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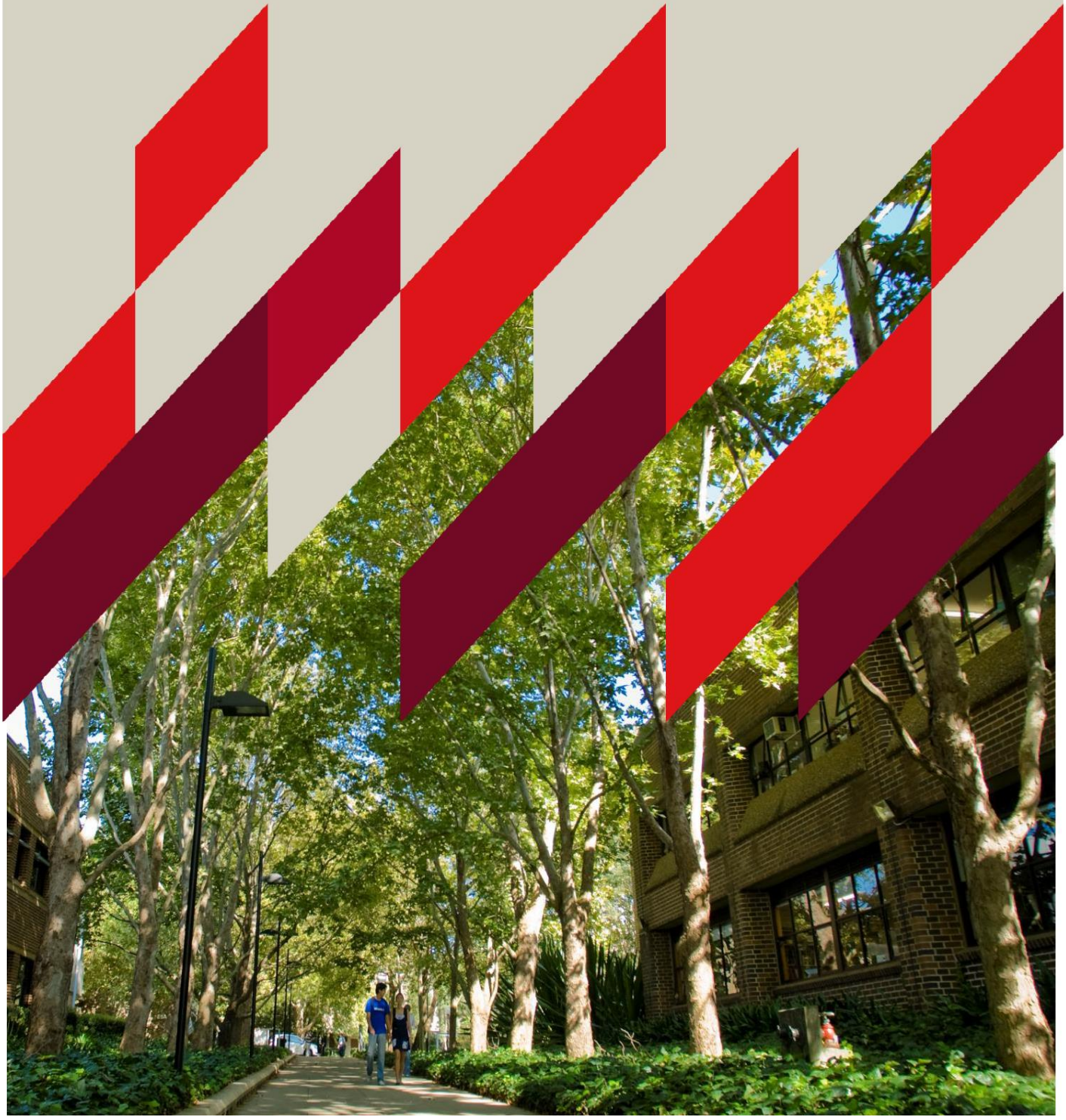

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Articles should be between 8000 and 10 000 words in length, while shorter papers between 4000 and 6000 words may also be published. Case notes, reports on recent developments and book reviews should be approximately 1500–2000 words in length. References and footnotes are not included in the above word counts. All articles and shorter papers submitted for consideration are subject to a formal process of peer review by at least two academic referees with expertise in the relevant field.

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The Editor
Macquarie Law Journal
Macquarie Law School
Macquarie University NSW 2109 AUSTRALIA

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EDITOR'S NOTE

The Call for Papers for this 16th volume of the *Macquarie Law Journal* invited general submissions on a wide variety of legal topics and, in the view of the editorial team, it delivers to the high standard expected of this publication. Included are some of the best peer-reviewed results of current research being conducted by Australian academics and researchers in the fields of contract law, international law, civil justice, constitutional law and history, and human rights. If it is acknowledged that one of the traditional functions of a university law journal is to showcase at least some of the research conducted at that university (a function under pressure in the current research funding model), then this volume delivers in that sense as well.

We thank Professor Gillian Triggs, President of the Australian Human Rights Commission, who delivered the Annual Tony Blackshield Lecture in November 2015. This is an event held under the auspices of the Macquarie Law School in recognition of Emeritus Professor Tony Blackshield AO, a distinguished member of this journal's Editorial Board. Professor Triggs reminded the audience of the constant vigilance required to monitor and curtail any overreach by the executive branch of government that may conflict with fundamental human rights. She argued that recent challenges posed by the perceived threats to public safety and national sovereignty have in recent times provoked excessive executive discretion by governments of all political hues, putting human rights at risk and undermining freedoms that Australian citizens expect. A timely reminder indeed, and one that is perennial and relevant to all cultures and political systems.

Dr Kate Chetty of the University of Canberra provides a useful survey and exegesis of the body of law that addresses the scope and application of the defence power in the Australian Constitution. Her article traverses key historical decisions relevant to the power and organises them according to themes that are critical to its understanding. Her contention is that the defence power is uniquely placed to expand and contract in its executive application, but that it has at times been used to limit the rights of individuals. She points to recent defence power underpinnings in the pursuit of anti-terrorism measures that challenge common understandings of human rights, an issue that echoes the concerns of Professor Triggs' address.

Professor David Clark of Flinders University offers a fascinating insight into constitutional law and history by addressing the extent to which the Commonwealth Parliament was independent of the British Parliament with the passage of the Statute of Westminster in 1931. This highly specialised research on the decade following the proclamation of the famed statute seeks to present a convincing argument, based on the opinions of judges, commentators and senior legal officers in the 1930s, that the Commonwealth remained dependent on the British Parliament in important ways and that the legal restrictions that remained between 1931 and 1942 could not be ameliorated by constitutional conventions. In this article, Professor Clark pits himself against the well-published views of some of Australia's leading constitutional historians.

Associate Professor Michael Legg of the University of New South Wales addresses a pressing issue, and provides a timely update on law and practice, concerning the distribution to group claimants of settlement proceeds in Australia's rapidly developing class action jurisdiction. He raises the inherent tension between the competing demands

of efficiency and compensation on the merits. Citing from most recent empirical evidence of class action resolutions, the article contends that a difficult balancing act is constantly required, and argues that the compensation principle should act as a guide only, but that too ready an acceptance of efficiency or 'rough justice' threatens to harm group members and class actions alike.

Professor Peter Radan of Macquarie Law School revisits the *Gouriet* case, in which the House of Lords addressed the proper role of the Attorney-General in relator proceedings for the enforcement of public rights. The case serves as a template illustration of the tension between the Attorney-General's political role as a member of the government, and his or her duty to protect and enforce the legal order. Emerging as it did in a Britain that was about to embark on the Thatcher era, the decision is placed in vivid historical and political context. The article attempts to set parameters around the justiciability of the fiat rule, and directs attention to the consequences for practical politics of the question of where the decision-making line between the executive and the courts is to be drawn.

Ava Sidhu of the University of Notre Dame, Australia, sets out in her contribution to evaluate, and provide a principled framework for, betterment in the law of damages. Ms Sidhu addresses the predicament it poses as to whether an account for betterment should be allowed or not, and if so when and why. In doing so, she provides a useful summary of the existing law, as well as a practically workable method of solving problems that may arise in this important doctrinal and commercially practical field of law. The article's recommended framework for dealing with betterment, drawing on distributive justice and corrective justice criteria, aims to lead to more consistent, reasoned and just outcomes in disputes where betterment is alleged.

