In some circumstances, SLO considerations may conflict. For example, in making a decision as to whether or not to shut down a factory that is not making large profits and is also producing pollution, directors face conflicting stakeholder interests and conflicting SLO considerations. For example, it would be in the interests of employees and the local community (in one sense) for the factory to stay open in terms of keeping jobs and thus creating business for local businesses. On the other hand, it would be in the interests of the environment and the local community (in another sense) to cease the pollution. What this example also brings out is that, while there may be no positive duty associated with SLO, at the very least the concept of SLO provides justification for directors who do take into account SLO considerations. This is particularly due to the widening of the concept of the company’s interests, as well as the recognition of the importance of reputation and of investor concerns and demands. The example also highlights the continued relevance of corporate benefit as the ‘bottom line’ in decision-making and the reference point for balancing and mediating competing SLO considerations (or stakeholder demands).

Directors’ responses to such scenarios, and the steps they should take to comply with their duties, are also dependent on the circumstances. Such circumstances include the type and nature of the company (which are factors specifically mentioned in s 180 of the *Corporations Act 2001* (Cth) and also shape what companies’ interests are for the purposes of the best interests duty), as well as

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<sup>69</sup> See, eg, *Cassimatis (No 8)* (n 58) 296 [453]–[455] (Edelman J), upheld on appeal in *Cassimatis (FCAFC)* (n 61).

<sup>70</sup> See, eg, *Cassimatis (No 8)* (n 58) 296 [453]–[455] (Edelman J); Kingsford Smith (n 67).

the nature of the SLO consideration and its likely impact. For example, small individually transgressive SLO actions will inevitably cause less damage to reputation, and therefore to the interests of the company, than significant high-profile actions such as Rio Tinto's extensive blasting in the Juukan Gorge. In that case, the very significant impact of the company's actions enables the decision to be more clearly classified as a threat to reputation. In addition, reporting obligations are increasing transparency in relation to companies' SLO-related decisions. The potential social media impact of an issue (and, particularly, its impact on the company's reputation) may heighten its relevance. What is also clear is that, ultimately, a social licence decision for a board is situational. The interests of one company might necessarily include particular attention to employees (such as in situations in which it is difficult to attract sufficient trained talent), but with another it might be capacity to attract institutional investors (which will likely be irrelevant for other companies such as small family companies). This means that decisions are contextual and that it is not possible to specify one set of yardsticks that will apply in all situations.

At the same time, as noted above, the duties of care and diligence and to act in good faith in the interests of the company are not absolute duties that require directors to reach the optimal outcome. Rather, they require directors to exercise care and diligence in giving good faith consideration to the interests of the company and to the factors and considerations relevant to those interests. Making a mistake or causing damage to the company's interests does not, on its own, occasion a breach of duty.

#### IV Qualitative Insight into Director Perceptions

While a few high-profile directors' views were canvassed in the media at the time of the proposed changes to the *ASX Corporate Governance Principles*, overall little is known about directors' views in relation to this important concept. This absence of empirical evidence concerning Australian directors' attitudes to social licence and related concepts reflects an international lack of research examining directors' social responsibility decision-making in general. For example, scholars are only now beginning to investigate the connections between boards of directors and corporate social responsibility ('CSR').<sup>71</sup> Qualitative work in relation to boards has been particularly sparse,<sup>72</sup> despite the potential for non-quantitative methods to contribute in-depth perspectives not otherwise available to researchers.<sup>73</sup> There is also a clear

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<sup>71</sup> Jan Endrikat, Charl de Villiers, Thomas W Guenther and Edeltraud M Guenther, 'Board Characteristics and Corporate Social Responsibility: A Meta-Analytic Investigation' (2020) 60(8) *Business & Society* 2099.

<sup>72</sup> Kathyayini Rao and Carol Tilt, 'Board Composition and Corporate Social Responsibility: The Role of Diversity, Gender, Strategy and Decision Making' (2016) 138(2) *Journal of Business Ethics* 327, 328, 343. For a rare example of qualitative work with boards in the context of corporate governance practice, see John Roberts, Terry McNulty and Philip Stiles, 'Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom' (2005) 16(S1) *British Journal of Management* S5.

<sup>73</sup> Particularly in emergent fields and those associated with ethics issues: Andrew Crane, 'Are You Ethical? Please Tick Yes or No: On Researching Ethics in Business Organizations' (1999) 20(3) *Journal of Business Ethics* 237. The value of qualitative work is that '[o]pen-ended, particularly in-

need for research into the thinking of non-executive directors, whose work within boards otherwise remains ‘completely invisible’.<sup>74</sup> Qualitative investigation of Australian boards, particularly in connection with corporate social responsibility-related issues, is even rarer.<sup>75</sup>

The only empirical work in relation to Australian directors’ perceptions of social licence concepts is a quantitative 2018 study by the Australian Institute of Company Directors (‘AICD’) and KPMG.<sup>76</sup> This research, which predated the ASX’s proposed use of social licence in the *ASX Corporate Governance Principles*, investigated directors’ views on trust and related issues, including SLO concepts. The study noted ‘an important shift’ in Australian directors’ attitudes, with directors ‘starting to ask questions about their organisation’s social licence to operate’.<sup>77</sup> It also pointed to the financial risks associated with loss of a social licence, noting that ‘[a]ggrivated and cynical communities can withdraw their social licence of organisations that lose or exploit their trust — with potentially devastating financial, legal and regulatory impacts.’<sup>78</sup> Social licence was identified as a crucial factor in building trust for an organisation,<sup>79</sup> and the Chairman of the AICD noted that ‘[t]he social licence to operate is absolutely essential to ongoing community support [for organisations]’.<sup>80</sup>

Some quantitative evidence of Australian directors’ perceptions is available in relation to wider stakeholder and sustainability debates. Anderson and colleagues have investigated directors’ perceptions of their ability to take into account stakeholder interests while complying with their directors’ duties.<sup>81</sup> They found that directors saw the law of directors’ duties as allowing them discretion to take into account non-shareholder stakeholder interests.<sup>82</sup> Klettner, Clarke and Boersma have reported a content analysis study of Australian companies’ sustainability disclosures.<sup>83</sup> Their research reported a ‘developing acceptance amongst large corporations that efforts towards improved corporate sustainability are not only

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depth, questioning offers the possibility that respondents will nominate outcomes not envisioned by the researcher’: Vivienne Brand, ‘Empirical Business Ethics Research and Paradigm Analysis’ (2009) 86(4) *Journal of Business Ethics* 429, 431.

<sup>74</sup> Roberts, McNulty and Stiles (n 72) S20.

<sup>75</sup> The only other extant study would appear to be Sainty’s unpublished doctoral work reporting a ‘qualitative examination of members of corporate boards and their beliefs, practices and influences to capture the institutional complexity and inherent tensions at the CG/CSR interface’: Rosemary Sainty, ‘Honouring the Tensions: Corporate Boards at the Interface of Corporate Governance and Corporate Social Responsibility’ (PhD Thesis, University of Technology Sydney, 2017) 318.

<sup>76</sup> KPMG and Australian Institute of Company Directors (‘AICD’), *Maintaining the Social Licence to Operate: 2018 KPMG–AICD Trust Survey* (Report, 2018) <<https://aicd.companydirectors.com.au/advocacy/research/maintaining-the-social-licence-to-operate-2018-kpmg-aicd-trust-survey>>.

<sup>77</sup> *Ibid* 11.

<sup>78</sup> *Ibid*.

<sup>79</sup> *Ibid* 17.

<sup>80</sup> *Ibid* 5, quoting Graham Bradley, Graincorp Chairman.

<sup>81</sup> Malcolm Anderson, Meredith Jones, Shelley Marshall, Richard Mitchell and Ian Ramsay, ‘Shareholder Primacy and Directors’ Duties: An Australian Perspective’ (2008) 8(2) *Journal of Corporate Law Studies* 161.

<sup>82</sup> *Ibid* 171–2.

<sup>83</sup> Alice Klettner, Thomas Clarke and Martijn Boersma, ‘The Governance of Corporate Sustainability: Empirical Insights into the Development, Leadership and Implementation of Responsible Business Strategy’ (2014) 122(1) *Journal of Business Ethics* 145.

expected but are of value to the business'.<sup>84</sup> Earlier empirical insight is also offered by the *PJC Corporate Responsibility Report*, which aimed to investigate 'the extent to which organisational decision-makers [had] regard for the interests of stakeholders other than shareholders, and the broader community'.<sup>85</sup> The PJC reported 'evidence that many companies are integrating the consideration of broader community interests into their core business strategies, rather than treating these issues as an add-on or a side show'.<sup>86</sup> The Committee also noted that the concept of social licence was raised in a number of submissions, identifying the need for companies to engage effectively with the communities in which they operate.<sup>87</sup>

In light of the growing significance of SLO, and the fact that directors have key responsibility for the implementation of SLO decision-making in corporations, this lack of in-depth insight into the views of Australian directors represents a significant gap in our knowledge. This Part reports the director-related findings of a qualitative study of Australian directors' perceptions of SLO and related trust concepts undertaken in the immediate aftermath of the rejection of the ASX's controversial SLO proposals. In particular, it describes directors' perceptions of the relationship between their duties and SLO concepts, filling a lacuna on this important issue.

Directors' views reported in this article offer valuable insight into the operation of the duty of care and best interests duty in contemporary corporate practice. This illuminates the relationship between current doctrinal understandings and the application of those principles. The findings confirm that, consistently with the evolving legal framework, SLO and related concepts are highly relevant to current director activity, with directors referring to those concepts as part of their 'business as usual'. Crucially, directors thought that recognition of these concepts was consistent with the duties they owe. The data also make clear, however, the complexity of the associated decision-making. Part IVA–B below outlines the research project's design, its sample and the method of analysis, with a discussion of the study's findings in relation to directors' duties.

## ***A Research Design, Sample and Analysis***

The study was undertaken in late 2019 and early 2020 with 24 respondents, and used in-depth semi-structured interviews as the key inquiry tool. Interviews addressed a range of participants' perceptions of SLO and related trust concepts. As part of a larger project, respondents were asked how directors perceived the connection between their duties at law and SLO, and whether those duties limited their capacity as directors to respond to SLO factors.<sup>88</sup> Targeted recruitment of participants for the research was undertaken through non-probability, voluntary sampling with

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<sup>84</sup> *Ibid* 145, 161.

<sup>85</sup> *PJC Corporate Responsibility Report* (n 23) vii.

<sup>86</sup> *Ibid* xiii.

<sup>87</sup> *Ibid* 32. See also Corporations and Markets Advisory Committee (Cth), *The Social Responsibility of Corporations* (Summary of Submissions, December 2006) 38–40 [1.5.11].

<sup>88</sup> The results of the wider study are described in Vivienne Brand, Justine Lacey and Jordan Tutton, 'Social Licence as a Regulatory Concept: An Empirical Study of Australian Company Directors' (2023) 46(1) *University of New South Wales (UNSW) Law Journal* (forthcoming).

assistance from Australia's peak industry body for directors (the AICD), professional networks and snowball sampling. Particularly where face-to-face interviews are relied upon, personal introductions obtained as the study progresses provide a valuable recruiting mechanism,<sup>89</sup> and this is true also of obtaining hard-to-reach participants. Targeting of a desired cohort is consistent with qualitative approaches where '[q]ualitative researchers must characteristically think purposively and conceptually about sampling'.<sup>90</sup> Directors generally, and particularly public company directors, are often reluctant to publicise their views on contentious issues, and may have limited availability for participation in research projects. There are well known difficulties associated with obtaining access to elite populations for interview purposes,<sup>91</sup> and this could be expected to particularly be the case where interview content is highly sensitive. In light of this context, access issues were identified as a likely limitation on the study. Director willingness to participate (on the basis of assured confidentiality) was, however, high.

Sixteen of the interviewees in the study were male and eight were female, a ratio that is approximately representative of the current gender distribution on Australian listed boards.<sup>92</sup> Respondents were widely experienced and all but one participant was a currently serving director; that person operated as a senior officer with board experience. The vast majority of participants were non-executive directors. Respondents were linked to more than 80 companies ranging in size from smaller proprietary companies to large publicly-listed organisations with market capitalisations up to, and in excess of, A\$50 billion; a number of individual directors sat on multiple boards. Several were highly influential directors, with representation from a number of ASX Top 50 and ASX Top 100 companies.<sup>93</sup> Respondents were also sourced from smaller entities, with less exposure to contemporary debates in relation to SLO and *ASX Corporate Governance Principles* reform proposals. The industries from which participants were drawn included manufacturing, consultancy, resources, food and beverages, technology, banking and financial services, and energy.

The interview guide was developed from a precedent guide used in prior SLO studies in mining and energy industries.<sup>94</sup> Developments included adaptations to reflect both the ASX SLO proposals and the emerging corporate regulatory context within which the interviews took place. Interviews were recorded, contemporaneous

<sup>89</sup> Vivienne Brand and Amy Slater, 'Using a Qualitative Approach to Gain Insights into the Business Ethics Experiences of Australian Managers in China' (2003) 45(3) *Journal of Business Ethics* 167, 170.

<sup>90</sup> A Huberman and M Miles, 'Data Management and Analysis Methods' in Norman K Denzin and Yvonna S Lincoln (eds) *Handbook of Qualitative Research* (SAGE Publications, 1994) 428, 441.

<sup>91</sup> William S Harvey, 'Strategies for Conducting Elite Interviews' (2011) 11(4) *Qualitative Research* 431; Sharyn Roach Anleu and Kathy Mack, *Performing Judicial Authority in the Lower Courts* (Palgrave, 2017) 193–4.

<sup>92</sup> As at 30 November 2021, 28.7% of board members on ASX All Ordinaries companies were women: AICD, *Board Diversity Statistics* (Web Page, 8 December 2021) <<https://aicd.companydirectors.com.au/advocacy/board-diversity/statistics>>.