Two student contributions from the Macquarie Law School are also featured in this edition. Emerging with plaudits from the peer review process, Eliza Fitzgerald's research thesis on countermeasures in international law and practice provided the backbone for her published submission. The author offers an original and interesting comparative analysis of how countermeasures have been used in different legal contexts and engages in critical legal analysis to call for more discourse in the international legal community about the failings of the doctrine, but also its potential as a self-help tool of peaceful enforcement. The case note by Max Turner analyses the the High Court's 2016 decision in *Victoria v Tatts Group Limited*, which demonstrates the risks associated with private dealings with government, calls into question the inadequacy of the current remedial framework for sovereign risk, and sheds light on important issues of contractual construction.

I have to especially commend the Student Editors whose names appear on the title of this edition of the Macquarie Law Journal. Despite some planned, but also unplanned, absences of the Editor during the editorial and production process, these eager and capable students of the Law Journals unit in the LLB program of Macquarie Law School took control of the task and volunteered time and effort over and above what would reasonably be expected from a senior cohort. Congratulations to them for the timely and efficient production of Volume 16.

Ilija Vickovich

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HUMAN RIGHTS AND THE OVERREACH OF EXECUTIVE DISCRETION: CITIZENSHIP, ASYLUM SEEKERS AND WHISTLEBLOWERS

GILLIAN TRIGGS*

Annual Tony Blackshield Lecture delivered at Macquarie Law School, Macquarie University, 5 November 2015.

I

It is a special pleasure for me to speak in honour of Professor Blackshield, who is a long time colleague of mine in the law. He is a constitutional law scholar of the highest order and one of the most influential figures in Australian legal education over the last 50 years.

I have two memories of Professor Blackshield that stand out. One is of Professor Blackshield striding up and down the lecture theatre, being both entertaining and provocative for the benefit of his students, displaying his superb knowledge of constitutional law and the common law. He is a lecturer without peer in his ability to engage and challenge students. Another is from when I was Dean of the Sydney University law school, proudly showing off Sydney's new law school building to a visitor. I found Professor Blackshield buried in books in the library, on a general desk with all the students. He is a modest man who would not have dreamt of asking for his own office or for any special privileges.

It was typical of Professor Blackshield that when discussing the topic for tonight's lecture with him, he observed that this 5 November is the 410th anniversary of the Gunpowder Plot in London of 1605. The Gunpowder Plot is so called because of the attempt by the catholic Guy Fawkes (and others) to blow up the houses of Parliament and kill the protestant King James I.

While such violent intentions can hardly be condoned, my theme tonight also challenges Australia's Parliaments by observing that they have, over the last few years, passed laws that explicitly, or in their effect, breach fundamental human rights. Not only have our Parliaments failed to exercise their traditional restraint to protect our common law freedoms and liberties, they also have allowed the executive government to expand its discretionary powers and, increasingly, to limit the courts' exercise of judicial scrutiny. The doctrine of the separation of powers is too often ignored by Parliament, and the rule of law, international law and Australia's obligations under human rights treaties are often trumped by the government's uncontested assessment of national interest and security.

* Emeritus Professor of Law and President, Australian Human Rights Commission.

II

For the Australian Human Rights Commission ('the Commission'), this has been a 'year of living dangerously', as we have drawn attention to the erosion of our human rights and to the diminution of the checks and balances that preserve our democracy; all in the year in which we also celebrate the 800th anniversary of the *Magna Carta* and the 70th anniversaries of both the *Charter of the United Nations* and creation of the Nuremberg tribunals. The *Magna Carta* was, at its heart, an attempt by the feudal barons to constrain the power of 'bad King John', and to ensure that the sovereign is always subject to the rule of law, in particular to the common law and to the scrutiny of an independent judiciary.

Let us fast forward from 1215 to a few weeks ago, when a number of government agencies planned to implement Operation Fortitude. Operation Fortitude provides a powerful example of executive overreach in civilian affairs. You will recall that the recently merged Australian Border Force ('ABF') announced Operation Fortitude under which a 'coalition of the willing' (including Victoria Police, Yarra Trams, Metro Trains, the Sherriff's Office, Taxi Services Commission and the ABF) agreed to target crimes ranging from 'anti-social behaviour' to outstanding warrants of arrest.[1] The now notorious media release states that the intention was to position ABF officers, 'at various locations around the Melbourne CBD speaking with any individual we cross paths with.'[2] The focus of this strategy was revealed by the warning that 'if you commit visa fraud, you should know it's only a matter of time before you are caught.'[3]

It is true that there are people in the Australian community who do not have a valid visa or who have overstayed their visa. It is also true that a nation has the sovereign right to arrest and deport those who are in Australia unlawfully. Indeed, officials require evidence of lawful status from non-citizens regularly, if quietly under s 188 of the *Migration Act 1958* (Cth) ('*Migration Act*'), which requires an officer to know or reasonably suspect that the person is not a citizen. But never before have we had ABF officers planning to stop people in shopping malls for questioning, apparently at random. Quite apart from the legal fact that the ABF do not have the power to do so, it is a reasonable assumption that those chosen for questioning will be those that fit a racial profile, contrary to the *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act*').

Melbournians reacted to the media release by demonstrating on the steps of Flinders Street Station, blocking traffic. Within hours, Operation Fortitude had been cancelled and all concerned have since run for cover, blaming low-level officials for making the statement on the operation.[4]

Operation Fortitude raises many questions. My question is: how it is that public officials within the ABF, the Victoria Police and all the other agencies, whether senior or not, did not ask whether such an operation was consistent with Australian liberties? Are we as a

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[1] Australian Border Force, 'ABF Joining Inter-Agency Outfit to Target Crime in Melbourne CBD' (Media Release, 28 August 2015).
[2] Ibid.
[3] Ibid.
[4] Australian Border Force, 'Statement by ABF Commissioner Roman Quaedvlieg on the ABF's Role in Operation Fortitude' (Media Release, 28 August 2015).

nation and are our government officials so ill informed about human rights under the *Constitution*, the common law and international law that no one thought to question so obvious a violation of our freedom to walk the streets without fear of being stopped and questioned by border protection officers?

Operation Fortitude is but one example of the tendency to increase executive power and to criminalise behaviour that, in the past, might have attracted a civil fine. Australian governments have introduced, and Parliaments have passed, scores of laws that infringe our common law freedoms of speech, of association and movement, the right to a fair trial and the prohibition on arbitrary detention. These new laws undermine a healthy, robust democracy, especially when they grant discretionary powers to executive governments in the absence of meaningful judicial scrutiny.

What explains Australia's move to restrictive approaches to our fundamental freedoms and human rights over the last few years? I suggest that there is a conflation in the public mind of the events of 2001 — the Tampa Crisis on 26 August, the 'children overboard' affair on 7 October and a month following Tampa, the 9/11 terrorist attacks on the United States. Since these events 14 years ago, governments and political leaders have played on community fears of terrorism and the unauthorised entry of refugees to concentrate power in the hands of the executive to the detriment of Australian liberty.

III

I would like to discuss the overreach of executive discretion in the dozens of new federal, state and territory laws introduced by recent governments and passed by compliant and complicit Parliaments. These laws have the effect of restricting the powers of our judiciary and threatening the core democratic principles of the separation of powers and the independence of the courts.

Particularly troubling has been the phenomenon of the major political parties agreeing with each other to pass laws that threaten fundamental rights and freedoms that we have inherited from our common law tradition. Indeed, respective governments have been remarkably successful in persuading Parliaments to pass laws that are contrary, even explicitly contrary, to common law rights and to the international human rights regime to which Australia is a party. Compounding the concentration of power in the hands of the executive is the recent phenomenon of criminalisation of behavior that has not hitherto been the subject of criminal penalties. Let me give you some examples:

1. Counter-terrorism laws, including laws that mandate the retention of metadata and access to that data by law enforcement agencies, without a warrant or independent or judicial authorisation and oversight;[5]

2. The criminalisation of Australians who enter 'declared areas' in Syria and Iran through provisions that place the burden of providing a legitimate reason for presence in those areas on the accused;[6]

3. The cancellation of visas and mandatory detention of those who become unlawful non-citizens by, for example, failing the new character test[7] — a test that depends

[5] *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).
[6] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

on the Minister's suspicion that even minor criminal offences have occurred — all this coupled by a power of the Minister to overturn the decisions of the Administrative Appeals Tribunal;[8]

4. Lengthy administrative detention of the mentally ill or unfit to plead without trial;[9]

5. Operation Sovereign Borders and secrecy of 'on water activities';

6. Secrecy provisions under the *Australian Border Force Act 2015* (Cth) ('*Border Force Act*') that allow for the prosecution of immigration workers who disclose 'protected information', an offence that attracts a penalty of two years imprisonment; [10] and

7. Legislative exclusion from the *Administrative Decisions (Administrative Review) Act 1977* (Cth) of decisions made under national security[11] and migration laws.[12]

The legislation I have briefly described has been assented to by Parliaments. This is an obvious but vital point, for it leads us to the question: what are the proper limits on the power of Parliament? This question remains a live one for contemporary Australian democracy.

What are the safeguards of democratic liberties if Parliament itself is compliant and complicit in expanding executive power to the detriment of the judiciary and ultimately of all Australian citizens? What are the options for democracy when both major parties, in government and opposition, agree upon laws that explicitly violate fundamental freedoms under the common law and breach Australia's obligations under international treaties?

IV

Over the last 15 years or so, Australia has become increasingly isolationist and exceptional in its approach to the protection of human rights.

The *Constitution* protects freedom of religion, the right to compensation for the acquisition of property,[13] the right to vote,[14] to trial by jury[15] and an implied right of political communication,[16] but very little more. As is well known, unlike every other

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[7] *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth); *Migration Act 1958* (Cth) s 501.
[8] *Migration Act 1958* (Cth) ss 133A, 133C, 501BA.
[9] See Australian Human Rights Commission, Submission No 6 to Senate Community Affairs References Committee, *Inquiry into the Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia*, 31 March 2016.
[10] *Australian Border Force Act 2015* (Cth) s 42.
[11] See *Australian Security Intelligence Organisation Act 1979* (Cth); *Criminal Code* (Cth) s 104.2, div 5.
[12] See, eg, *Maritime Powers Act 2013* (Cth) ss 75D, 75F, 75H.
[13] *Constitution* s 51 (xxxi).
[14] Ibid s 40.
[15] Ibid s 80.
[16] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

common law country and most civil law countries in the world, Australia has no Charter or Bill of Rights. This means that we do not have the core benchmarks against which to measure or challenge laws that breach fundamental freedoms. It is notable, for example, that the United States Supreme Court can employ the jurisprudence of the 14th Amendment on equality before the law to decide that marriage is available to all people including those of the same sex.[17]

Despite what I have said about the lack of domestic Constitutional or legislative protections for human rights, it remains true that, in the past, Australia has been a good international citizen, playing an active role in negotiating the human rights treaties that form the international monitoring regime. However, it is vital for Australians to understand that these treaties have typically not been introduced into Australian law by Parliament. The lamentable consequence is that key instruments such as the *International Covenant on Civil and Political Rights* ('*ICCPR*'),[18] the *International Covenant on Economic and Social Rights* ('ICESCR')[19] and the *Convention on the Rights of the Child* ('*CROC*')[20] are not directly applicable by our courts. There are three important exceptions, being the conventions on discrimination on the grounds of race, sex and disability, where implementing legislation underpins the work of the Commission.

Not only are core human rights instruments not part of Australian law but also, over recent months, we have taken a major step backwards in stripping international laws from our domestic laws. The *Maritime Powers Act 2014* (Cth) removed references to the *Convention relating to the Status of Refugees* ('*Refugee Convention*')[21] from s 36 of the *Migration Act*, which sets out the criteria for grant of a protection visa. 'Refugee' is now defined in legislation itself, but not by reference to the international agreement. Section 197C of the *Migration Act* sets out that Australia's nonrefoulement obligations are now irrelevant to removal of unlawful non-citizens under s 198 of the *Migration Act*. It is especially worrying that the *Border Force Act* provides that an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under s 198 arises irrespective of whether there has been an assessment, according to law, of Australia's nonrefoulement obligations in respect of the non-citizen.

It is notable that the *Border Force Act* slipped through the federal House of Representatives in March 2015 without a single opposition party member speaking against it.

Compounding our isolation from international human rights jurisprudence, the Asia Pacific has no regional human rights treaty and no regional court to develop human rights law or to build a regional consensus, unlike Europe, North America, Africa, Latin America and the Arab states.

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[17] *Obergefell v Hodges* 576 U.S. ____ (2015).
[18] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[19] *International Covenant on Economic and Social Rights*, opened for signature 19 December 1966, 999 UNTS 3 (entered into force 3 January 1976).
[20] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[21] *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).

V

It might be thought that we can rely on our courts to protect common law liberties. Judges have employed the principle of legality to adopt a restrictive interpretation of legislation to protect common law freedoms. Laws passed by Parliament are not to be construed as abrogating fundamental common law rights, privileges and immunities in the absence of clear words or 'unmistakable and unambiguous language.'[22] It is also presumed that Parliament intends to act in conformity with international law and the treaties to which it is party.[23]

In practice, the principle of legality and the presumption of international law consistency have not provided as effective protection as hoped. There is a palpable reluctance by courts to refer to an international source of law where the international obligation or principle has not been implemented into domestic law by Parliament. Moreover, the principle of legality applies only if there is an ambiguity in the words of the legislation; the rationale being, of course, that Parliament is the law maker and the task of the courts is to interpret and to implement such laws.

As Kiefel J said in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* ('*Malaysian Declaration Case*'):[24]

> [A] statute is to be interpreted and applied… so that it is in conformity, and not in conflict, with established rules of international law… However, if it is not possible to construe a statute conformably with international law rules, the provisions of the statute must be enforced even if they amount to a contravention of accepted principles of international law.

But, as our laws today are drafted with such precision, or are so constantly amended, ambiguities are increasingly hard for the courts to find.

In the *Malaysian Declaration Case*, for example, the High Court found that, under s 98A of the *Migration Act,* the Minister could not send asylum seekers to Malaysia as that nation had not ratified the *Refugee Convention* and they would be at risk of return to the country of persecution and discrimination. The government immediately returned to Parliament to delete the offending clause, leaving open the possibility of further offshore processing arrangements with the Asian region, where so many states are not party to the relevant human rights treaties.

VI

The *Malaysian Declaration Case* illustrates the phenomenon that time and again the High Court has limited executive discretion by reference to statutory principles of interpretation and the principle of legality. It also demonstrates that time and again, the government has been successful in requesting Parliament to tighten up legislation to permit what was hitherto illegal.

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[22] *Coco v The Queen* (1994) 179 CLR 427, 436.
[23] *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363.
[24] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 2 (31 August 2011) [247].

In short, respective Parliaments over the last few years have failed to exercise their traditional self-restraint in protecting democratic rights. Historically, Parliament has been the bulwark against sovereign or executive power. Professor George Williams estimates that there are currently over 350 Australian laws that infringe fundamental freedoms.[25] He suggests that prioritising governmental power has become a 'routine part of the legislative process', with new laws stimulating little community or media response.[26] This assessment is supported by the interim report of the Australian Law Reform Commission in its inquiry into Commonwealth laws and traditional rights and freedoms, which provides evidence of an extensive body of federal laws that infringe rights and freedoms.[27]

Despite the disappointing failure of Parliaments to protect human rights, it can be observed that Australia's historical and current preference has been to rely on its Parliaments rather than the courts to determine the balance between individual rights and national security and public safety.

One of the most important mechanisms to ensure that Australian laws are consistent with fundamental rights and freedoms is that of scrutiny through Parliamentary Committees, such as the Parliamentary Joint Committee on Intelligence and Security and the Senate Committee on Legal and Constitutional Affairs. These Committees regularly review proposed and existing laws for their impact on migration, counter-terrorism and national security.