<sup>93</sup> The S&P/ASX 50 Index 'comprises the 50 largest stocks by market capitalisation in Australia': ASX, *Capitalisation Indices* (Web Page) <<https://www2.asx.com.au/investors/learn-about-our-investment-solutions/indices/types/capitalisation-indices>>. The ASX 100 Index similarly represents a category of larger stocks. Variations in market capitalisation affect which stocks are represented in these categories at points in time.

<sup>94</sup> Parsons, Lacey and Moffat (n 18); Hall et al (n 18).

notes were made by the interviewer, transcripts were prepared by an independent party and all transcripts were reviewed for accuracy by the interviewer. Descriptive analysis informed by grounded theory was employed to analyse the data.<sup>95</sup> Themes were thus drawn from the transcripts in order to generate theoretical insights from those themes, in distinction to testing of existing theory. Interview transcripts were subjected to a systematic, verifiable analysis of themes and ideas by a research team, and coding was cross-checked and verified across the team. Computer Assisted Qualitative Data Analysis Software ('CAQDAS') was used to document and facilitate retrieval of coded content. Almost all directors who were approached were willing to participate in the study and were generous in the time they made available for the research. A number have continued to be interested in the study's findings and to follow the outputs of the research, suggesting a level of interest in the issues under investigation.

## ***B Results and Discussion***

Consistent with the evolving legal framework discussed in Part III, directors' responses largely confirmed the significance of SLO and related concepts to directors' work. Indeed, these ideas were described by some as simply part of their 'business as usual' activity. Directors also perceived consideration of SLO and related concepts as consistent with their directors' duties, and particularly their obligation to act in the best interests of the company. However, despite many participants affirming the relevance of the concept, there was no clear consensus on the definition of SLO. Some directors saw it as too imprecise and too subjective to operate as an externally imposed regulatory requirement. This demonstrates the nuanced nature of director responses on this issue. It was also apparent that a broad range of factors were relevant in any SLO-related judgements. These include the need to consider the timeframe over which a decision would play out, to distinguish between consumer-facing organisations and business-to-business entities, and the significance of geographical SLO factors for corporate activities that have a physical footprint. Consistently with the doctrinal analysis in Part III, reputation in particular was identified as an important aspect of directors' duties, SLO and related concepts, and participants noted the way in which SLO reacted to circumstances.

### *1 Social Licence to Operate as Part of 'Doing the Job'*

Broadly speaking, directors demonstrated a clear awareness of the relevance of SLO and related concepts such as reputation and trust, although a few objected to the phrase 'SLO' itself. One director commented that 'all I can say is, boards are really taking it seriously' (I19). Another director said 'I think social licence is every day ... it's business as usual, it has to be. It's in everything' (I23). The majority of directors saw SLO-related concepts as intrinsic to normal business operations. Many

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<sup>95</sup> Kathy Charmaz, 'Grounded Theory: Objectivist and Constructivist Methods' in Norman K Denzin and Yvonna S Lincoln (eds) *Handbook of Qualitative Research* (SAGE Publications, 2<sup>nd</sup> ed, 2000) 509; Anselm Strauss and Juliet Corbin, 'Grounded Theory Methodology: An Overview', in Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (SAGE Publications, 1994) 273.

directors emphasised that taking into account all the impacts of board decisions was simply part of what they did as directors; one director said: ‘I’ve never sat there and gone, oh, should we screw our employees or should we make more money? Mmm. Those decisions just don’t come up’ (I23).

Overall, the perspective taken by many is encapsulated in the response of the director who indicated that ‘meeting the expectations of the community is actually good business as well and you can’t achieve your long term objectives for your owners without taking into account all of the relevant stakeholders’ (I10). This understanding is broadly consistent with the approach taken by the *PJC Corporate Responsibility Report*. It is also consistent with the findings of Klettner, Clarke and Boersma’s 2012 study of Australian companies’ sustainability disclosures, which reported a developing corporate acceptance of the value of sustainability activities for businesses.<sup>96</sup> These views are also largely in line with evidence from the KPMG and AICD 2018 study indicating the significance of SLO issues for contemporary directors.<sup>97</sup> Significantly, the views expressed by directors also align with the evolving doctrinal position, and its increasing recognition of the relevance of stakeholder perspectives and reputational factors.<sup>98</sup>

## 2 *Social Licence to Operate Relevance Seen as Consistent with Directors’ Duties*

Consistently with the view that SLO and related concepts were intrinsic to directors’ work, the majority of respondents did not perceive directors’ duties as operating as a restriction on social licence decisions. Most directors’ views broadly accorded with the finding of the 2006 *PJC Corporate Responsibility Report* that the existing legal framework for directors’ duties was ‘sufficiently open to allow companies to pursue a strategy of enlightened self interest’.<sup>99</sup> This finding is also consistent with earlier quantitative work by Anderson and colleagues that found ‘an overwhelming majority (94.3%) of directors believed that the law of directors’ duties was broad enough to allow them to take into account the interests of stakeholders other than shareholders’.<sup>100</sup> As one director put it: ‘I don’t see any of the duties restrict us from doing it [that is, SLO] —quite the contrary I think if anything we just feel more obligation to’ (I08). Another referred to social licence issues and directors’ duties as being ‘intertwined’ (I10), while a third described directors’ duties as ‘sit[ting] in parallel’ to social licence requirements, and as supporting them (I01).

In discussing the statutory formulation of the best interests duty, one respondent argued that the ‘legal posts are quite wide’ and that people often misread the *Corporations Act 2001* (Cth):

They’ve read that as being in the best interests of shareholders, and that is not what it says. It says it’s in the best interests of the company, and that’s been interpreted as being, clearly it has to be for the benefit of the general body of

<sup>96</sup> Klettner, Clarke and Boersma (n 83).

<sup>97</sup> KPMG and AICD (n 76) 10, 12.

<sup>98</sup> See Part III of this article.

<sup>99</sup> *PJC Corporate Responsibility Report* (n 23) xiv.

<sup>100</sup> Anderson et al (n 81) 172.

shareholders. But it goes further. It doesn't then mean you don't look at all these other things. (I03)

Another very experienced director explained their thinking in this way:

[A]s a company director, your obligation is to act in the best interests of the company, and in doing so, you take into account all the different factors there, and all of your decisions, you are weighing up all the different stakeholders and the different factors, and that's where this concept of social licence comes in. (I22)

This 'weighing up' idea was identified by this director as a key component of the practical application of directors' duties: 'I think that "in the best interests of the company" serves us well, because you do have to weigh different things up ... based on what you know at that point in time' (I22).

A requirement to be explicit about the weighing-up process was described by one of the most experienced and high-profile directors in the sample, indicating the connection between the director's perception of their duties and the need to be very clear about the judgement processes involved in SLO considerations:

[S]ometimes you actually may decide well in this situation I'm not going to prefer the customer I am going to prefer the bottom line but I'm going to say so. You're explicit about the decisions that you make. I think in any sort of commercial enterprise it's quite open to you to make those decisions. You just need to be explicit about it. (I13)

The connection between wider stakeholder interests and directors' duties was expressed by another highly experienced senior director in this way:

I've never interpreted the notion that you owe your duties to the shareholders primarily, as inconsistent with their interest in the long term of you being a good corporate citizen and earning the respect of the communities of which you operate, your employees, you know your suppliers, all those things. (I14)

One director pointed to the need to ensure that any SLO-related decision had some form of connection with the company. This respondent identified a key distinction between 'issues that have no connection with the company' and the SLO-type issues that were considered by this director's board, which 'would generally have a connection with the company' (I03). This director perceived the latter as relevant to the requirements of the acting-in-the-best-interests-of-the-company test, because they had 'a connection between the decision, the issue and the company, some connection' (I03). A similar test was raised by other directors, who indicated the need for a direct connection between a company's reputation or business and its social licence or corporate social responsibility actions.

Interestingly, one of the senior directors dismissed the simplicity of the argument that stakeholder and shareholder interests tend to 'eventually' align, arguing 'that's just not true. You do have to make deliberate preferential decisions around your different constituents' (I13). This director's perspective points to the complexity of SLO issues for boards and reinforces the emphasis on 'balancing' and 'weighing' activities evident in many responses.

Perhaps the clearest expression of the idea that directors' duties are consistent with recognising SLO principles occurred in the following comment of another of the most senior directors interviewed:

I have no doubt that to fulfil my duty, to act in the best interests of the company and for proper purposes, and in good faith, means having regard to all stakeholder interests, environment, social issues, as well as shareholders. So, there's certainly no restraint at all, and I think courts, certainly are just going to confirm that the momentum is all going in the right way. (I04)

The perspective enunciated by this director appears to recognise that directors' decisions need to take account of stakeholder voices, but cannot do so in the absence of the corporation's own specific circumstances. Notably, this formulation and the preceding quotes implicitly recognise the need to have primary regard to the best interests duty. As discussed in Part III, the best interests duty does not allow promotion of stakeholder interests with no link to corporate benefit.

### 3 *Lack of Consensus on Definition*

However, despite the perceived importance of the concepts underlying SLO, respondents demonstrated a divergence of opinion on whether or not 'social licence to operate' was a well-understood term. While several directors indicated the phrase had a clear meaning for them, others saw it as interchangeable with, or easily confused with, similar terms such as CSR and environmental, social and governance ('ESG'). One highly experienced director referred to the multiplicity of terms as representing 'a big blur' for many directors (I08). As another said, 'I've got no idea what it means ... that's what pretty much everyone says' (I10). Some directors felt that the lack of agreed definition of 'social licence' left it open to being manipulated by special interest groups. This risk has also been recognised by Gunningham, Kagan and Thornton in commentary on the potential for social licence obligations to facilitate action by 'extremist elements'.<sup>101</sup> More than one respondent pointed to the difficulty of directors being held to account in relation to a concept that appeared to lack formal definition. As noted, this argument also represented a major criticism of the proposed use of the term in *ASX Corporate Governance Principles*.<sup>102</sup>

### 4 *Range of Relevant Factors*

The data reveal a wide range of factors to which directors have regard when exercising their duties in relation to SLO-type issues. These include the timeframe over which a decision might be expected to play out. One of the most experienced directors in the sample did not 'think there's any question that when companies consider the longer term interest of the company and shareholders they need to consider the interests of every constituency and ... that's an absolute truth' (I14). By contrast, another very senior director referred to the strong pressure from investment funds to focus more on short-term gains: '[I]t's about maximising return' (I02).

<sup>101</sup> Neil Gunningham, Robert A Kagan and Dorothy Thornton, 'Social License and Environmental Protection: Why Businesses Go Beyond Compliance' (2004) 29(2) *Law & Social Inquiry* 307, 338.

<sup>102</sup> Durkin, 'Governance Council Retreats' (n 42).

Some directors also raised the distinction between a consumer-facing rather than a business-to-business ('B2B') organisation, with SLO-related factors such as trust seen as more important for consumer-facing entities. One director explained the distinction in this way:

[T]he ones who are worried about trust are usually the ones who are customer focused; so if you're dealing with consumers yes, you need to worry about this because the last thing you want is some sort of campaign against you for some reason [whereas] if you are purely B2B as a business I suspect you're a lot less concerned about that trust factor, you're more concerned with just getting on and doing the job. (I09)

Geographical presence was also identified as influencing decision-making. For example, a director whose experience was in construction pointed to the critical need to have local acceptance of a company's operations where they were physically present in a community, rather than having a less tangible activity base:

So there's always a sort of — a negotiation with the local community that you impact on, because really they are hosting you in their environment. ... You have to have a social licence to operate, because otherwise local communities make it very difficult for you to get things done ... [but] if you're in a consumer facing organisation where you're selling products or services, the concept is probably a little more nebulous. (I21)

These insights help to clarify the reasoning process directors engage in when undertaking SLO-related analyses, and illustrate the situational nature of many of those judgements. As discussed in Part III, both the duty of care and best interests duty have the capacity to accommodate these subjective, nuanced factors. Crucially, however, these factors may conflict,<sup>103</sup> adding significant complexity to the judgements required of directors when considering SLO factors.

## 5 *Reputation is Crucial*

A company's reputation was identified by many respondents as a key concept in relation to SLO. This is consistent with both the growing importance of reputation in the application of directors' duties<sup>104</sup> and the ASX CGC's choice of the term 'reputation' as an alternative to use of SLO in its 4<sup>th</sup> edition of the *ASX Corporate Governance Principles*. As noted above, the Principles now describe 'the need for the entity to preserve and protect its *reputation and standing in the community* and with key stakeholders, such as customers, employees, suppliers, creditors, law makers and regulators'.<sup>105</sup> Similarly, one director identified the interrelationship of the concepts of reputation and SLO in this way (echoing elements of Keay's analysis cited in Part III):<sup>106</sup>

[W]ith all due respect to some of my colleagues, I didn't feel like social licence to operate extended what might be expected of us, as directors in a modern corporation anyway, because at a minimum, all of the areas where social licence to operate might get you into difficulty, many of them are

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<sup>103</sup> See Part IIID above.

<sup>104</sup> See Part III above.

<sup>105</sup> See n 51 and accompanying text.

<sup>106</sup> See above n 66 and accompanying text.

reputational risks which have an impact on your business, they have an impact on the engagement of your staff, so to just separate it out to me, means you're not doing the job that's required of you, as a director. (I02)

The volatility of reputational factors was also highlighted by some directors. One respondent referred to the rapidity with which a company's reputation could be affected by events, saying 'it takes years to build trust, and one day to lose it' (I21). This is particularly so in the context of social media — an emerging factor in director liability — a perspective consistent with the evolving legal framework for directors' duties discussed in Part III.<sup>107</sup> In part, it also reflects a potential corollary to Edelman J's description in *Cassimatis (No 8)* of the importance of company compliance with the law. As noted above, Edelman J has identified that it is difficult 'to imagine examples where it could be in a corporation's interests for the corporation to engage in serious unlawful conduct even if that serious unlawful conduct was highly profitable'.<sup>108</sup> Insights from directors in this study indicate that it may be equally hard to imagine examples where it could be in the corporation's interests for the corporation to engage in seriously reputationally-damaging conduct even if that conduct was highly profitable and was reasonably considered by the director to be lawful.