A welcome addition to these Committees has been Parliamentary Joint Committee on Human Rights established in 2011 ('the Committee').[28] The Committee has the primary mandate to examine current and proposed laws for compatibility with human rights and to report accordingly to Parliament. Human rights are specifically defined by reference to international human rights law as the rights and freedoms accepted by Australia in the treaties dealing with civil and political rights, economic, social and cultural rights, discrimination on the basis of sex, race, disability and torture and children's rights. In this way, Parliament has made a clear commitment to international human rights law. Indeed, as French CJ has pointed out:

> It does not take a great stretch of the imagination to visualise intersections between these fundamental rights and freedoms, long recognised by the common law, and the fundamental rights and freedoms which are the subject of the *Universal Declaration of Human Rights* and subsequent international conventions to which Australia is a party.[29]

The Committee has in its early years produced consensus reports; no mean feat given that all political parties are represented. More recently, however, the Committee has split down political party lines to produce both majority and minority reports.

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[25] George Williams, 'The Legal Assault on Australian Democracy' (Paper presented at Sir Richard Blackburn Lecture, Pilgrim House Conference Centre, 12 May 2015) 350.
[26] Ibid.
[27] Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, Interim Report No 127 (2015).
[28] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).
[29] Chief Justice Robert French, 'Oil and Water? International Law and Domestic Law in Australia' (Speech delivered at the Brennan Lecture, Bond University, 26 June 2009) 21.

It is not easy to determine the impact of the Committee in protecting and promoting human rights. It is clear that most Committee recommendations are not accepted by government and do not lead to significant amendments to the original Bill. Indeed, governments, unsurprisingly, remain reluctant to accept that a Bill it has introduced to Parliament fails to comply with human rights.

For example, in respect of amendments to the *Migration Act* regarding 'Unauthorised Maritime Arrivals' in 2012,[30] the Minister for Immigration and Citizenship concluded that the rights to freedom of movement and to family, the right not to be detained arbitrarily and the rights of the child were not engaged because the asylum seekers were 'unlawfully' in Australia.[31] The Committee in its 7th report of 2012 ('the Report') stated that:

> …as a matter of international law persons who are not 'lawfully' present in Australian territory nonetheless enjoy a range of rights under the ICCPR and other relevant human rights treaties while they are … under Australian jurisdiction. … The committee considers that this Bill on its face give rise to issues of compatibility with human rights, [especially the holding of children in detention and their transfer to regional processing]. The Committee also considers that there may be issues of compatibility with the right not to be detained under Article 9 of the ICCPR….32

The Report, among most others, has not persuaded the government to amend the Bill to achieve compatibility with human rights.

Despite this and other disappointing responses by governments to its work, the Committee arguably improves the understanding of human rights among Parliamentarians. It can provide valuable advice to those drafting legislation and encourage a culture of human rights among public servants. The reports of the Committee may also inform the views of courts when interpreting the new laws.

VII

Additional to Parliament, the Commission plays a central role in protecting human rights. The Commission was established in 1986, and is now coming up to its 30th anniversary. The constituting statute, the *Australian Human Rights Commission Act 1986* (Cth) creates an agency of government with corporate legal status. It is one of 110 national human rights institutions in the world and is accredited with 'A' status under the United Nations *Paris Principles*. [33] Its most important characteristic is the

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[30] Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012 (Cth).
[31] Explanatory Memorandum, Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Bill 2012, Attachment A: Statement of Compatibility with Human Rights, 2–3.
[32] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Seventh Report of 2012: Bills Introduced 29 October – 1 November 2012; Legislative Instruments Registered with the Federal Register of Legislative Instruments 17 October – 16 November 2012* (2012) 20–21.
[33] ICC Sub-Committee on Accreditation, *Chart of the Status of National Institutions* (23 May 2014) International Coordinating Committee of National Institutions for the Protection and Promotion of Human Rights <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/Chart%20of%20the%20Status%20of%20NHRIs%20%2823%20May%202014%29.pdf>.

independence of its President and seven Commissioners from government influence. The Commission has many functions including:

1. Investigating and conciliating complaints of violations of human rights and anti-discrimination laws;
2. Inquiring into acts or practices that may be inconsistent with human rights;
3. Promoting an understanding of human rights through education;
4. Reporting to the Minister on laws that Parliament should be made to comply with human rights; and
5. Intervening, with leave of the court, in judicial proceedings where a human rights perspective is relevant.

The statutory definition of human rights, as contained in the ICCPR or other relevant treaties, is critical to the role of the Commission. As you will understand from my earlier remarks about Australian exceptionalism, the *ICCPR*, the *ICESCR* and the *CROC* are not directly part of Australian law. This places the Commission in a delicate position with the government of the day, because while we give our advice on the basis of international law, government officials and the courts apply Australian domestic law. In the absence of domestic laws protecting human rights, where Parliament fails to exercise its traditional restraint to protect fundamental freedoms and where the courts have a limited opportunity to apply the principle of legality, the Commission has a greater role in our democratic system than its founders may have intended.

In summary, Australia has not developed the legal or Parliamentary tools for protection of human rights that are available in comparable legal systems. It is for this reason that the executive government, with the support of Parliament, is able to pass laws that threaten our democratic freedoms with apparent impunity.

VIII

Expanded counter-terrorism laws stand as an example of this executive overreach. Counter-terrorism laws have been significantly extended over recent years to modernise our existing laws. The strength of the rule of law is more truly tested when security is threatened than in times of peace. When Australia is threatened by terrorism, the need to protect our traditional liberties assumes an even greater urgency.

Many counter-terrorism laws, introduced with unseemly haste before last Christmas, go well beyond what might be deemed to be proportionate, creating a chilling effect on freedom of speech and the press and breaching the right of individuals to privacy.

Three tranches of new counter-terrorism laws have been passed:

1. *National Security Legislation Amendment Act (No. 1) 2014* (Cth) creates new Australian Security Intelligence Organisation ('ASIO') powers for intelligence gathering;

2. The *Counter-Terrorism Legislation Amendment (Foreign Fights) Act 2014* (Cth) establishes 'declared areas' in Iraq and Syria and creates an offence for

Australians to enter these areas or to fight abroad. Problematically, the evidentiary burden is placed on the accused to provide a legitimate reason;[34] and

3. The mandatory data retention scheme enacted by the *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) requires telecom providers to retain data of all Australians for two years. Data is available to security agencies without a prior warrant, or judicial or independent supervision and authorisation.[35] A similar law of the European Union has recently been ruled invalid by the European Court of Justice as disproportionate interference with privacy and freedom of expression.[36]

A fourth tranche of legislation has been introduced but is yet to be passed. The Australian Citizenship (Allegiance to Australia) Bill 2015 (Cth) ('the Bill') has recently been introduced to ensure that Australian citizens who engage in specific terrorist related conduct, even in the absence of any conviction, fight in the service of a declared terrorist organisation, or are convicted of a specified terrorism offence, will lose their citizenship automatically if they are a dual national.[37] The loss of citizenship for dual nationals, including those who have spent most (if not all) of their lives in Australia, strikes at the heart of Australia's successful migrant and multi-cultural nation and threatens our social cohesion.

Under current law, the power of the Minister to revoke citizenship arises in limited circumstances, such as a conviction for specified offences related to false information in connection with their citizenship application.[38]

It is now proposed that the revocation should arise by operation of law rather than the initially proposed subjective Ministerial discretion. In short, no decision is required by the Minister, though it is implicit that an official somewhere will make the decision. But it is also proposed that the Minister be granted a non compellable discretion to exempt the citizen from the automaticity of the loss of citizenship, if he considers it in the public interest to do so.[39] The Minister does not have a duty to consider whether he will exercise this discretion and if he makes any mistakes is not bound by the rules of natural justice.[40]

The *Magna Carta* provides that no man is to be exiled except by the lawful judgment of his equals or the law of the land. This ancient principle raises the question whether it is consistent with the rule of law for Parliament to pass legislation to withdraw citizenship automatically, subject to the discretion of the Minister. I suggest that to strip a person of their citizenship in these circumstances is likely to be contrary to Article 12(4) of the *ICCPR*, which protects the right to enter and remain in one's own country. In effect, Parliament has elevated the subjective views of a Minister above an evidence based determination by a judge.