## 6 *Nuance in the Data*

Some contrary views in relation to the relevance of SLO and its consistency with contemporary directors' duties were apparent, both for directors in the sample and also reportedly for others in the wider director environment. One very senior director rejected the relevance of SLO as a descriptive concept, commenting 'I ignore social licence to operate because I think it's meaningless' (I16). However, while suggesting the term itself was problematic, this director did not reject the underlying need to take into account related concepts:

[I]n the interest of the long term viability of any entity, you've got to take into account the quality of your products, how your customers feel about your products, your reputation in the community. You've got to be a good place to work, so your — so you can compete for talent. (I16)

Another very experienced director identified the lack of relevance that many of their colleagues placed on formal directors' duties formulations at all. This is a timely reminder that not all directors pay as much attention to statutory and general law descriptions of directors' duties as lawyers and academics might. This director suggested that his colleagues, 'if they've ever heard "licence to operate", wouldn't know what it meant, and would have a fuzzy idea about what is in the best interests of the company, even though we've had that sort of test for, you know, a hundred-odd years' (I04). Another director accepted the importance of SLO concepts, but remained concerned about the unintended consequences that might flow from formal regulatory adoption of the concept: '[T]his concept of social licence, I think is an

<sup>107</sup> Recent research indicates that 'social media is becoming an important factor in the forced CEO transitions, which are happening due to a broad spectrum of ESG reasons': Tony Boyd, 'Lessons from Forced CEO Exits', *The Australian Financial Review* (online, 20 May 2021) <<https://www.afr.com/chanticleer/lessons-from-forced-ceo-exits-20210519-p577bd>>.

<sup>108</sup> *Cassimatis (No 8)* (n 58) 301 [482].

important and valuable one, but to codify it could create undesired and unforeseen second and third order consequences' (I22). These dissenting views in relation to SLO operate as a reminder of the complexities that can arise in relation to the interactions between SLO and directors' duties.

### ***C Key Insights from the Empirical Evidence***

A number of key insights are apparent in the empirical evidence. It is clear from director responses in the empirical study that SLO and related concepts were seen as core issues for most respondents, and that directors' views largely aligned with the evolving doctrinal position on this point. However, some directors were unhappy about potential limits being placed on their exercise of director discretion through the formal imposition of an obligation to comply with a concept (that is, SLO) that does not enjoy a clear or agreed definition. Overall, there is no doubt that SLO concepts are complex, nuanced, and highly situational. This is true regardless of the perspective taken by directors and irrespective of whether SLO ought to be an externally imposed regulatory device or remains an internally-applied mechanism.

Factors such as the timelines over which a decision would play out, the presence of a consumer component to a company's operations, and the impact of a company's physical presence in a community were acknowledged in interviews. This again highlights the situational nature of SLO-related decision-making. The complexity of those situational judgements is apparent in the range of relevant factors raised by directors, the level of judgement required, the significant impact decisions could have on company operations and the potential for devastating impacts to arise very quickly. Significantly, respondents saw no inconsistency between the discretionary considerations required by SLO concepts and applicable directors' duties. While little emphasis was placed on specific duties, the best interests duty was referred to by many directors. This affirms the key relevance of the bottom line requirement that promotion of stakeholder interests not occur without a link to corporate benefit.

The data in this study also reveal that directors are aware of the complexity of the challenges SLO presents, particularly in relation to the trading-off of competing benefits and risks. As one director expressed it: '[T]he hardest things you do, as a director ... are things that are in the grey ... it'd be so easy if things were clear-cut and no-brainers' (I22). These insights again align with doctrinal descriptions of the expectations placed on directors, which recognise there is significant room for error in the complex decision-making tasks imposed on directors. Inherent in the exercise of director discretion is the need to balance competing demands and factors within the company's specific situational context: 'it is the function of the board and management to identify, balance and reconcile ... obligations ... according to each corporation's "values proposition"'.<sup>109</sup>

Identification, balancing and ultimate reconciliation of competing demands may be increasingly difficult in an age of heightened reputational risk and social media pressures. In this respect, it is important to note that 'reasonable minds may

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<sup>109</sup> Hanrahan, 'Exciting Times' (n 11) 148.

differ'.<sup>110</sup> Moreover, as stated in Part III above, directors are not subject to absolute duties that require the achievement of an optimal outcome. Making a mistake or causing damage to the company's interests does not, on its own, occasion a breach of duty. The data in the empirical study indicate that directors are sanguine about the need to undertake the nuanced reasoning required by SLO and related concepts. That is, the exercise of complex discretion is expected — as difficult as that may sometimes be. In the words of one respondent: 'You [are] supposed to make some hard calls at times, and you get paid for it, so for God's sake, get on and do it' (I01).

The high degree of judgement inherent in SLO-related assessments, together with a lack of consensus as to the definition of SLO, help explain why formalisation of SLO caused so much controversy. An attempt at codification appears to have been seen by some directors as limiting the exercise of their core discretion, and some saw the concept as too imprecise and too subjective to work as an externally imposed regulatory yardstick in any event. These perceptions are consistent with criticism at the time of the ASX CGC's proposals that the formal introduction of SLO into the Principles might create 'confusion about the general law and statutory duties of directors under the *Corporations Act*'.<sup>111</sup>

## V Conclusion

In 2006, the *PJC Corporate Responsibility Report* introduced SLO to the general corporate regulatory environment in Australia,<sup>112</sup> but noted that corporate responsibility was still in its 'developmental stages'.<sup>113</sup> The doctrinal and empirical analyses presented in this article confirm that this development has continued and matured. These analyses also demonstrate the place of SLO concepts as an intrinsic component of the suite of factors to which contemporary directors must, and do, have regard in discharging their duties. Directors' own perceptions of their obligations in relation to SLO clearly demonstrate the significance attributed to SLO and related concepts by respondents. Directors were very attuned to these concepts.

However, it is also clear that SLO judgements are nuanced, requiring the exercise of complex discretion on the part of directors. These judgements may be difficult to make. In addition, the consequences in terms of reputational damage can be sudden and very significant, as the recent Juukan Gorge example amply demonstrates. The discretionary aspect of SLO-related decision-making, dealing as it does with 'things that are in the grey', appears to be part of the reason why the proposed ASX CGC's formalisation of SLO caused so much controversy.

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<sup>110</sup> *Ibid*, citing *RBC Investor Services Australia Nominees Pty Limited v Brickworks Ltd* (2017) 348 ALR 605, 616 [42] (Jagot J):

The courts recognise that it is the responsibility of the directors to weigh the competing considerations with which they will be routinely confronted and determine what is in the best interests of the company as whole. They recognise also that as the task of the directors is evaluative it is necessarily one about which reasonable minds may differ.

<sup>111</sup> AICD (n 41) 6 [4.2]. See also Law Council of Australia (n 43) 10 [63], 10–11 [69].

<sup>112</sup> The concept was identified in a number of submissions to the PJC inquiry into corporate responsibility and triple-bottom-line reporting: *PJC Corporate Responsibility Report* (n 23) 52 [4.33].

<sup>113</sup> *Ibid* xix.

Despite the inherent complexity, the nuanced reasoning required and the multi-factorial nature of SLO judgements, many directors in this study appeared accepting of the need to engage with SLO-related decision-making. There is also strong alignment between respondents' views and the doctrinal analysis of the evolving legal position as to the relevance of SLO and related concepts. While SLO decisions may be difficult, for many directors these decisions are no more than a matter of 'doing the job that's required of you'.



# *Before the High Court*

## *Aboriginal Identity and Status under the Australian Constitution: Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*

**Elisa Arcioni\* and Kirsty Gover†**

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### **Abstract**

In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* ('*Montgomery*'), the High Court of Australia is faced with a challenge to the significant, but controversial, decision in *Love v Commonwealth*. That decision held that the aliens power under s 51(xix) of the *Australian Constitution* does not reach Aboriginal Australians. As a result, they are not vulnerable to the removal powers contained in the *Migration Act 1958* (Cth) regardless of their statutory citizenship status. In *Montgomery*, the Commonwealth seeks to reopen and overturn *Love v Commonwealth*, or to confine the category of Aboriginal Australians in a way that excludes persons like Montgomery, who have been culturally adopted into an Aboriginal society, but have not shown that they are the biological descendant of an Aboriginal or Torres Strait Islander person. *Montgomery* highlights the challenges entailed in efforts to determine the scope of the Australian Parliament's power to determine membership of the constitutional polity, and appropriately describe Aboriginal Australians in a way that respects the complexities of Aboriginal and Torres Strait Islander identity and membership.

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## I Facts and Procedural History

In *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (*Montgomery*),<sup>1</sup> the Commonwealth<sup>2</sup> seeks to reopen and overturn *Love v Commonwealth*, which held that the aliens power under s 51(xix) of the *Australian Constitution* does not reach Aboriginal Australians.<sup>3</sup> Alternatively, the Commonwealth seeks to confine the category of Aboriginal Australians in a way that excludes persons like Montgomery. Shayne Paul Montgomery was born in New Zealand and is a New Zealand citizen. His mother is an Australian citizen and his father a New Zealand citizen of Māori (Ngā Puhī) descent. He moved to Australia in 1997 as a teenager and was granted a visa under s 32 of the *Migration Act 1958* (Cth) (*Migration Act*). He has never been naturalised. Montgomery identifies as Aboriginal Australian and has been recognised as a culturally adopted Mununjali man by persons enjoying traditional authority in the Mununjali community, in accordance with that society’s traditional laws and customs.<sup>4</sup> He was told by his paternal grandmother that his Ngā Puhī ancestors married into an Aboriginal clan, but he does not know if he is a direct descendant of Aboriginal ancestors, and he does not know if his Australian mother has Aboriginal ancestry.<sup>5</sup>

In 2018, Montgomery was convicted of a burglary offence and sentenced to 14 months’ imprisonment, following which a delegate of the Minister cancelled his visa. That cancellation was mandatory, as Montgomery had breached the character test because of his criminal record.<sup>6</sup> At the expiration of his sentence in February

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<sup>1</sup> *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (High Court of Australia, Case No S192/2021) (*Montgomery*).

<sup>2</sup> We refer to ‘the Commonwealth’ as shorthand for the appellants and supporting interveners — all being emanations of the Commonwealth.

<sup>3</sup> We use the expression ‘Aboriginal Australian’ to reflect the terminology used by the majority of the High Court of Australia in *Love v Commonwealth* (2020) 270 CLR 152, 192 [81] (Bell J) (*Love*) and Federal Court of Australia decisions, otherwise ‘Aboriginal and Torres Strait Islander’ persons or people is used.

<sup>4</sup> *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1423, [53] (*Montgomery* (FCA)).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* [2], [29]–[30]. See *Migration Act 1958* (‘Cth’) s 501(3A)(a)(i), (6)(a), (7)(c).

2019, Montgomery was taken into immigration detention.<sup>7</sup> A year later, the High Court of Australia decided the case of *Love*, in which a majority of the Court held that Aboriginal Australians, even if not citizens, are not aliens for the purpose of s 51(xix) of the *Australian Constitution*.<sup>8</sup>

Montgomery challenged his immigration detention on a number of grounds in the Federal Court of Australia. He was successful in a habeas corpus application based on a challenge to the lawfulness of his detention under s 189 of the *Migration Act*.<sup>9</sup> That challenge was premised on the finding that Montgomery's representations as to his Aboriginality were sufficient to put in issue the lawfulness of his detention,<sup>10</sup> shifting the burden of proof to the Minister.<sup>11</sup> SC Derrington J, in the Federal Court, concluded that the detaining officer's suspicion that Montgomery was not an Aboriginal Australian was not reasonable.<sup>12</sup> The Minister filed a notice of appeal with respect to the habeas writ and it is that appeal which was removed into the High Court on 29 November 2021.<sup>13</sup>

Montgomery has sought to separate any constitutional issues from the grounds upon which the habeas writ was granted, given that the question of Montgomery's status as an Aboriginal Australian in the terms required by *Love* was not before the Federal Court. Yet the issues are not so easily separated. The constitutional issue (the effect of Aboriginality on alien status) is linked to the habeas writ's dependence on a conclusion regarding the lawfulness of Montgomery's detention. Following *Love*, there have been several Federal Court cases regarding the application of that precedent to individuals faced with immigration detention.<sup>14</sup> The logic adopted in those cases has been that Aboriginal Australians, understood in accordance with the tripartite test used in *Love*,<sup>15</sup> are not aliens, therefore they are not vulnerable to detention and deportation under the *Migration Act*.<sup>16</sup> *Montgomery* is the first of the Federal Court cases on this issue to reach the High Court.

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<sup>7</sup> *Montgomery (FCA)* (n 4) [29].

<sup>8</sup> *Love* (n 3) 192 [81] (Bell J).

<sup>9</sup> *Montgomery (FCA)* (n 4).

<sup>10</sup> *Ibid* [55].

<sup>11</sup> *Ibid* [52].

<sup>12</sup> *Ibid* [68].

<sup>13</sup> Transcript of Proceedings, *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCATrans 201.

<sup>14</sup> See *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647 ('*Helmbright (No 2)*'); *Hirama v Minister for Home Affairs* [2021] FCA 648 ('*Hirama*'); *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602 ('*McHugh (FCAFC)*'); *Webster v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 277 FCR 38.

<sup>15</sup> The tripartite test, addressed below in Part VI, was that referred to by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 70 ('*Mabo (No 2)*'): see below n 44 and accompanying text.

<sup>16</sup> The extent to which non-aliens may be lawfully detained under that Act is the subject of separate proceedings flowing from the *Love* decision, see *Thoms v Commonwealth* (High Court of Australia, Case No B56/2021, commenced 11 October 2021, heard 9 March 2022 with judgment reserved).