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[34] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).
[35] *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).
[36] *Maximillian Schrems v Data Protection Commissioner* (C-362/14) [2015] ECR 351.
[37] Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) cls 33AA, 35, 35A.
[38] *Australian Citizenship Act 2007* (Cth) Pt 2 Div 3.
[39] Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) cl 33AA(7).
[40] Ibid cls 33AA(8), 35(7), 35A(7), 33AA(10), 35(9), 35A(9).

The government argues that the right to a fair trial over loss of citizenship is not threatened by the Bill, because there can be judicial review of any decision made by the Minister not to exempt a person from the automatic loss of citizenship.[41] This is true. A court could review whether the power under the *Australian Citizenship Act 2007* (Cth) has been exercised according to the law. But if all the law requires is that the Minister can exercise his discretion as he considers appropriate, in practice, the courts have nothing to review, rendering the exercise futile. The Bill, I suggest, diminishes the judicial power to make determinations, and will be, if passed, an arbitrary overreach of executive discretion facilitated by a compliant Parliament.

While there are few details yet available, a fifth tranche of laws is expected to be introduced shortly,[42] and will:

1. Create a new offence of inciting genocide, which already exists as a crime against humanity under our war crimes legislation;[43]
2. The control order regime will be extended to lower the age at which a person can be subject to a control order from 16 to 14 years. Currently a control order applies to 16–18 year olds for up to 3 months subject to some safeguards;[44]
3. Monitoring of individuals subject to control orders will also be facilitated by the proposed law by relaxing controls over searches, telecommunications interception and surveillance devices;[45] and
4. Make it more difficult for the subject to understand the reasons for the order or to challenge it in the courts.[46]

IX

A second example of the overreach of executive discretion and power lies in the expansion of executive powers to order the arbitrary and indefinite detention of individuals. The enduring words of the *Magna Carta* are, 'no freeman is to be imprisoned except by the lawful judgment of his equals or by the law of the land.'

Over recent years, respective Parliaments have granted governments the power to lawfully detain indefinitely various classes of persons, including most notably refugees and asylum seekers, along with those less well known who have infectious diseases, or who are mentally ill and unfit to plead to criminal charges, or who are subject to mandatory admission to drug and alcohol rehabilitation facilities or indefinite detention of serious sex offenders. Few of those detained under such laws have meaningful access to legal advice or regular independent judicial or administrative review.

The Commission is particularly concerned by the growing instances of detention in prisons of those with cognitive disabilities for lengthy periods without releasing them into more appropriate facilities and in the absence of regular review by an independent

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[41] Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth), Attachment A: Statement of Compatibility with Human Rights, 31.
[42] Commonwealth, *Parliamentary Debates*, Senate, 13 October 2015, 7434 (George Brandis, Attorney-General).
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] Ibid.

tribunal.[47] In a recent complaint, the Commission found that four Aboriginal men with intellectual and cognitive disabilities had been held for many years in a maximum security prison in the Northern Territory.[48] Each complainant had been found unfit to stand trial or found not guilty by reason of insanity. In respect of two of these men, they would have received a maximum sentence of 12 months had they been duly convicted. Instead, they were imprisoned for four and a half years and six years, respectively. The Commission found that the failure by the Commonwealth was a violation of the right not to be detained arbitrarily under Article 9 of the *ICCPR*, a provision in the spirit of the *Magna Carta*.

Detention powers of the executive have also been expanded to detain asylum seekers and refugees indefinitely; powers that were found to be valid by the High Court in *Al Kateb v Godwin*[49] in 2007. Most egregiously, those with adverse security assessments issued by the ASIO are detained indefinitely. Many, including children, are detained for some years without meaningful access to legal advice or independent review. About 2044 people, including 113 children, remain in closed detention in Australia and 934 males remain on Manus Island and 631 refugees on Nauru, including 92 children.[50] Many have been held for well over a year in conditions that have been criticised by the United Nations as breaching the *Convention against Torture*.[51]

The mandatory detention provisions of the *Migration Act* have also been activated by s 501 the *Migrations Amendment (Character and General Visa Cancellation) Act 2014* (Cth) which allows the Minister to cancel visas on character grounds, on the basis of his reasonable suspicion that the person does not pass the character test, where the person is not able to satisfy the Minister that they pass the character test.[52] That is any possible risk of committing certain offences including disruptive activities or inciting discord in the community. While earlier law required a criminal conviction by a court of law, the new provisions give the Minister personal, non-delegable, non-compellable and non-merits reviewable powers to cancel a visa.[53]

The Commission has expressed concerns that these powers increase the likelihood of arbitrary detention and unjustified interference with families and the rights of

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[47] See Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2012' (Report, Australian Human Rights Commission, 26 October 2012) 62–70; Australian Human Rights Commission, 'Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues' (Report, Australian Human Rights Commission, 2008); Australian Human Rights Commission, 'Equal before the Law: Towards Disability Justice Strategies' (Report, February 2014) 26.

[48] Australian Human Rights Commission, 'KA, KB, KC and KD v Commonwealth of Australia' (Report No 80, 2014).

[49] (2004) 219 CLR 562.

[50] Department of Immigration and Border Protection, *Immigration Detention Statistics for 30 September 2015* (September 2015) <http://www.border.gov.au/about/reports-publications/research-statistics/statistics/live-in-australia/immigration-detention>.

[51] Juan E Mendez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* UN Doc A/HRC/28/68 and Add.1 (6 March 2015) [19], [26]; *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[52] *Migration Act 1958* (Cth) s 501(2).

[53] Australian Human Rights Commission, Submission No 8 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Character and General Visa Cancellation) Bill 2014*, 28 October 2014, [4].

children.[54] Even more worryingly, the Minister has the power to overturn a decision of the Administrative Appeals Tribunal that revokes a decision to cancel a visa under s 501 (3A) of the *Migration Act*, without any need to satisfy the principles of natural justice.[55]

X

Some recent cases shine rays of legal light on the unconstrained right of Parliaments to give the executive the power to detain. In 2014, in *Plaintiff S4/2014 v Minister for Immigration and Border Protection,*[56] the High Court decided unanimously that the executive discretion to detain was limited to three purposes — deportation, determining a visa application, or determining whether to allow the plaintiff to apply for a visa.[57] The Court qualified the executive's power to detain, holding that the *Migration Act* does not authorise the detention of an asylum seeker 'at the unconstrained discretion' of the Minister.[58] It found that an alien is not an 'outlaw' and that the Minister must make a decision, one way or the other, as soon as is practicable.'[59]

This decision was followed by a High Court writ of peremptory mandamus against the Minister for Immigration and Border Protection — a rare phenomenon under our law. Earlier this year in *Plaintiff S297/2013 v Minister for Immigration and Border Protection*,[60] the Court considered a matter in which it had previously issued a writ of mandamus ordering the Minister to decide to either grant or refuse a protection visa application made by an asylum seeker held in closed detention for three years.[61] On return to the court, having determined that the Minister had failed to make the required decision in accordance with law, the Court unanimously issued a peremptory writ of mandamus, requiring the Minister to make a decision to *grant* a permanent protection visa to the plaintiff asylum seeker refugee held in closed detention for three years.[62]

As punitive detention is for the courts alone, I suggest that the prolonged and indefinite administrative detention by the executive risks becoming punitive. If so, it violates the principle of separation of powers.

An aspect of enforcing international human rights law is the United Nations monitoring system through the Human Rights Council and the Human Rights Committee. Both institutions have been clear in voicing their concerns about policies of immigration detention and offshore processing, as have the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees. Additionally, the United Nations Subcommittee on Prevention of Torture raised concerns that conditions on Nauru raised a pressing need for increased monitoring of compliance with the *Convention against Torture*,[63] and the Special Rapporteur on Migration cancelled a

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[54] Ibid.
[55] Migration Amendment (Character and General Visa Cancellation) Bill 2014 cl 133A.
[56] [2014] HCA 34 (11 September 2014).
[57] Ibid [26].
[58] Ibid [22].
[59] Ibid [24], [9].
[60] [2015] HCA 3 (11 February 2015).
[61] [2014] HCA 24 (20 June 2014) [69].
[62] [2015] HCA 3 (11 February 2015) [48].
[63] Office of the High Commissioner for Human Rights, 'UN Torture Prevention Body Urges Nauru to Set Up Detention Monitoring Mechanism' (Media Release, 6 May 2015).

visit to Nauru because of secrecy laws.[64] Finally, concerns have been raised by civil society including Amnesty International, Human Rights Watch, the Human Rights Council of Australia, the Refugee Advice and Casework Service and the Andrew & Renata Kaldor Centre for International Refugee Law.