## II Overview of the Issues

The threshold question before the High Court in these proceedings is a challenge to its competency to hear an appeal from the habeas writ. Montgomery refers to a so-called ‘preclusion principle’, in which ‘no appeal lies from an order of a competent Court for the issue of a writ of habeas corpus discharging a [detained] person from custody, unless a right of appeal is specifically given by the Legislature’.<sup>17</sup>

Assuming the Court decides it is competent to hear the appeal, it will likely proceed to address the Minister’s arguments regarding the reopening of *Love*.<sup>18</sup> The Commonwealth Attorney-General has intervened in support of the Minister, indicating the Government’s desire to see a reversal of the decision in *Love*.<sup>19</sup> That position is no surprise given the criticism of the Court’s decision in *Love* and the public position of at least one member of the current government.<sup>20</sup> Montgomery argues *Love* should neither be reopened nor overturned, and is supported by interveners.<sup>21</sup>

If *Love* remains good law, the Court will provide a restatement of what that case stands for, but in order to respond to the case before them, the Court may also have to consider its application to Montgomery’s circumstances. At that point, questions of fact become particularly fraught, since the hearing in the Federal Court proceeded without comprehensive evidence on Montgomery’s status as an

<sup>17</sup> Shayne Paul Montgomery, ‘Submissions of Respondent’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 4 March 2022, [13] (‘Respondent’s Submissions’).

<sup>18</sup> For other preliminary arguments of Montgomery to avoid the Court reaching the *Love* issue, see *ibid* [21]–[36].

<sup>19</sup> Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs, ‘Submissions of the Appellants and Attorney General for the Commonwealth (Intervening)’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 28 January 2022 (‘Appellants’ Submissions’).

<sup>20</sup> Senator Amanda Stoker, currently Assistant Minister to the Attorney-General, made clear in her paper delivered to the Samuel Griffiths Society in 2020, prior to the appointments of Gleeson and Steward JJ, that ‘challenging the decision under a reconstituted Bench’ is her preferred approach for the Government in seeking to ‘remedy’ the ‘truly disturbing’ decision reached by the majority of the Court in *Love*: Amanda Stoker, ‘All’s Fair in Love and War: The High Court’s Decision in *Love & Thoms*’ (2020) (Online Speaker Series) *Samuel Griffiths Society* <<https://www.samuelgriffith.org/papers>>.

<sup>21</sup> See the submissions in *Montgomery* seeking leave to intervene: National Native Title Council, ‘Submissions of the National Native Title Council Seeking Leave to Intervene’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 9 March 2022; Northern Land Council, ‘Proposed Submissions of the Northern Land Council’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 9 March 2022; Attorney-General (Vic), ‘Submissions of the Attorney-General for the State of Victoria (Intervening)’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 9 March 2022 (‘Attorney-General (Vic) Intervener’s Submissions’). See also the submissions of the Australian Human Rights Commission seeking leave to appear as *amicus curiae*: Australian Human Rights Commission, ‘Submissions of the Australian Human Rights Commission Seeking Leave to Appear as *Amicus Curiae*’, Submission in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*, Case No S192/2021, 9 March 2022.

Aboriginal Australian under the tripartite test referred to in *Love*.<sup>22</sup> The lack of facts may affect whether or not the Court enters the fray on this point. The High Court may decide that the factual matters have to be resolved in the Federal Court, as it did in relation to Daniel Love. To the extent that the High Court entertains the definitional challenge of identifying ‘Aboriginal Australians’, the focus will turn on the meaning of ‘biological descent’ in the first limb of the tripartite *Mabo v Queensland (No 2)* test relied on in *Love*.<sup>23</sup>

In this article, we address two issues: first, how the aliens power is to be understood; and second, the state of play regarding tests for determining whether a person is an Aboriginal Australian. We conclude that the finding in *Love* that a person’s status as an Aboriginal Australian is relevant to constitutional membership is neither illegitimate nor inconsistent with fundamental principles of Australian constitutionalism.

### III *Love* and Alienage: A Clarification?

The decision in *Love* is the first time that a majority of the High Court has enunciated a specific limit to the aliens power in s 51(xix) of the *Australian Constitution*. That majority was composed of four separate judgments by Bell, Nettle, Gordon and Edelman JJ. The members of the majority agreed on a central proposition as expressed by Bell J:

I am authorised by the other members of the majority to say that although we express our reasoning differently, we agree that Aboriginal Australians (understood according to the tripartite test in *Mabo [No 2]*) are not within the reach of the ‘aliens’ power conferred by s 51(xix) of the *Constitution*.<sup>24</sup>

Whatever route the Court takes in responding to the appeal in *Montgomery*, the reasoning of *Love* will be in focus. Individual judges may decide the case on the question of whether leave is required to reopen *Love* and whether leave should be granted. Whether or not *Love* is reopened, the Court will either have to explain why the case should be overturned, or explain what the precedent means in application to *Montgomery*.

At its heart, the *Montgomery* appeal is about choosing between different approaches to understanding alienage in s 51(xix) of the *Australian Constitution* and whether (and, if so, how) a person’s status as an Aboriginal Australian is relevant. The submissions of the parties effectively repeat the key lines of disagreement seen on the High Court in *Love*, influenced by the intervening case of *Chetcuti v Commonwealth*,<sup>25</sup> decided in August 2021, and the arguments in *Alexander v*

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<sup>22</sup> Respondent’s Submissions (n 17) [12].

<sup>23</sup> *Mabo (No 2)* (n 15) 70. Only the first limb of the test (biological descent) is in issue in *Montgomery*. This is addressed below in Part VI.

<sup>24</sup> *Love* (n 3) 192 [81] (Bell J).

<sup>25</sup> *Chetcuti v Commonwealth* (2021) 95 ALJR 704.

*Minister for Home Affairs*,<sup>26</sup> heard in February 2022. Despite the disagreements, the entire Court speaks with one voice on some key elements.

One element of agreement in the High Court is that the aliens power is a key component of the Australian State’s capacity to determine membership and exclusion under the *Australian Constitution*.<sup>27</sup> Another is that there is a great deal of latitude available to the Australian Parliament in how it seeks to determine membership and therefore implicitly also exclusion through statute — principally by means of citizenship legislation. This latitude is due to the lack of settled law as to alienage at Federation given statutory inroads to that status at the time, and the evolution of Australia as an independent nation. Lastly, all judges have recognised that the power of the Parliament in this field is not completely unlimited, by reference to the key statement of Gibbs CJ in *Pochi v Macphee*: ‘the Parliament cannot, simply by giving its own definition of “alien”, expand the power under s 51(xix) to include persons who could not possibly answer the description of “aliens” in the ordinary understanding of the word’.<sup>28</sup>

#### **IV Maintaining a Supervisory Function of the High Court — Limits to the Aliens Power**

The Commonwealth structures their argument in a way that seeks to reduce the impact of the ‘ordinary understanding’ limit. They note: ‘the existence of [the *Pochi*] qualification is undoubted ... [but] ... the ordinary understanding of “alien” is relevant only to the extent that the *range of possible meanings* encompassed by that understanding marks the limit on the first aspect of s 51(xix)’.<sup>29</sup> The Commonwealth argues that the majority in *Love* reasoned in error by focusing on the essential or ordinary meaning of alien and concluding that Aboriginal Australians do not fall within that meaning. That is, they say one should not *start* with a focus on that limit because it would be a ‘direct application’ of the ordinary meaning of alien.<sup>30</sup>

This approach of the Commonwealth effectively prevents the identification of limits on the aliens power. The logic of the Commonwealth’s approach is to allow the Australian Parliament to choose from among a smorgasbord of options regarding the possible bases upon which to determine citizenship and by implication non-alienage. The argument goes as follows: if it is sufficient that any one of those is a basis upon which to legislate, then no limit can be identified unless that list is itself challenged. That is, the very reference to ‘ordinary meaning’ simply collapses back to the bases upon which individuals have been treated as aliens in the past and each of them is available today and into the future at the choice of the Parliament, with no other factors being able to be legitimately raised to limit the Parliament’s power.

<sup>26</sup> *Alexander v Minister for Home Affairs* (High Court of Australia, Case No S103/2021, commenced 23 July 2021).

<sup>27</sup> Appellants’ Submissions (n 19) [23]; *Love* (n 3) 217–18 [167] (Keane J), 173 [14] (Kiefel CJ), 209 [130], 212 [138] (Gageler J), 293–4 [404] (Edelman J).

<sup>28</sup> *Pochi v Macphee* (1982) 151 CLR 101, 109.

<sup>29</sup> Appellants’ Submissions (n 19) [27] (emphasis in original). See also [34].

<sup>30</sup> *Ibid* [26].

The Commonwealth's approach should be rejected, because of (among other reasons) the way in which it affects the supervisory function of the High Court in determining limits to powers conferred under the *Australian Constitution*. Deference is appropriate in the context of determining membership of the body politic through constitutional status. However, that deference should not extend to the refusal to consider limits to the power of the Australian Parliament. In the context of the *Montgomery* case, the question becomes whether Aboriginality can be understood as a limit to the aliens power. Assuming the Court takes an approach that leaves open the possibility of determining limits to the aliens power, it would then be faced with the question of whether Aboriginality is relevant to constitutional status in terms of alienage.

## **V Aboriginality is Relevant to Constitutional Membership**

### **A Sui Generis Basis of Belonging**

The reasoning of the majority in *Love* provides recognition of a sui generis basis of constitutional membership through non-alienage: being an Aboriginal Australian. It is significant that the basis is expressly sui generis, since this helps sustain the coherency of existing case law regarding alien status for non-Aboriginal persons. The High Court has not fully developed a jurisprudence regarding constitutional membership. However, one element of existing doctrine is that substantive absorption into the Australian community is not relevant to alienage.<sup>31</sup> The absorption doctrine was one that applied in relation to another constitutional category — that of 'immigrant' relevant to s 51(xxvii).<sup>32</sup> The sui generis nature of the reasoning in *Love* does not affect this element of the law.

Key to the majority reasoning in *Love* is the way in which the core or essential meaning of alienage was understood to be 'belonging to another place'<sup>33</sup> or, more fundamentally, as not belonging to Australia. From that position, the majority judges concluded that Aboriginal Australians cannot be aliens because by definition they belong to Australia, by virtue of their unique, spiritual, two-way connection to Australian land and waters. The way in which that claim of belonging occurs through a particular recognition of Aboriginal Australians and their unique connection to Country, rather than simply a generic or substantive connection to the Australian body politic, avoids any conflict with the absorption doctrine noted above.

### **B Sovereignty and a Longstanding Recognition of 'Connection'**

The non-justiciability of questions pertaining to the validity of the British Crown's assertion of sovereignty over Australia is well-established in the High Court's

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<sup>31</sup> *Pochi* (n 28) 111 (Gibbs CJ).

<sup>32</sup> *Re Yates; Ex parte Walsh and Johnson* (1925) 37 CLR 36; *R v Director-General of Social Services (Vic); Ex parte Henry* (1975) 133 CLR 369.

<sup>33</sup> *Love* (n 3) 186 [61], 190 [74] (Bell J), 240–1 [246] (Nettle J), 263 [301]–[302] (Gordon J), 292–3 [403] (Edelman J).

jurisprudence. In *Montgomery*, the Commonwealth raises the possibility that the tripartite test set out by Brennan J in *Mabo No (2)* and endorsed in *Love* amounts to an ‘implicit conferral of political sovereignty on Aboriginal societies’ at odds with the decision in *Mabo (No 2)* and subsequent cases.<sup>34</sup> *Montgomery* explains the majority’s reasoning as an exercise of the sovereignty of the Australian State, through the authority of the Court, not a challenge to it.<sup>35</sup>

The task of the Court in *Montgomery* is analogous to that required of courts by a longstanding orthodoxy in native title jurisprudence. Traditional laws and customs supply the content of native title rights and interests as identified by the court, so that while the latter are recognised and protected by common law and statute, traditional laws and customs are left to continue ‘out of frame’.<sup>36</sup> So too in the constitutional law setting of *Montgomery*. The Court sets the rule regarding Aboriginal Australians being non-alien, together with a test for how to determine who is relevantly an Aboriginal Australian. We address the choice of test below.

The question for the Court in *Montgomery* directly engages the Court’s responsibility to determine and develop the law, including where it is necessary to resolve instances of ‘incongruity between legal characterisation and historical reality’,<sup>37</sup> or, in the words of Brennan J in *Mabo (No 2)*, to close the gap between ‘theory [and] our present knowledge and appreciation of the facts’.<sup>38</sup> The way in which the majority of the Court in *Love* reasoned is consistent with the understanding that some legal and social changes recognised by Australian law can, in turn, affect the meaning of the *Australian Constitution*.<sup>39</sup>

The majority judges in *Love* made it clear in their reasoning that the common law recognition of ‘Aboriginal societies’<sup>40</sup> and their connection to Australian land and waters is longstanding, and does not, as suggested by Kiefel CJ, amount to the development of an unspecified ‘new principle’ of the common law.<sup>41</sup> Nettle J emphasised the foundational point that the consequences of the acquisition of sovereignty in domestic law *are* justiciable<sup>42</sup> and Gordon J noted that:

[n]ative title is one legal consequence flowing from common law recognition of the connection between Aboriginal Australians and the land and waters that

<sup>34</sup> Appellants’ Submissions (n 19) [45].

<sup>35</sup> Respondent’s Submissions (n 17) [66]–[67].

<sup>36</sup> See generally Robert French, ‘Simple Justice — Recognition and Sovereignty’ in Robert Pascoe (ed), *The Tuning Cymbal: Selected Papers and Speeches of the Robert French* (Federation Press, 2020), 36, 39.

<sup>37</sup> *Love* (n 3) 250 [265] (Nettle J), quoting Sharwood, ‘Aboriginal Land Rights — The Long Shadow of the Eighteenth Century’ (1981) 14 *Proceedings of the Medico-Legal Society of Victoria* 93, 93.

<sup>38</sup> *Mabo (No 2)* (n 15) 38 (Brennan J, Mason CJ and McHugh J agreeing at 15). See also *Love* (n 3) 249–50 [264]–[265] (Nettle J).

<sup>39</sup> See, for example, the reliance on a durable legislative practice leading to a baseline of a universal adult citizenship franchise in the reasoning of the Court in *Roach v Electoral Commissioner* (2007) 233 CLR 162 and the interpretation of marriage to extend to same sex marriage in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

<sup>40</sup> *Love* (n 3) 252–3 [269] (Nettle J).

<sup>41</sup> *Ibid* 181 [42]–[43].