I will shortly leave for Geneva to be present at Australia's Universal Periodic Review before the United Nations Human Rights Council. Concerns of the international community in respect of the mandatory detention and offshore processing policies will almost certainly be expressed at the Review next week. The outcome may well affect the strength and credibility of Australia's bid for a seat on the Human Rights Council in 2018–20.

XI

One of many lessons I have learned over my three years as President of the Commission is that one of the most effective safeguards of human rights is the cultural expectation of Australians that our freedoms will be protected. While most Australians are unlikely to be able to describe the doctrine of the separation of powers, they are quick to assert their liberties under the rubric of a 'fair go' — a phrase that is as close to a Bill of Rights in this country as we are likely to get. This cultural expectation is what keeps our freedoms alive today, as was illustrated by the overwhelming community response to Operation Fortitude and to preserve s 18C of the *Racial Discrimination Act*.

The scores of laws passed recently that infringe our rights has confirmed my view that Australia needs a legislated charter of rights. If such a law were to fail or be defective, it can easily be repealed or amended. We must prioritise the education of young Australians, so they better understand and value our Constitutional protections for democracy and the rule of law. We also need to invest in Parliament as a vital institution to protect the rights and freedoms of citizens, through stronger powers for the Joint Parliamentary Committee on Human Rights.

I hope that, despite challenging the power of the executive and Parliament, as an English migrant and a dual citizen, I can keep my Australian passport and eventually retire to smell the roses in peace.

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[64] Office of the High Commissioner for Human Rights, 'Migrants/Human Rights: Official Visit to Australia Postponed Due to Protection Concerns' (Media Release, 25 September 2015).

A HISTORY OF THE DEFENCE POWER: ITS UNIQUENESS, ELASTICITY AND USE IN LIMITING RIGHTS

KATE CHETTY*

The s 51(vi) defence power in the australian constitution is unlike any of the other constitutional heads of power. It is one of only a few purposive powers, and so when considering whether legislation is intra vires the defence power, the subject matter of the legislation is analysed to determine whether it is for defence purposes. It is also the only power which expands and contracts according to the extant political climate, so it has been interpreted broadly during times of war but more restrictively during other periods. This article provides a comprehensive analysis of the approach of the high court during the different stages of expansion and contraction, including during periods of ostensible peace, periods of increasing international tension, wartime and the aftermath of war. It places particular emphasis on cases where the defence power has been used to limit the rights of individuals. It considers the current climate post-september 11 and the extent to which the defence power has been used to pursue anti-terrorism measures.

I INTRODUCTION

It is the duty of any government to take reasonable steps to keep persons within their control secure from threats.[1] Indeed, 'exceptional times may be best governed by exceptional means and … exceptional powers to make laws should be made available in these times'.[2] While the *Australian Constitution* does not contain explicit emergency powers, s 51(vi) confers on the Parliament the power to make laws for the peace, order, and good government of the Commonwealth with respect to 'the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth'. This defence power is unique when compared to other constitutional heads of power, which has significant implications for human rights.

The defence power is one of only a limited number of purposive powers in the *Constitution*. When scrutinising the validity of legislation enacted pursuant to the defence power, one must analyse the subject matter of the legislation to determine whether it is *for* defence purposes. This can be contrasted to the analysis required for non-purposive powers, where the question is whether the legislation was enacted *upon*, or in relation to, the relevant head of power. There are a number of implications of this

* B Comm (Advert&Mkt) (UCan); LLB (Hons) (UCan); LLM (UCan); GradDip (Leg Prac) (ANU); PhD (CSU). Dr Chetty is currently a sessional lecturer at the University of Canberra and an acting Deputy Defence General Counsel at the Department of Defence. The views expressed in this article are entirely her own and should not be taken to represent those of her employers.

[1] Dame Mary Arden, 'Meeting the Challenge of Terrorism: The Experience of English and Other Courts' (2006) 80 *Australian Law Journal* 818, 819.

[2] H P Lee, *Emergency Powers* (Law Book Co., 1984) 1.

approach, including the availability of the proportionality test (or 'appropriate and adapted' test) when considering whether legislation is intra vires. Secondly, unlike any other constitutional head of power, the defence power is elastic in scope and so expands and contracts according to the extant political climate. The High Court has recognised three stages of expansion and contraction: those core aspects of the defence power which are obviously defence-related and therefore are available generally, including during peacetime; an intermediate power which is available during periods of increasing international tension and the aftermath of war; and an expanded power which is available during wartime.[3]

This article discusses these unique aspects of the defence power and undertakes a historical analysis of how the High Court has approached the power during these periods of expansion and contraction. In particular, it considers the approach of the High Court in cases where the Parliament has attempted to limit the human and economic rights of individuals.[4] This is highly relevant in the current post-September 11 era of the 'War on Terror', where Australia is not at war, but nor can the climate be described as one of ostensible peace.

II INTERPRETING SECTION 51(VI)

While prima facie its scope may appear to be quite restricted, the defence power has generally been interpreted more broadly than its wording may suggest, even during peacetime. In *Farey v Burvett* it was held that the words 'naval and military' are not words of limitation,[5] and when read together with the s 61 executive power it includes the 'power to protect the nation'.[6] There are also a number of other principles of interpretation and characterisation that apply to the defence power which make it unique.

In *Stenhouse v Coleman*, the High Court described the defence power as a purposive power, meaning that legislation enacted pursuant to it must have a particular purpose, the defence of the Commonwealth.[7] When scrutinising the validity of legislation enacted pursuant to the defence power, the High Court has adopted an approach whereby the steps taken or authorised by the legislation are analysed to determine whether they are *for* defence purposes, either directly or incidentally, according to the prevailing 'needs' or threat that existed at the time. This involves forming a view as to whether the legislation is *conducive* to a desired end, as opposed to whether the legislation is *designed* to attain a desired end.[8] For example, fixing the price of food was found capable of contributing to the war effort,[9] while seizing the property of organisations

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[3] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 222-3 (Williams J).
[4] Noting that there is minimal constitutional protection of human rights in Australia, the broad references to human and economic rights in this article refers to those rights recognised under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, including the right to liberty of the person, the freedom from arbitrary detention, the right to due process, and the right to work.
[5] (1916) 21 CLR 433, 440 (Griffith CJ).
[6] *Thomas v Mowbray* (2007) 233 CLR 307, 388-9 (Kirby J).
[7] (1944) 69 CLR 457, 464 (Latham CJ), 466 (Starke J).
[8] Lee, above n 2, 14.
[9] *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ).

deemed prejudicial to the war effort was not because there was no adequate connection between the defence power and the seizure of property.[10]

Legislation enacted for defence purposes may be in relation to 'primary' and 'secondary' aspects. The primary aspects include matters directly related to the raising, equipping and conduct of the armed forces.[11] The secondary aspects are what Sawer describes as 'conditions in the community which are in turn relevant to such "direct" activities, but only as the general background for them'.[12] For example, the retention of specially trained staff in a Commonwealth-run clothing factory may not be possible unless the factory is always fully engaged as it would be during wartime, and so sales to civilian organisations are merely incidental to the maintenance of the factory for war purposes.[13] The approach to the defence power is a wider test than the subject matter test for non-purposive powers, because legislation need not relate to matters that directly affect defence but may also include matters that, for example, indirectly contribute to a war effort.

In contrast with the Court's approach to non-purposive powers, the proportionality test (or the 'appropriate and adapted' test) is available in the characterisation of the purposive defence power. The effect of this is that the judiciary is empowered to invalidate legislation where there is a lack of proportionality between the purpose of the measure and the legislative means for achieving that purpose. While the question of what is the appropriate method of achieving a desired result is a matter for the Parliament, the law must be capable of being reasonably considered to be appropriate and adapted to achieving what is said to impress it with the character of a law with respect to the relevant power.[14] Implicit in this requirement 'is a need for there to be a reasonable proportionality between the designated purpose or object and the means which the law embodies for achieving or procuring it'.[15] This can be contrasted with the approach taken in the characterisation of non-purposive powers, where such matters are not relevant.

That being said, the availability of the proportionality test in relation to the defence power varies according to the immediate threat. This is because the scope of s 51(vi), unlike any of the other enumerated powers, expands and contracts according to the prevailing international and political climate.[16] During periods falling short of war, in applying the proportionality test the High Court has focused on the purpose of measures and their capacity to assist defence generally. Given that the threat is less than during times of war, the extent to which a measure will fall within the scope of the defence power is more limited. For example, in relation to legislation that limits rights, in *Polyukhovich v Commonwealth* Brennan J held that although the retrospective offence provisions of the *War Crimes Act 1945* (Cth) could be capable of having a relevant

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[10] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 154 (Starke J).
[11] Geoffrey Sawer, 'Defence Power of the Commonwealth in Time of Peace' (1953) 6 *Res Judicatae* 214, 217.
[12] Ibid 220.
[13] *Attorney-General (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth* (1935) 52 CLR 533, 558 (Gavan Duffy CJ, Evatt and McTiernan JJ).
[14] *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1, 259. This case concerned the purposive treaty implementation aspect of the external affairs power, but it was held that the same approach may be taken in relation to the defence power.
[15] Ibid 260.
[16] *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ).

deterrent effect and might, on that account, be said to be 'appropriate and adapted' to serve defence purposes,

> the validity under s.51(vi) of a law enacted in a time of peace depends upon whether the Parliament might have reasonably considered the means which the law embodies for achieving or procuring the relevant defence purpose to be appropriate and adapted to that end, a question of reasonable proportionality … In times of war, laws abridging the freedoms which the law assures to the Australian people are supported in order to ensure the survival of those freedoms in times of peace. In times of peace, an abridging of those freedoms … cannot be supported unless the Court can perceive that the abridging of the freedom in question is proportionate to the defence interest to be served.[17]

During wartime the High Court focused on the nature of the hostilities and the threat faced in order to determine whether a measure was proportionate. In World War II, Dixon J explained that the existence and character of hostilities are facts which will determine the extent of the operation of the power.[18] The effect of this is that the proportionality test gives rise to a greater capacity of the judiciary to consider substantive issues than is possible in the case of non-purposive constitutional powers. Conversely, the elasticity of the defence power means that there is scope for a much broader range of topics to fall within power during periods falling short of ostensible peace. An analysis of the different stages of expansion and contraction of the defence power demonstrates the implications this has for human rights where measures seek to limit the rights of individuals.

III THE DEFENCE POWER DURING PEACETIME

During periods of profound peace the High Court showed its reluctance to permit the Parliament to enact legislation pursuant to the defence power where a strong connection between that legislation and the defence of the Commonwealth was not demonstrable. During such periods there is no material threat to the security of the nation and so the defence power is at its narrowest, authorising only legislation which has, as its direct and immediate object, the naval and military defence of the Commonwealth and of the several States.[19] 'While peace prevails, the normal facts of life take their respective places in the general alignment, and are subject to the normal action of constitutional powers.'[20] The focus is on the 'primary aspects' of the defence power, which includes measures such as the enlistment and training of military members, and the manufacture of weapons.[21] The effect of the defence power on human rights during such periods was minimal, given that during such periods there was no need for the Parliament to limit human rights in the interests of defence.

The early 1920s was considered to be a period of peace. In 1926 in *Commonwealth v Australian Commonwealth Shipping Board*,[22] the High Court was required to consider whether the Board transgressed the powers set out in its enabling legislation when it entered into a contract to supply, erect and maintain steam turbo-alternators. The Board

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[17] (1991) 172 CLR 501, 592-3.
[18] *Andrews v Howell* (1941) 65 CLR 255, 278.
[19] Lee, above n 2, 30.
[20] *Farey v Burvett* (1916) 21 CLR 433, 453 (Isaacs J).
[21] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 254 (Fullagar J).
[22] (1926) 39 CLR 1.

argued that its dockyard and workshops were necessary for the defence of the Commonwealth, and that it was impracticable to maintain them efficiently for that purpose unless it could enter upon general manufacturing and engineering activities. While the High Court recognised that there might be practical difficulties in maintaining the works, such as costs and worker experience, it was satisfied that 'the power of naval and military defence does not warrant these activities in the ordinary conditions of peace, whatever be the position in time of war'.[23]

This case can be contrasted with the 1935 decision of *Attorney-General (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth*,[24] some ten years later. Rich J identified that the requirements of the Commonwealth-run clothing factory were of a fluctuating character, and given that 'all things naval and military have the possibility of war in view', the nature of the factory could not be determined in accordance with peacetime requirements.[25] The Court accepted that the retention of specially trained staff might not be possible unless the factory was fully engaged as it would be during wartime. It was therefore 'necessary for the efficient defence of the Commonwealth to maintain intact the trained complement of the factory, so as to be prepared to meet the demands which would inevitably be made upon the factory in the event of war'.[26] The High Court distinguished this case from *Commonwealth v Australian Commonwealth Shipping Board*[27] on the grounds that in the earlier case it was required to have regard to the supply of electrical equipment as a trade 'wholly unconnected with any purpose of naval or military defence'.[28]

In *Re Tracey; Ex parte Ryan*,[29] a more recent peacetime case, the High Court confirmed the validity of a separate judicial system for the enforcement of military discipline. Here, a defence force member charged with offences under the *Defence Force Discipline Act 1982* (Cth) objected to the jurisdiction of a Defence Force Magistrate to hear his case on the basis that the hearing and determination of the charges involved an unauthorised exercise of Chapter III judicial power. Mason CJ and Wilson and Dawson JJ conceded that 'a service tribunal has practically all the characteristics of a court exercising judicial power'.[30] However, the unique nature of the defence force allowed the defence power to be used to impose a system of discipline which is administered judicially, not as part of the judiciary under Chapter III but as part of the defence force organisation itself.[31] To this end, 'the power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code standing outside Chapter III and to impose upon those administering that code the duty to act judicially'.[32] Although the *Constitution* did not expressly provide for the disciplining of the forces, it is necessarily comprehended by s 51(vi) because the military defence of the Commonwealth

[23] Ibid 9-10 (Knox CJ, Gavan Duffy, Rich and Starke JJ).
[24] (1935) 52 CLR 533.
[25] Ibid 562.
[26] Ibid 558.
[27] (1926) 39 CLR 1.
[28] *A-G (Vic) (At the Relation of the Victorian Chamber of Manufacturers) v Commonwealth* (1935) 52 CLR 533, 559 (Knox CJ, Gavan Duffy, Rich and Starke JJ), quoting *Farey v Burvett* (1916) 21 CLR 433, 441 (Griffith CJ).
[29] (1989) 166 CLR 518.
[30] Ibid 537.
[31] Ibid 540-1.
[32] Ibid 541.

demands the provision of a disciplined force.[33] It is required 'no less at home in peace-time than upon overseas service or in war-time'.[34]

From the above, it is clear that the judiciary places a relatively high level of scrutiny on defence measures introduced during times of peace. This can be contrasted with wartime, where the High Court treated parliamentary opinion as conclusive and the consequential parliamentary and executive action as justified by the defence power.[35] This line becomes blurred during periods falling between war and peace, particularly when the Parliament is seeking to limit human rights for defence purposes.