<sup>42</sup> *Ibid* 249–50 [264]–[265].

now make up Australia. That Aboriginal Australians are not ‘aliens’ within the meaning of that constitutional term in s 51(xix) is another.<sup>43</sup>

The central proposition in *Love* that Aboriginal Australians are not aliens under the *Australian Constitution* can be understood as consistent with Australian constitutional law doctrine. It does not do damage to the standard narrative of monistic and absolute sovereignty held by the Australian State and does not conflict with other elements of existing law. However, if the Court upholds the central proposition in *Love*, it is faced with the challenging task of determining when a person fits within the settler legal construct of ‘Aboriginal Australian’.

## VI Definition of ‘Australian Aboriginal’

As noted above, the majority in *Love* adopted the tripartite test set out by Brennan J in *Mabo (No 2)*:

[m]embership of the indigenous people depends on biological descent from the indigenous people and on mutual recognition of a particular person’s membership by that person and by the elders or other persons enjoying traditional authority among those people.<sup>44</sup>

If the High Court elects to address Montgomery’s status as an ‘Aboriginal Australian’, the Court will need to consider the following question: in circumstances where a person who is not a native title holder is unaware of facts that would otherwise assist them to prove their ‘biological descent’ from an Aboriginal or Torres Strait Islander person, does that person’s self-identification as an Aboriginal Australian, coupled with recognition of their membership by others exercising traditional authority within the group, suffice to satisfy the *Mabo (No 2)* test? The answer to this question will turn on the meaning of ‘biological descent’ in the first limb of the test, and whether, as SC Derrington J asked, the tripartite test applied in *Love* ‘supplants the rights of Aboriginal people to determine by reference to Indigenous law and customs who possesses such rights’<sup>45</sup> or ‘foreclose[s] any other approach “to determining Aboriginality as the basis for those fundamental ties of political community in Australia”’.<sup>46</sup> In this section, we consider the relevance of Federal Court decisions applying *Love* as they interact with the parties’ arguments in *Montgomery*.

While the majority judges in *Love* applied the tripartite test set out by Brennan J in *Mabo (No 2)*, their Honours left open the possibility that this test may not be the only, or the most appropriate, test to identify a non-citizen as an ‘Aboriginal Australian’ for the purposes of determining whether that person is an ‘alien’. An alternative test was not in play in *Love* and the biological descent of Daniel Love and Brendan Thoms was not at issue. Edelman J noted that:

<sup>43</sup> Ibid 281 [364].

<sup>44</sup> *Mabo (No 2)* (n 15) 70.

<sup>45</sup> *Montgomery (FCA)* (n 4) [61], citing *Love* (n 3) 279 [357] (Gordon J).

<sup>46</sup> *Montgomery (FCA)* (n 4) [61], quoting *Love* (n 3) 317 [458] (Edelman J).

The tripartite test was applied in *Mabo [No 2]* as a means to identify those members of a particular sub-group of indigenous people who enjoy continuing connection with particular land. It can be usefully applied in this case. However, it is not set in stone, particularly as an approach to determining Aboriginality as the basis for those fundamental ties of political community in Australia which are not dependent upon membership of a particular sub-group.<sup>47</sup>

## **A Biological Descent**

The question of how to assess Montgomery's biological descent was not the subject of a full factual inquiry in the Federal Court. Montgomery's arguments accordingly emphasise the undesirability of the High Court entering into a discussion of the relationship between 'biological descent' and cultural adoption in a context where SC Derrington J, correctly in Montgomery's view, did not entertain trial on facts bearing on that question.<sup>48</sup>

The Commonwealth argues that 'biological descent' in its ordinary sense is confined to 'genetic relationships' and to remove this 'objective criterion' from the test would make it dependent on 'the content of traditional laws and customs regarding adoption and other forms of non-biological kinship',<sup>49</sup> and unreasonably complicate the determination of the *Migration Act* by rendering it reliant on matters that may be 'difficult to ascertain'.<sup>50</sup> On this point, Montgomery observes that the Commonwealth remains free to 'set in train lawful statutory or administrative steps that they consider advisable in response to the decision in *Love*; much as did the Executive and the Parliament in response to this Court's decision in *Mabo [No 2]*'.<sup>51</sup> Connecting *Love* and *Mabo (No 2)* in this way, and pointing to the different response of the political branches to each case, is a powerful provocation. Montgomery effectively characterises the *Love* precedent as one that, like *Mabo (No 2)*, is a signal determination of the law in response to a novel legal question.

## **B The Application of *Love* in the Federal Court of Australia**

Cases decided at the Federal Court level give an indication of the type of considerations that the High Court may consider relevant if it embarks on an inquiry into Montgomery's status. The contentious question that may then arise is whether Montgomery's self-identification and 'recognition as a Mununjali man by persons enjoying traditional authority amongst that society'<sup>52</sup> will suffice to satisfy the 'biological descent' limb of the *Mabo (No 2)* test.

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<sup>47</sup> *Love* (n 3) 317 [458]. See also 192 [80] (Bell J).

<sup>48</sup> Respondent's Submissions (n 17) [25], supported by the National Native Title Council, the Northern Land Council and the Victorian Government: see, eg, Attorney-General (Vic) Intervener's Submissions (n 21) [41].

<sup>49</sup> Appellants' Submissions (n 19) [55].

<sup>50</sup> *Ibid.*

<sup>51</sup> Respondent's Submissions (n 17) [44]. See also [50].

<sup>52</sup> *Montgomery (FCA)* (n 4) [4].

On the facts considered in the Federal Court proceeding, Montgomery does not claim to be a native title holder, and his satisfaction of the third ‘mutual recognition limb’ is not in question. These differences aside, the reasoning in two applications for declaratory relief is likely to be of relevance: *Hirama v Minister for Home Affairs*,<sup>53</sup> and *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)*.<sup>54</sup> Both cases were decided by Mortimer J in the Federal Court and her Honour’s reasoning in *Helmbright (No 2)* is applied to Hirama’s application to the extent that it is relevant.

In *Hirama*, a native title holder succeeded in his application for a declaration that he was an ‘Australian Aboriginal’ in the terms required by *Love*. It was an agreed fact between the applicant and the Minister that Hirama is an ‘Aboriginal Australian’ in accordance with the *Mabo (No 2)* test, and the applicant was prepared to agree to what Mortimer J described as ‘additional criteria’ corresponding with the Minister’s interpretation of the ratio in *Love*,<sup>55</sup> described by Mortimer J as the ‘native title approach’.<sup>56</sup> This required that the community in question held, or was entitled to hold, native title, by virtue of being a community that had ‘remained continuously united in and by its acknowledgment and observance of laws and customs deriving from before the Crown’s acquisition of sovereignty over the territory’.<sup>57</sup> In *Helmbright (No 2)*, Mortimer J rejected the native title approach.<sup>58</sup> In *Hirama*, her Honour imported her reasoning on that point, and found that the applicant satisfied the criteria set out in the agreed facts, while making the point that the Court is not bound by the parties’ agreement as to the content of the relevant law.<sup>59</sup>

The critical feature of the *Hirama* reasoning for Montgomery is that the agreed facts in *Hirama* trace the applicant’s descent through his great grandfather, who was culturally adopted into the community.<sup>60</sup> The native title determination in question includes descendants ‘by adoption in accordance with the traditional laws and customs of the native title holders’.<sup>61</sup> Both parties in *Hirama* submitted that the applicant satisfied the ‘biological descent’ limb of the *Mabo (No 2)* test on this basis, and her Honour accepted this submission,<sup>62</sup> noting that ‘the Minister accepts that “descent” need not mean strict biological descent but can include adoption in accordance with the traditional law and custom of a particular group.’<sup>63</sup> To what extent could this reasoning assist Montgomery to show ‘biological descent’ by ‘cultural adoption’?

Applied to Montgomery’s circumstances, as far as we know them, if the High Court (or Federal Court on remittance) enters into an assessment of Montgomery’s

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<sup>53</sup> *Hirama* (n 14).

<sup>54</sup> *Helmbright (No 2)* (n 14).

<sup>55</sup> *Hirama* (n 14) [11].

<sup>56</sup> *Ibid* [11]. See also [24].

<sup>57</sup> *Helmbright (No 2)* (n 14) [89]–[90], quoting *Love* (n 3) 258 [278] (Nettle J). See also *ibid* [11].

<sup>58</sup> *Helmbright (No 2)* (n 14) [5]–[6]. See also *Hirama* (n 14) [11].

<sup>59</sup> *Hirama* (n 14) [13], [15].

<sup>60</sup> *Ibid* [34].

<sup>61</sup> *Ibid* [33].

<sup>62</sup> *Ibid* [34]–[35].

<sup>63</sup> *Ibid* [35].

status as an ‘Aboriginal Australian’, *Helmbright (No 2)* and *Hirama* could support a finding that his self-identification coupled with the recognition of his membership in the Mununjali community (by persons exercising traditional authority in accordance with traditional laws and customs) could suffice to enable Montgomery to satisfy the biological descent limb of the *Mabo (No 2)* test. That may be so notwithstanding the fact that Montgomery is not (yet) aware of facts that would otherwise assist him to prove his ‘biological descent’, and, while not at issue, that the Mununjali people are not (yet) recognised as a native title-holding community.<sup>64</sup>

This approach would be consistent with questions raised about the ‘biological descent limb’ by the judges of the Full Federal Court of Australia in the course of granting a detainee’s habeas corpus petition in *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*.<sup>65</sup> In that case, Allsop CJ left open the possibility that the biological descent limb of the *Mabo (No 2)* test could be proved, when required, by relevant normative standards that included adoption:

Is it genealogical or biological descent strictly by blood, or does it include other features, such as adoption, that may be encompassed within (if applicable) traditional Aboriginal law or custom? The question is to be posed and answered using the correct frame of reference or normative standard. The question is or may be more than one drawn from analytical jurisprudence or the principles of private international law as to the ascertainment of the proper law of a subject, once the subject is identified by a process of characterisation.<sup>66</sup>

In the same case, Besanko J noted that self-identification and community recognition can be probative of descent in tests of Aboriginality other than the *Mabo (No 2)* test.<sup>67</sup> In making these comments, his Honour drew attention to the probative role accorded to community recognition in cases applying the ‘*Tasmanian Dam test*’,<sup>68</sup> referring to the cases of *Shaw v Wolf*<sup>69</sup> and *Gibbs v Capewell*<sup>70</sup> for this proposition.

There are two further areas of likely future legal development on the application of *Love* that may be touched on by the High Court if it enters into a discussion of Montgomery’s status. First, we note the possibility that an alternative test for Aboriginality, not involving an exercise of traditional authority, may be brought into play (possibly the *Tasmanian Dam test*). Second, that the relationships between traditional law and custom and the *Native Title Act 1993* (Cth) on questions of descent will require further elaboration in a relevant case.

As to the first possibility, obiter dicta in the reasoning of Besanko J in *McHugh (FCAFC)* and Mortimer J in *Helmbright (No 2)* and *Hirama* point to the

<sup>64</sup> A native title claim was filed on behalf of the Danggan Balun (Five Rivers) People, which may include at least some Mununjali people, over land in the Beaudesert area in 2017: *Williams on behalf of the Danggan Balun (Five Rivers) People v Queensland* (Federal Court of Australia, File No QUD331/2017, 27 June 2017).

<sup>65</sup> *McHugh FCAFC* (n 14).

<sup>66</sup> *Ibid* 620–1 [65].

<sup>67</sup> *Ibid* 631–2 [108], 632 [110].

<sup>68</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1, 273–4 (‘*Tasmanian Dam*’).

<sup>69</sup> *Shaw v Wolf* (1998) 83 FCR 113, 120 (Merkel J).

<sup>70</sup> *Gibbs v Capewell* (1995) 54 FCR 503, 510 (Drummond J).

possibility that recognition of a person's Aboriginality by a 'relevant society or community',<sup>71</sup> in the absence of traditional authority, could be probative of 'biological descent'. The test of Aboriginality referred to in those comments is the tripartite *Tasmanian Dam* test, set out in the reasons of Deane J in the *Tasmanian Dam* case in the course of determining if the relevant federal legislation was supported by the races power in s 51(xxvi) of the *Australian Constitution*. That test provides that: "'Australian Aboriginal" [means] a person of Aboriginal descent, albeit mixed, who identifies himself as such and who is recognized by the Aboriginal community as an Aboriginal.'<sup>72</sup>

In *Hirama*, Mortimer J noted that in contrast to the *Mabo (No 2)* test, if applying the *Tasmanian Dam* test in the context of alienage, the traditional authority requirement may not be express or required, but the relevant community in that test (or another test) would 'probably' still be one that identifies itself as connected to particular land, given the underpinning justificatory emphasis in *Love* on Aboriginal societal connections to land and waters.<sup>73</sup> This latter point is expanded on in *Helmbright (No 2)*, in which Mortimer J observed that while she was bound to apply the *Mabo (No 2)* tripartite test as a single judge in the Federal Court, Helmbright would have qualified in accordance with the *Tasmanian Dam* test had it been possible to apply it.<sup>74</sup>

The second area that may be touched on in any substantive analysis of Montgomery's status is the interface of the *Native Title Act 1993* (Cth) and associated regulations with traditional laws and customs and questions of alienage. In deliberations in *McHugh (FCAFC)*, Mortimer J noted that the issue is one of some considerable complexity.<sup>75</sup> As is evident in *Hirama*, some native title determinations refer to the possibility of descent by adoption in accordance with traditional laws and customs, and reasoning in several important native title cases emphasises that descent from native title holders is not always required for membership of a native title holding community.<sup>76</sup> However, the Act itself appears, on its face, to replicate definitions premised on the idea of an 'Aboriginal race'.<sup>77</sup> As Mortimer J explained:

the relationship between on the one hand what has been said in *Love/Thoms* about 'Aboriginality' by reference to the High Court's decision in *Mabo (No 2)* on the common law's recognition of native title, and on the other hand the operation of the statutory scheme of native title in the *Native Title Act 1993* (Cth), is in my respectful opinion yet to be worked through in detail.<sup>78</sup>

<sup>71</sup> *Helmbright (No 2)* (n 14) [300].

<sup>72</sup> *Tasmanian Dam* (n 68) 274 (Deane J).

<sup>73</sup> *Hirama* (n 14) [36].

<sup>74</sup> *Helmbright (No 2)* (n 14) [5], [8], [344].

<sup>75</sup> *McHugh (FCAFC)* (n 14) 686 [396].

<sup>76</sup> *Native Title Act (1993)* (Cth). For examples of native title determinations referring to cultural adoption, see *Congoo on behalf of the Bar Barrum People #9 v Queensland* [2017] FCA 1510, sch 3(2), *Saibai People v Queensland* [1999] FCA 158, order 3(c)(iii). Notably, the latter reference is expressed as a native title right.

<sup>77</sup> *Native Title Act (1993)* (Cth) (n 76) s 253 (definition of 'Aboriginal peoples').

<sup>78</sup> *McHugh (FCAFC)* (n 14) 686 [396].

In response to the Commonwealth's concerns about the difficulty of ascertaining the content of traditional law and customs in any given context, it is a distinctive feature of Australia's legal and political history that Aboriginal societies have been characterised as racial communities, rather than as political entities. This is a mistake of fact. Requirements for biological descent as an element of a person's 'race', overlaid across the vast diversity of Aboriginal polities, can be seen as an element of this mischaracterisation. Indeed, the tripartite test itself was developed to mitigate against an overly rigid and unilateral logic of race by requiring that Aboriginal peoples be involved in identity designations made in accordance with settler law.<sup>79</sup>

Provisions enabling the naturalisation of non-descendants in accordance with Indigenous law are not uncommon parts of the positive membership criteria used in the governing documents of Indigenous communities in Canada, Australia, New Zealand and the United States.<sup>80</sup> These forms of incorporation or 'cultural adoption' need not, in practice, correlate with 'descent' — biological or otherwise. Further, in Australia, as in other countries, Indigenous law on membership sometimes operates through the vehicle of rules set out in the governance documents of a formal legal representative institution, and sometimes those rules are unwritten and less accessible to outsiders. Difficulties of proof do not diminish the necessity of engaging with traditional law and authority on its own terms.<sup>81</sup> Likewise, whether or not an Aboriginal society has sought and received recognition of their rights at common law or through legislation is not a reflection of the coherency and authority of their traditional laws and customs. When the facts are present for a properly argued case, it will be high time to reconsider the place of racial designations of Aboriginal and Torres Strait Islanders, in order to recognise the authority of traditional law and custom and to bring about further reconciliation between 'theory [and] our present knowledge and appreciation of the facts',<sup>82</sup> in line with the central motivation for the High Court's decision in *Mabo (No 2)*.

## VII Conclusion

The challenge in *Montgomery* to the decision in *Love* concerns the intersection of multiple fraught areas of law and policy in Australia. The concept of alienage is one that is both political and legal, determining as it does membership or exclusion from the Australian body politic. Aboriginality can be understood as a sui generis basis for constitutional belonging. A significant challenge is for the High Court to articulate how Aboriginality is to be understood and applied. In particular, what test or tests may be applied and whether self-identification and recognition by persons 'enjoying traditional authority' in accordance with traditional law and custom will suffice to satisfy any requirement of 'biological descent'. The outcome in this case

<sup>79</sup> See discussion in *Helmbright (No 2)* (n 14) [125]–[128].

<sup>80</sup> For examples, see Kirsty Gover, *Tribal Constitutionalism: States, Tribes and the Governance of Membership* (Oxford University Press, 2010).

<sup>81</sup> *Mabo (No 2)* (n 15) 52, *Love* (n 3) 258 [281] (Nettle J). See also *Love* (n 3) 282 [368] (Gordon J).

<sup>82</sup> *Mabo (No 2)* (n 15) 38 (Brennan J, Mason CJ and McHugh J agreeing at 15), quoted in *Love* (n 3) 250 [265] (Nettle J).

will depend, to a great extent, on the judicial sensibilities of each judge on the current Court and how they interpret the limits of their own role. This case will neither satisfy calls for structural constitutional reform as seen in the Uluru Statement from the Heart,<sup>83</sup> and in the progress of state and territory treaties, nor prevent such reforms from taking place. It is only one case in the ongoing negotiation between the Australian settler colonial state and the reality of First Nations and their ongoing connection to the territory of that state.

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<sup>83</sup> 'Uluru Statement from the Heart' (2017) <<https://ulurustatement.org/the-statement/>>.



# Review Essay

## *Doc Evatt: “Justice is the Thing”*

*The Brilliant Boy: Doc Evatt and the Great Australian Dissent* by Gideon Haigh (2021), Scribner, 378pp, ISBN 10987654321

**Prue Vines\***

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### **Abstract**

*The Brilliant Boy*, by Gideon Haigh, traces the life of HV Evatt, pivoting it around the case of *Chester v Waverley Municipal Council*, in which Evatt J, on the High Court, gave an extraordinary dissent that ultimately led to legislative change to the law of negligent psychiatric harm. The case is an interesting example of the range of judgments that might be given under the ‘strict and complete legalism’ approach espoused by Dixon J. Haigh’s book offers a view of Evatt’s life that illuminates his judgments and political roles, including appointments as a judge on the High Court, Chief Justice of the Supreme Court of NSW, State and Federal Member of Parliament, Leader of the Opposition, President of the United Nations General Assembly and Federal Minister for Foreign Affairs as well as major scholarly works. His relationships with his wife and family were close and loving throughout his life and Evatt had a keen eye for the vulnerable. In *Chester* his great achievement was to empathise deeply with the distraught and show this by his use of poetry, but without the loss of the rigour the case demanded. He said ‘Justice is the thing’ and we see evidence of this throughout his life and work.

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## I Introduction

The central paradox of the common law's use of the doctrine of precedent is the fact that although cases must follow the precedent set by the court above them, the law does change. The relationship of the law to justice is similarly fraught with contradiction. Law is not always just, but lawyers frequently strive for justice in the law and judges may wish to change the law in order to achieve what they see as justice. The constraints on judges in the doctrine of precedent are real, despite the common calls about 'judicial activism'. The High Court of Australia's use of strict legalism lasted until the 1980s and then returned in the 2000s.<sup>1</sup> Strict legalism<sup>2</sup> was supposed to be a clear constraint on judges, being very focused on strict rules of the common law: use of ratio decidendi and argument by analogy, and avoiding social and non-legal factors including political arguments. This was the environment in which Evatt J gave his great dissent in *Chester v Council of the Municipality of Waverley*,<sup>3</sup> which did create legal change, albeit not for the appellant in the case. HV (Herbert Vere) Evatt himself had an extraordinary career, which included being a barrister, political offices of various kinds, and judgeships. In this way, *The Brilliant Boy: Doc Evatt and the Great Australian Dissent*<sup>4</sup> is an excellent vehicle for considering the real operation of law in Australia, both in Parliament and in the courts. Moreover the particular focus on *Chester* creates a picture of the lives of the participants — the plaintiff, lawyers and judges — as well as the treatment of the law itself.

In 1937, seven-year-old Max Chester (originally Sochaczewski, but renamed as an immigrant) was found drowned in a trench measuring 12 metres long by half a metre wide. The Waverley Council workers had left it marked with some planks and with lights to warn traffic, but with no barricade capable of stopping a child falling in. It was nearly two metres deep with water and children had been challenging each other to leap across it. When Max was found, his mother Golda and other adults had been searching for him for several hours. When his body was found her distress could not be alleviated and had been going on for over a year when Abram Landa, acting for her, lodged a writ in the Supreme Court of New South Wales ('NSW') for negligence occasioning nervous shock.<sup>5</sup>

This action failed at trial and in the Full Court of the NSW Supreme Court. It then went to the High Court of Australia on appeal. The tragedy of Max Chester's death gave rise to Evatt's dissent, which was so persuasive that the NSW Parliament changed the law to recognise the psychiatric injury suffered by people such as Max's mother.

<sup>1</sup> Tanya Josev, *The Campaign against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017) 92.

<sup>2</sup> Sir Owen Dixon, 'Concerning Judicial Method' (1956) 29(9) *Australian Law Journal* 468, reproducing an address given at Yale University on receiving the Howland Memorial Prize.

<sup>3</sup> *Chester v Council of the Municipality of Waverley* (1939) 62 CLR 1 ('*Chester*').

<sup>4</sup> Gideon Haigh, *The Brilliant Boy: Doc Evatt and the Great Australian Dissent* (Scribner, 2021).

<sup>5</sup> Name changes were a common part of immigrants' stories. This went further in this case, as Abram Landa (who is also a hero in this story) suggested that Golda change her name to Janet in order to avoid any lurking anti-Semitism. So Janet Chester, rather than Golda Sochaczewski, brought the action against the Council of the Municipality of Waverley.

## II Evatt's Early Career

Most of the book and the 'brilliant boy' concerns Evatt's career, but that description also was used by Max Chester's mother of 'Maxie' himself, a nice linkage used in the title. Evatt himself was very close to his mother, who was a reader and singer, and who moved the family to Sydney for his benefit. Evatt was the fifth of eight brothers, two of whom died of typhoid when young. He lost two brothers in World War I, which scarred the family deeply. He himself was rejected from the military three times because of astigmatism. These deaths appear to have made the family deeply concerned about health, and Evatt became renowned for his concerns about health, constantly worried about incipient colds or flu, sleeping in fresh air, but worrying about draughts. At Sydney University he won first class honours in English, philosophy and mathematics before going on to do law. At the same time he was passionate about rugby and cricket, and played both.

By the time he was 30 years old, Evatt was a standout at the Bar. He was regarded as the most significant product of public education in Sydney, his soubriquet 'Doc' referred to his receipt of a Juris Doctor from University of Sydney (not the equivalent of the modern JD, but a higher degree) for a thesis on the Crown's prerogative powers. In chapter 2 of *The Brilliant Boy*, we are shown Evatt at home with his wife Mary Alice exhorting her to read books to share with him; when separated each writing heartfelt letters to the other, a habit that lasted all their lives. Haigh notes Evatt's habit of quoting verse, which also appears to great effect in his *Chester* dissent.

Evatt's Labor sympathies came early along with his strong sense of being Australian. In a speech to state school students he said: 'Do not forget Australian writers, because I am trying to be one myself. (Laughter).'<sup>6</sup> His involvement in the Labor Party was not without struggle. According to Haigh, Evatt had thought his way to his position, and his intellectual approach did not always go down well with others in the Party: 'He seemed not so much to want to join the party as to want the party to join him'.<sup>7</sup> In 1924, Evatt became legal adviser to the Labor Party and then chair of its policy-making committee. He won the election for state member for Balmain and entered NSW Parliament in Jack Lang's Government, in which Edward McTiernan was Attorney-General. McTiernan introduced a bill to abolish the death penalty, and Evatt then led the debate. Its passage was thwarted by the Legislative Council. This was a tumultuous time in politics, and Evatt and Lang crossed swords. Evatt was re-elected in 1927, but Lang's party lost government and Evatt left his electorate in 1929.

## III To the High Court and *Chester*

In Chapter 3, 'The Legal Phar Lap', Haigh considers the next stage of Evatt's career. He appeared in several 'political' cases including representing several unions in high profile cases. These were political often because they involved unions. His brother,

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<sup>6</sup> Haigh (n 4) 51.

<sup>7</sup> Ibid 55.

Clive, and Abram Landa were close and Evatt was briefed often by Landa, especially in workers' compensation cases. Evatt's reputation grew until *Smith's Weekly* referred to him as 'The Legal Phar Lap' and he took silk in 1929. While Prime Minister Scullin was away, the Labor caucus appears to have engineered the appointment of Evatt, then aged 35, and McTiernan, aged 38, as High Court judges. Both had served in Labor Governments. This scandalised many. The Victorian Bar talked about 'the degradation of judicial office'<sup>8</sup> and the South Australian Law Society similarly disapproved. Evatt remains the youngest High Court judge ever appointed, and McTiernan ran him a close second.

What was the High Court like at the time? The reception of Evatt and McTiernan was chilly. Owen Dixon J said of them 'Evatt — brains without character; McTiernan — character without brains'.<sup>9</sup> The Nationalists put a motion of no confidence in the Government for having made political appointments to the Court, which was just defeated. At this time, there was no High Court building and the Court sat mostly in the Darlinghurst Courthouse in Sydney. Budgets were tight — it being the Depression, and some of the judges took pay cuts, while others waived travel allowances; a library was lacking. It was also the era of another bellicose Lang Government in NSW. Lang attempted again to abolish the Legislative Council, but was tactfully resisted by Governor Game. Evatt was probably the expert on the royal prerogative in Australia at the time and he was shocked when Lang was dismissed by the Governor and Lang accepted it. In Evatt's view, it was inappropriate for the Governor to terminate for illegality when the courts were the proper forum for determining illegality. In *R v Hush; Ex parte Devanny*,<sup>10</sup> a case concerning whether a call for funds in the *Workers' Weekly*, the official organ of the Communist Party of Australia, breached the *Crimes Act's* prohibition of solicitations of contributions by unlawful associations, Evatt J gave a remarkable judgment that included a broad discussion of political philosophy:

In the ultimate ideal of a classless society, the Communist movement has much in common with the Socialist and working-class movement throughout the world. They all profess to welcome a revolutionary change from the present economic system, which, conveniently enough, is called Capitalism, and the more violent protagonists of which are now called Fascists. ... It is not a question whether it is desirable to have a struggle between a property-less class and a property-owning class, but whether such struggle exists in fact. The Communists claim that democratic institutions conceal, but do not mitigate, the concentration of political and economic power in the property-owning class, and that, for such dictatorship there should be substituted the open, undisguised dictatorship of the property-less classes. They say that it is extremely probable that violent upheaval will ensue when the time comes to effect such substitution. ... The history of the attempts and failures of Communism to gain control of other political movements of the working classes may tend, upon close analysis, to show that, to turn the phrase, Communism illustrates the gradualness, the extreme gradualness, of inevitability.<sup>11</sup>

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<sup>8</sup> Ibid 85.

<sup>9</sup> Ibid 89.

<sup>10</sup> *R v Hush; Ex parte Devanny* (1932) 48 CLR 487 ('Hush').

<sup>11</sup> Haigh (n 4) 109–10, quoting *Hush*, ibid 517–18.

This was not the central issue in the case; it may have been the deeper social issue, but it does illustrate Evatt's fearlessness of disagreement and the extent to which political considerations were part of his view of society and law. This could not be said to be part of a judgment using a strict and complete legalism. It is of interest, but of course, it could not be part of the ratio decidendi of the case, and was strictly obiter dicta at the time. Now that the High Court has said that dicta of the High Court should be considered carefully by lower courts,<sup>12</sup> such dicta might be regarded as more significant and more troubling than they appeared to be in the 1930s.

In chapter 5 of *The Brilliant Boy*, we return to the domestic front and Evatt's other interests. Evatt the husband was devoted and tried to keep his wife Mary Alice with him as much as possible. Evatt the father was both indulgent and disciplinarian and clearly concerned about ill-health. Evatt the employer could be over-demanding. In other ways, Evatt was extremely generous, so he was a man of contradictions. The title of the chapter 'A good kick in the pants for the old guard' was what Evatt said when he saw a modern painting that led to a longstanding relationship with modern art and artists. This chapter also contains fascinating details about the case of *R v Wilson; Ex parte Kisch*.<sup>13</sup> Kisch was a Czechoslovakian writer whom the Liberal Government wished to prevent entering the country, including by means of the famous 'dictation test'. Although Kisch spoke some seven European languages, he did not speak Scots Gaelic. Evatt J sat alone when the case first came to the High Court. The initial approach of Kisch's lawyers was to argue about the constitutional status of the *Immigration Act*. Evatt, as judge, recommended an argument about whether the Government had complied with the Act. The ethical status of this intervention is doubtful, but the approach was taken up by Kisch's counsel, Albert Piddington KC (then aged 72), and Evatt J gave an order nisi with costs. Further developments led to the case going to the Full Court using the same line of argument and Kisch won — the dictation test had been improperly applied.

Chapter 6 canvasses the inner arguments of the High Court, sometimes petty, and the debates concerning who would be Chief Justice. The appointment of judges to the High Court, and the appointment of Chief Justice in particular, was a matter about which both sides of politics fought hard, as did those who wished for the office. The relationship of Evatt and McTiernan JJ with Starke J was contemptuous on both sides, with no contact at all. The relationship between Evatt J and Dixon J was quite different. They agreed that the death penalty should be abolished and Evatt clearly admired Dixon's rigour, even where he disagreed (slightly) with him. One of the cases they disagreed on was *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor*.<sup>14</sup> Evatt argued presciently for a tort of privacy on the basis that television would come and there would be new law. Dixon took a hard line and said there was no right not to have people look over your fence. It is noteworthy that while Evatt was on the Court, he and Dixon wrote 18 joint judgments. This suggests that Dixon was in agreement with the judgments of Evatt and vice versa. Coper has suggested that Dixon's judgments were more nuanced than his account of legalism indicates:

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<sup>12</sup> *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 150–1 [134].

<sup>13</sup> *R v Wilson; Ex parte Kisch* (1934) 52 CLR 234.

<sup>14</sup> *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

‘[i]n truth, Sir Owen’s elegant, nuanced, complex and allusive essay boil[ed] down to a preference for change that is gradual and evolutionary rather than abrupt’.<sup>15</sup>

Evatt was invited to give the Macrossan Lecture in 1937. His topic was William Bligh and the lecture later became his famous book *Rum Rebellion*.<sup>16</sup> It was intended to right the historical wrongs meted out to Bligh and to rehabilitate his reputation. He noted that Bligh’s reputation had mostly been created by partisans. Evatt wrote the book while at the High Court, taking no time out for this.

In 1938, Evatt took leave from the Court and travelled with Mary Alice to Europe and the United States. By this time, the Evatts had established themselves as connected with modern art, and there was a public stoush between Menzies criticising modern art and Evatt supporting it. Haigh notes: ‘Maker of law, promoter of history, spokesman of arts: Australia had never known such a figure. The world had not seen too many either. It was about to.’<sup>17</sup> On their trip, Mary Alice, a painter, spent time in various ateliers, while Evatt wrote his biography of Holman<sup>18</sup> and they both attended galleries, and concerts, including four days of continuous jazz concerts in New York. Evatt lectured at Harvard University and Columbia University, and gave a tribute to Justice Cardozo soon after his death.<sup>19</sup> He wrote to President Roosevelt suggesting that Felix Frankfurter be appointed as Supreme Court Justice. As Haigh says, ‘Who did Evatt think he was? ... Rare has been such cheek in the history of Australia’s external affairs.’<sup>20</sup>

Chapter 8 of *The Brilliant Boy* brings us to *Chester*, the case that is central to the book. Haigh takes us through the precedential history of ‘nervous shock’ cases from 1767. Early views called this ‘railway spine’ because of a putative link between a jolt to the spine and mental illness, but the history of these cases also shows the changes in psychiatric thinking over time — such as the development of concepts of neurosis and ‘shell shock’ in World War I and post-traumatic stress disorder in the Vietnam War. The earliest Australian case, *Victorian Railways Commissioners v Coultas*,<sup>21</sup> concerned a pregnant woman who was caught at a railway crossing and only just managed to leave it before the train came through. She suffered a miscarriage and nervous shock. The Privy Council held that she could not recover for mental injury without physical injury. This remained the position in Australia for some time, while English, American and Canadian cases moved on.

In chapter 9, Haigh details the various stages of *Chester*. Evatt’s brother, Clive, appeared for Golda/Janet. The evidence of the doctor treating Golda was that

the scar will always be there to a more extent [sic] than in the ordinary case of the ordinary death of the child, owing to the fact of her having seen the

<sup>15</sup> Josev (n 1) 101, quoting Michael Coper, ‘Critique and Comment: Concern about Judicial Method’ (2006) 30(2) *Melbourne University Law Review* 554, 561.

<sup>16</sup> HV Evatt, *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (Angus & Robertson, 1938).

<sup>17</sup> Haigh (n 4) 183.

<sup>18</sup> HV Evatt, *Australian Labour Leader: The Story of WA Holman and the Labour Movement* (Angus and Robertson, 1940).

<sup>19</sup> HV Evatt, ‘Mr Justice Cardozo’ (1939) 48(3) *Yale Law Journal* 375.

<sup>20</sup> *Ibid* 191.

<sup>21</sup> *Victorian Railways Commissioners v Coultas* (1888) 13 AC 222.

body as the boy was taken from the water and ... also the fact that this boy was a particularly brilliant boy ... the hope of her family ...<sup>22</sup>

The requirements for nervous shock at the time included that the shock had been caused by the seeing of the event causing death and that it was the shock, rather than anxious waiting, that caused the psychiatric illness. The fact that Maxie's father said he thought he was alive when he came out of the water created doubt for Golda's claim. Evidence from a nine-year-old who said he saw Maxie go into the water and told his mother so, (but she told the nine-year old to go to the pictures, rather than investigate), also caused problems because it may have shown that Maxie was in the water at 2pm rather than 5pm, suggesting that Golda incurred suffering by waiting, rather than by seeing his death.

For the modern reader, the judgments of the majority of the High Court in *Chester* are shocking in their unwillingness to understand the mental injury suffered by Maxie's mother. Haigh points out that this is a generation who had lived through the World War I and a depression. The judges regarded death as an everyday thing that affected others only briefly. Latham CJ said:

Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is however, not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place.<sup>23</sup>

Latham CJ, Starke and Rich JJ all found for the Council. The majority thought that the harm done to Golda was not foreseeable and outside normal human experience and therefore not compensable. When one considers whether this is a judgment of complete and strict legalism one is struck by the fact that they have such a negative (in the sense of absent) view of emotional reaction to death. But although this looks as if it is non-emotional, it is indeed an emotional and social argument, although Evatt J's dissent has been more often seen that way.

Evatt J's judgment began with a detailed statement of the facts. His Honour then considered the feelings of Golda while she looked for Maxie: 'During this crucial period [while Maxie was lost] the plaintiff's condition of mind and nerve can be completely understood only by parents who have been placed in a similar agony of hope and fear, with hope gradually decreasing.'<sup>24</sup> The judgment allows us to see Golda looking in an agony of fear and hope, which is ultimately dashed, and also into Evatt's emotional relationship with his own children — he is identifying with her. His Honour goes on to quote William Blake from the *Songs of Experience*.<sup>25</sup> The use of literature is striking and has real impact in the judgment, giving it an emotional depth that marks it out very strongly from the majority judgments. Evatt J then quoted Australian Joseph Furphy's (Tom Collins') book *Such is Life*,<sup>26</sup> which, as Haigh notes, is 'haunted by lost children'.<sup>27</sup> Haigh also points out that it is typical

<sup>22</sup> Haigh (n 4) 235, quoting *Chester* (n 3) 18.

<sup>23</sup> Haigh (n 4) 270, quoting *Chester* (n 3) 10.

<sup>24</sup> Haigh (n 4) 275, quoting *Chester* (n 3) 17.

<sup>25</sup> *Chester* (n 3) 17.

<sup>26</sup> *Ibid* 18; Haigh (n 4) 234.

<sup>27</sup> Haigh (n 4) 278.

of Evatt to put English literature and Australian literature on the same level, in a way that was not common at the time. Haigh gives a detailed account of the judgment, which critiques the trial judge's and Jordan CJ's treatment of the case. Evatt J pointed out that the range of human responses to an accident is wide, and that this is common knowledge, thus disposing of the foreseeability argument made by the lower courts. This argument is the legalistic argument, but the references to literature are extremely unusual in Australian law at the time, as is the clear acceptance of the validity of Golda's emotional reaction to her son's death.

Why is this case of such interest? One reason is the power of the language and arguments in it. Evatt J's judgment is strong, and consistently powerful. Another reason is that ultimately, as predicted by Goodhart in the *Law Quarterly Review*,<sup>28</sup> it prevailed in the form of the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW), which made it easier to bring such cases. Abram Landa, discussing this Bill in Parliament as Member for Bondi, (and having been the instigator of the *Chester* case) said

The people of Bondi had a special reason to appreciate the humanitarian attitude of the Government in providing for the type of case which was not provided for when Mrs Chester, in that famous case now known as the Chester case, had the misfortune to lose her son in the Waverley district.<sup>29</sup>

The Bill was passed, and subsequently followed by other Australian jurisdictions.

Josev argues that the language of 'judicial activism' did not reach Australia until the 1990s.<sup>30</sup> Evatt J's dissent might well have been argued to be activist if it had been delivered at that time, although as a dissent it would have been subject to less scrutiny. But Evatt J's dissent and its consequences show one of the other ways in which the law changes, while the doctrine of precedent remains. The intervention of Parliament to change the law because a dissent has become more persuasive than the majority is uncommon, but certainly happens. Evatt J's judgment in this case is not particularly political, although others of his judgments are.

## IV Foreign and Internal Affairs

Evatt's role in the United Nations ('UN') (at the same time as he was Attorney-General and Minister for External Affairs) has not been prominent in Australian minds, but as the fourth President of the UN, he had a considerable role, including in protecting the International Children's Emergency Fund ('UNICEF') and working on the division of Palestine. His connection to Abram Landa, a Zionist, was strong. Haigh argues that Evatt was influenced by Julius Stone's arguments that the British restrictions on Jewish immigration to Palestine breached international law.<sup>31</sup> The UN voted to admit the new nation of Israel in 1949.

<sup>28</sup> AL Goodhart, 'An Australian Shock Case' (1939) 55(4) *Law Quarterly Review* 495, 497.

<sup>29</sup> Haigh (n 4) 319.

<sup>30</sup> Josev (n 1) 85.

<sup>31</sup> Haigh (n 4) 322.

In 1950–51, Evatt argued against the Menzies Government in the High Court, successfully defeating the Communist Party Dissolution Bill.<sup>32</sup> As leader of the Labor Party, he then successfully campaigned against the yes vote in the subsequent referendum. Evatt, despite being leader, was often at odds with the rest of the Party. He later retired from politics and in 1960 became Chief Justice of the Supreme Court of NSW. Arguments that he was mentally ill have been canvassed, but Haigh dismisses these as disproportionate and perhaps created by his communist sympathies in the Cold War.<sup>33</sup>

## V A Flawed, Contradictory Genius...

Unsurprisingly, the Chesters did not have an easy life after the death of Maxie and the court case, which had become an ordeal in itself. Golda hanged herself 10 years after the decision. She is buried in Rookwood Cemetery in Sydney. The two older children had to live with the fact that they had not looked after Maxie, and Benny especially appeared to have felt very badly about this.

Evatt died at the age of 71 in 1965. He had become vaguer and somewhat confused towards the end of his life and lost his prodigious memory, having a severe stroke in the early 1960s, but his emotional connection to those who suffered remained. He was a doting grandfather who did far more than most grandfathers of the time, flying to Sydney from Canberra every couple of days when his granddaughter had to be left at Tresillian with stomach problems, and walking her in her pram.

Haigh has given us a picture of Evatt as a flawed, contradictory, loving, hating, resentful, arrogant, warm man of genius:

Yet in the 1930s ... no Australian leading the life of the mind was more brilliant, ambitious and ubiquitous. He argued unpopular causes. He brought breadth and warmth to a Bench crabbed and cold. He brought hope to those who yearned for an Australia of more than imperial loyalty, martial gestures, sporting heroism and hand-me-down culture, and walked confidently also in the world beyond.<sup>34</sup>

Writing about Evatt must be difficult. He had so many high points in his career, each of which would have been sufficient for another person's whole life — including being Member of both NSW and Commonwealth Parliaments, High Court justice, Attorney-General of the Commonwealth, Leader of the Labor Party, President of the UN, and Chief Justice of the NSW Supreme Court. Haigh's book emphasises the legal career, but it is not possible to talk about Evatt without mentioning politics because he was also such a political animal, and his interests were so wide-ranging. He was part of so many pivotal moments in Australian law and history, and is not as well known now as he should be. Perhaps this is a case of tall poppy syndrome, or perhaps it is that he was such a complex and contradictory character who cannot, as we are wont to do these days, be captured in a single pithy

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<sup>32</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

<sup>33</sup> Haigh (n 4) 340.

<sup>34</sup> *Ibid* 341.

phrase. One thing that is striking about Evatt for me is that no-one can doubt his commitment to justice, even if views of justice may differ. This shows in everything he did. Indeed, he said in his last speech of the referendum campaign against the dissolution of the Communist Party: 'Justice is the thing. To the best of my ability, I've stood for it.'<sup>35</sup>

What we see in Evatt's career is not only an intellectual giant, but also the futility of arguing that the law can exist independently of politics or political judgment or indeed the views and biases of the judiciary. The *Chester* case is a good example of this — with the majority's bias against 'emotionalism' and Evatt's bias towards recognition of the reality of emotion. The declaratory theory of law has been thoroughly discredited now, but Sir Anthony Mason describes it as legal formalism:

Legal formalism provides a mantle of legitimacy for the non-elected judiciary in a democratic society. If the principles of law are deducible from past precedents, there is no place for the personal predilections and values of the individual judge ... What the law should be is a matter not for courts but for Parliament ... In its most extreme form legalism required a complete separation of law from politics and policy ... partly on the ground that exposure to politics and policy would subject the law to controversy.<sup>36</sup>

Realism discredited legal formalism because, as Julius Stone showed,<sup>37</sup> legal formalism did not answer the question 'how do judges decide which cases are alike?'. Sir Owen Dixon's references to legalism drew on the political benefits of formalism, but as both his and Evatt J's judgments show, there was far more nuance in their work, and a realist interpretation of those judgments has much to offer. It is beyond the scope of this essay to go further into theories of the doctrine of precedent, but at one level Haigh's book might be seen as an exemplar of a realist investigation of a judge's work.

For tort lawyers, this book is a must-read. For Australians generally, it is also a must-read, and they need not be afraid that the reading is dull. It is a rollicking read, with Haigh's genius for story-telling demonstrating all the fascinating and paradoxical elements of Evatt's personality and achievements. Haigh has evoked not just Evatt, but also the turbulent Australia that Evatt lived in and greatly contributed to. This is a gem of Australian history.

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<sup>35</sup> *Ibid* 338.

<sup>36</sup> Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13(3) *Monash University Law Review* 149, 156.

<sup>37</sup> Julius Stone, 'The Ratio of the Ratio Decidendi' (1959) 22(6) *Modern Law Review* 597.

# Book Review

*Beyond the Republican Revival:  
Non-Domination, Positive Liberty and Sortition*  
by Eric Ghosh (2020) Hart Publishing, 264 pp  
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*Beyond the Republican Revival* is in some ways a curious title for Eric Ghosh's exploration of important controversies in recent political philosophy and constitutional theory.<sup>1</sup> As Ghosh is aware, 'Beyond the Republican Revival' is also the title of a much-cited article that Cass Sunstein published more than 30 years ago in the *Yale Law Journal*.<sup>2</sup> Ghosh barely mentions Sunstein's article, however, and reserves his most extensive comment on it to a few lines in a footnote on page 156 of his book. Notwithstanding the shared title, then, Ghosh's book is in no way a response to Sunstein's article.

Perhaps an even more curious feature of Ghosh's title is that he never makes clear the point of its preposition. To be sure, there is much discussion of attempts by notable scholars in the last half century or so to revive the republican tradition of political theory, and some of this discussion is quite illuminating; but in what sense Ghosh proposes to go beyond these neo-republican writers is never settled. Does he want the reader to regard his book as an attempt to deepen and extend the republican revival, or does he want us to conclude that the revival, interesting as it has been, is an exhausted effort that ought to be abandoned?

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<sup>1</sup> Eric Ghosh, *Beyond the Republican Revival: Non-Domination, Positive Liberty and Sortition* (Hart Publishing, 2020).

<sup>2</sup> Cass R Sunstein, 'Beyond the Republican Revival' (1988) 97(8) *Yale Law Journal* 1539.

Although that question is never clearly answered, one of the virtues of Ghosh's book is that it calls into question the use of the singular word 'revival'. It would be more accurate, as he shows, to refer to two republican revivals in the last half century. The first is the one to which Sunstein and others referred in the 1988 issue of the *Yale Law Journal* devoted to 'the republican revival'. Ghosh associates this revival with the advocacy of positive liberty: that is, the 'conception of liberty ... so closely tied to the claim that the best life is one of active political participation aimed at the public good that one does not count as free unless one leads this life'.<sup>3</sup> Prominent figures in this revival, according to Ghosh, were Hannah Arendt, JGA Pocock, and Michael Sandel.

The second revival, which Ghosh takes to begin roughly with the publication of Philip Pettit's *Republicanism: A Theory of Freedom and Government* in 1997 and Quentin Skinner's *Liberty before Liberalism* in the following year,<sup>4</sup> centres on a different conception of liberty. This is not a 'positive' conception, Ghosh argues, but neither is it 'negative' as negative liberty is usually understood — that is, as freedom from interference. Instead, the distinctive feature of republican liberty, according to Pettit, Skinner, and their now-numerous followers, is that it is freedom from domination (or freedom as non-domination). Ghosh regards this shift in emphasis as important enough to warrant the use of 'the term "non-positive" [rather than "negative"]' to include Pettit's and Skinner's interpretations of republican liberty'.<sup>5</sup> That is only half the story, however, for he later characterises 'liberty as non-domination as non-negative' and as 'non-positive' in order 'to distinguish it from the positive liberty associated with the [first] republican revival'.<sup>6</sup>

While the first revival took its inspiration largely from ancient Athens, the second has looked primarily to ancient Rome, as Skinner's application of the term 'neo-roman' to the vision of liberty shared by English republicans of the 17<sup>th</sup> century attests. This conception of 'neo-roman' or 'non-positive' liberty is Ghosh's primary concern throughout Part I, which is the longest of his book's three parts. He attends to positive-liberty republicanism in Part II, which concentrates not on Sunstein's 'Beyond the Republican Revival', but on two essays by another legal scholar, Frank Michelman.<sup>7</sup> In Part III, Ghosh makes the case for 'the republican device of sortition', or selection by lottery, as an effective response to the well-known counter-majoritarian difficulty posed by judicial review.<sup>8</sup> In particular, Ghosh proposes to establish randomly selected juries, constituted in the manner of James Fishkin's well-known deliberative polls, and to empower each 'Citizens' Court' to declare democratically enacted laws invalid.<sup>9</sup> In this way, Ghosh argues, the protection of individual rights that judicial review affords can be made compatible with the democratic will of the people.

<sup>3</sup> Ghosh (n 1) 5–6.

<sup>4</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997); Quentin Skinner, *Liberty before Liberalism* (Cambridge University Press, 1998).

<sup>5</sup> Ghosh (n 1) 8.

<sup>6</sup> *Ibid* 106.

<sup>7</sup> Frank I Michelman, 'The Supreme Court, 1985 Term — Foreword: Traces of Self-Government' (1986) 100(1) *Harvard Law Review* 4, Frank Michelman, 'Law's Republic' (1988) 97(8) *Yale Law Journal* 1493.

<sup>8</sup> Ghosh (n 1) 206.

<sup>9</sup> *Ibid* ch 9.

This proposal, and its attendant discussion and defence, is likely to be the part of *Beyond the Republican Revival* that commands the attention of readers who are more interested in constitutional theory than in political philosophy. For political philosophers, Ghosh's extended analysis of republican liberty, or liberty as non-domination, will be of greater interest. In both cases, Ghosh's conclusions are likely to be controversial. In the case of the proposal to institute a form of judicial review that replaces judges with panels of randomly selected citizens, the grounds for controversy are easy to anticipate. In the case of Ghosh's analysis of republican liberty, however, the controversy will turn on more abstract matters of scholarly dispute.

In part, Ghosh's claims about the nature and value of republican liberty are likely to prove controversial because the topic is already the subject of an ongoing controversy, and his intervention is not likely to settle the matter. Ghosh is well aware of this controversy, however, and he is generally fair to all parties — to Pettit, Skinner, and other neo-republicans, on the one side, and on the other to critics such as Ian Carter and Matthew Kramer, who maintain that there is nothing to be gained by replacing liberty understood as non-interference with liberty understood as non-domination. Ghosh also deserves praise for tracking most of the ways in which Pettit and Skinner have clarified, modified, elaborated, and defended their positions in the 20-plus years since the publication of *Republicanism* and *Liberty before Liberalism*. Most of all, in my view, he should be applauded for moving away from the dichotomy of negative versus positive liberty to a more complicated understanding not only of republican liberty, but, by implication, of liberty in general. For Ghosh to say that republican liberty is both 'non-negative' and 'non-positive' is perhaps not in itself of much help. The point, however, is that republican liberty incorporates elements of the negative and positive conceptions, and presumably is all the stronger for doing so. Ghosh also makes the point that the negative and positive conceptions are each more complex than they are often acknowledged to be. This point is especially important with regard to positive liberty, which he shows to be a term comprising several dimensions, not all of which neo-republicans ought to forswear. Pettit and Skinner have taken pains to deny that republican liberty is a form of positive liberty, he notes, because 'their interpretation of positive liberty is a narrow one: I describe it as a *full-blown positive conception of liberty*'<sup>10</sup> — that is, the kind of liberty advanced by Arendt, Pocock, and others in the first of the republican revivals. But republicans can reject this full-blown conception without rejecting other 'positive-liberty dimensions', such as the exercise of normative reason in the governmental sphere and the emphasis on civic participation as a way of protecting individual rights.<sup>11</sup> In these respects, Ghosh claims, Pettit and Skinner are advocating dimensions of positive liberty, and properly so, even though they have eschewed its 'full-blown conception'.

In making his case for this non-negative, but also non-positive, conception of liberty as non-domination, Ghosh relies almost as much on historical considerations as on conceptual analysis. He resembles Arendt, Pocock, Sandel, Pettit, and Skinner in this regard, despite his differing conclusions. Where Pettit and Skinner provide

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<sup>10</sup> Ibid 138 (emphasis added).

<sup>11</sup> Ibid 147 Figure 6.1.

accounts of 17<sup>th</sup> and 18<sup>th</sup> century political thinkers that sharpen the distinction between liberty conceived as non-interference and as non-domination, Ghosh reads the same thinkers — most notably Jeremy Bentham and William Paley, supposedly on the non-interference side, and James Harrington and Richard Price, in the non-domination camp — as encompassing elements of both conceptions of liberty. His defence of this position is well-grounded and carefully argued, but occasionally strained. This is notably so in the case of Harrington, whose response to Hobbes's critique of the non-domination view is often hailed by neo-republican writers. Hobbes's complaint, in Skinner's words, was that the citizens of the republican city of Lucca 'have no reason to believe that, as ordinary citizens, they have any more liberty than they would have had under the sultan in Constantinople', for 'what matters for individual liberty is not the source of the law but its extent'.<sup>12</sup> In other words, if the laws of a self-governing republic interfere more with the lives of its citizens than the decrees of a Turkish despot do with the lives of his subjects, then the Sultan's subjects may be freer than the republican citizens. Harrington's response, as Ghosh notes, was emphatic: 'in Constantinople, "the greatest bashaw is a tenant, as well of his head as of his estate, at the will of his lord"'.<sup>13</sup> To the neo-republicans, Harrington's retort places him squarely in the liberty as non-domination camp. Ghosh, though, argues that Harrington was not referring to the constraint imposed on the people of Constantinople that kept them 'from speaking or acting in such a way as to cause the sultan offence'.<sup>14</sup> In support of this claim, he offers some interesting comments on Harrington's position on property ownership in light of the Turkish system of land tenure. These comments, however, do nothing to diminish the force of Harrington's remark about the 'greatest bashaw' owing 'his head' as well as his estate to 'the will of his lord'.<sup>15</sup> Living one's life at the pleasure of a despot is surely a severe 'constraint', and Harrington's words here surely justify his placement among the champions of republican liberty as non-domination.

Of the historical figures he considers, Ghosh gives most attention to Price, the 18<sup>th</sup> century political and religious thinker. Indeed, Ghosh concludes that 'Priceian liberty' is not only a version of liberty as non-domination, as both Pettit and Skinner have held, but it is the best version. For one thing, it is a form that provides sufficient room for liberty as non-interference in addition to non-domination. Moreover, Priceian liberty includes dimensions of positive liberty while avoiding the over-reaching of the 'full-blown' conception of positive liberty. It also 'fits reasonably well within [what Judith Shklar called] the liberalism of fear'.<sup>16</sup> For these and other reasons, Priceian liberty is the conception of liberty Ghosh endorses.

This endorsement returns us to the question of what Ghosh means by the preposition in the title of his book. He endorses Price's conception of liberty as non-domination, but he insists that this is not a strictly republican conception, for it also accommodates at least one kind of liberalism. In similar fashion, he declares that his

<sup>12</sup> Ibid 62–3, quoting Skinner (n 4) 85.

<sup>13</sup> Ghosh (n 1) 63, quoting James Harrington, 'The Commonwealth of Oceana' in JGA Pocock (ed) *Harrington: The Commonwealth of Oceana and A System of Politics* (Cambridge University Press, 1992) 20.

<sup>14</sup> Ghosh (n 1) 63.

<sup>15</sup> Ibid 63 (emphasis added).

<sup>16</sup> Ibid 232.

proposed ‘Citizens’ Court’ relies on ‘the republican device of sortition’,<sup>17</sup> but he also is careful to qualify his position by saying, ‘while I tease out republican connections in these chapters [concerning sortition and judicial review], there is no intention to exclude other connections from being considered or highlighted’.<sup>18</sup> In the end, we are left to wonder whether Ghosh considers himself to be a republican, or perhaps a republican liberal, or something other than a republican. If we do move beyond the republican revival, will we be working within the republican framework or leaving it for something better?

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<sup>17</sup> Ibid 206.

<sup>18</sup> Ibid 215.