IV THE DEFENCE POWER DURING PERIODS OF INCREASING INTERNATIONAL TENSION

In the lead up to both World Wars and during the Cold War, the climate was one in which war had not been declared, but nor could it be said that it was a time of peace. There was apprehended emergency, so that while Australia was not embroiled in a crisis, the crisis was obvious elsewhere and there was a fear that it might soon spread to Australia.[36] During these periods, the High Court was more liberal in its interpretation of the defence power, and accepted that a wider interpretation was necessary in order to prepare for war. Indeed, '[a]ny conduct which [was] reasonably capable of delaying or of otherwise being prejudicial to the Commonwealth preparing for war would be conduct which could be prevented or prohibited or regulated under the defence power'.[37] That said, the High Court still established limits: the connection between the legislation and the particular purpose of defence needed at least to be established 'with reasonable clearness'.[38] Nevertheless, the elasticity of the defence power has meant that, generally speaking, the greater the prevailing threat or tension, the greater the power and, therefore, the greater the potential for the infringement of rights.

After World War II, during the Cold War tensions, came one of the most significant cases addressing the defence power: *Australian Communist Party v Commonwealth*.[39] This case remains of enormous interest from a human rights perspective because if the majority had upheld the validity of the legislation, the defence power would have potentially been deemed limitless, and exercisable simply on the subjective opinion of the executive. In a 6:1 judgment (Latham CJ dissenting), it was held that the *Communist Party Dissolution Act 1950* (Cth), which declared the Australian Communist Party unlawful and confiscated its property, was ultra vires the defence power.

The preamble to the Act contained nine recitals which, inter alia, described the Australian Communist Party as a revolutionary party using violence, fraud, sabotage, espionage, and treasonable or subversive means for the purpose of bringing about the overthrow or dislocation of the Australian government. Key sections included section 4 which declared unlawful, dissolved and forfeited the property of the Australian

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[33] Ibid 543 (Brennan and Toohey JJ).
[34] Ibid.
[35] Sawer, above n 11, 218.
[36] David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth* (Oxford University Press, 2000) 86.
[37] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 225 (Williams J).
[38] *R v Foster; Ex parte Rural Bank of NSW* (1949) 79 CLR 43, 84 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).
[39] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

Communist Party, and section 5 which granted the Governor-General the power to declare associated bodies unlawful if satisfied that their continued existence were prejudicial to defence – the exercise of which was not subject to judicial review. Ultimately, the majority of the High Court held that the legislation was invalid. Five of the justices (Dixon, McTiernan, Williams, Fullagar and Kitto JJ) held that in declaring whether a person or association threatened the Commonwealth, the Governor-General, as a member of the executive, was essentially making a declaration as to the application of the defence power, which is contrary to the doctrine of separation of powers.

Dixon J accepted that matters relating to defence are the responsibility of the executive, which has the benefit of accessing information that cannot be made public to inform its decisions.[40] '[T]he reasons why [the defence power] is exercised, the opinions, the view of facts and the policy upon which its exercise proceeds and the possibility of achieving the same ends by other measures are no concern of the Court.'[41] However, during times falling short of war, the defence power cannot be used to make a law attaching legal consequences to a legislative or executive opinion which itself supplies the only link between the power and the legal consequences thereby imposed.[42] Here, the effect of the legislation was that the Governor-General was left to judge the reach and application of the ideas expressed by phrases such as 'security and defence of the Commonwealth' and 'prejudicial to', and that declaration was conclusive.[43] McTiernan and Kitto JJ asserted that despite the views expressed in the preamble, the duty is cast upon the judiciary to determine whether laws are within the scope of the legislature's power.[44] The *Constitution* does not allow the Parliament to 'conclusively "recite itself" into power', which was what the Act purported to do.[45]

McTiernan and Kitto JJ considered that in order for the legislation to be valid, it must be proved that at the time it was enacted facts existed which made it reasonably necessary for the Australian Communist Party to be dissolved and its property forfeited.[46] Williams J accepted that there were notorious public facts during the war of which the Court could take judicial notice, and while this justified the *National Security Act 1939* (Cth) during actual hostilities, there were no relevant facts sufficient to bring the *Communist Party Dissolution Act 1950* (Cth) within the scope of the defence power on the day it was enacted.[47] Thus winding up bodies, disposing of their assets, and depriving individuals of their civil rights based on the executive's assertion that they were conducting themselves in a manner prejudicial to defence, was not authorised by the defence power in the prevailing climate.

Relevantly, McTiernan J commented on the extent to which the defence power could be used to limit civil liberties generally:

> In a period of grave emergency the opinion of Parliament that any person or body of persons is a danger to the safety of the Commonwealth would be sufficient to bring his or their civil liberties under the control of the Commonwealth; but in time of peace or when there is no immediate or present danger of war, the

[40] Ibid 198.
[41] Ibid.
[42] Ibid 261.
[43] Ibid 179.
[44] Ibid 207, 271.
[45] Ibid 206, 221.
[46] Ibid 224.
[47] Ibid 226.

> position is otherwise because the *Constitution* has not specifically given the Parliament power to make laws for the general control of civil liberties and it cannot be regarded as incidental to the purpose of defence to impose such a control in peace time.[48]

His Honour went on to note that 'the general control of civil liberty which the Commonwealth may be entitled to exercise in war time under the defence power is among the first of war-time powers that would be denied to it when the transition from war to peace sets in'.[49]

Interestingly, the majority judges, with the exception of Kitto J, indicated that they would have accepted a general policy of judicial restraint with respect to the defence power in times of actual war. On this basis, Sawer concludes that it is likely that had this case been decided during wartime, the High Court would have treated the parliamentary opinion as conclusive and therefore the legislative actions of the Parliament would have been within the scope of the defence power.[50] This is a reasonable conclusion in light of the wartime decisions discussed below. However, this approach was criticised in the post-September 11 decision of *Thomas v Mowbray*,[51] where the primary aspects of the defence power were held to be exercisable outside wartime in response to internal threats. The *Communist Party Dissolution Act 1950* (Cth) has since been described as 'one of the most draconian and unfortunate pieces of legislation ever to be introduced into the Federal Parliament'.[52]

Concerns arose following the decision in *Australian Communist Party v Commonwealth*,[53] with some arguing that the High Court's approach had the effect of inhibiting the efforts of the Commonwealth in preparing for war.[54] However, such concerns were dispelled in *Marcus Clark & Co Ltd v Commonwealth,*[55] in which the High Court demonstrated its support for defence measures introduced prior to any official declaration of war. Here, regulations stated that companies and individuals who borrowed above a set amount from certain entities had to obtain the Treasurer's consent, which could not be refused 'except for purposes of or in relation to defence preparations'.[56] The majority confirmed the validity of the legislation on the basis that restrictions regarding the raising of money amounted to a law with respect to defence. Unlike the legislation considered in *Australian Communist Party v Commonwealth,*[57] the enabling *Defence Preparations Act 1951* (Cth) contained a detailed account of the international situation, thus explaining why essential defence preparations needed to be undertaken with haste. Dixon CJ concluded that 'measures that tend or might reasonably be thought to be conducive to such an end are within the power provided that the tendency to the end is not tenuous, speculative or remote'.[58] Webb J also adopted a broad approach, and argued (quoting from *Farey v Burvett)* that the regulations might

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[48] Ibid 207.
[49] Ibid.
[50] Sawer, above n 11, 217.
[51] (2007) 233 CLR 307.
[52] G Williams, 'Australian Values and the War against Terrorism' (2003) 26(1) *University of New South Wales Law Journal* 191, 193.
[53] (1951) 83 CLR 1.
[54] See Lee, above n 2, 24.
[55] (1952) 87 CLR 177.
[56] *Defence Preparations (Capital Issues) Regulations 1951* (Cth) reg 17(i).
[57] (1951) 83 CLR 1.
[58] *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 219.

'"conceivably, even incidentally, aid the effectuation of the powers of defence" by diverting some men or materials to war preparations, and so have the necessary real connection with defence'.[59] His Honour was satisfied that despite war having not yet been declared, the Act and the regulations were justified:

> I am unable to hold that while the defence powers in their secondary aspect can be employed in times of peace, whether real or ostensible, to rebuild a city bombed during war ... they can never be employed to meet an international situation short of war, even when there is a distinct possibility of war with powerful enemies using weapons unprecedented in range and destructiveness.[60]

In finding a strong link between the defence power during war time and in the lead up to war when defence preparations were being made, McTiernan J considered that '[d]efence preparations, as the term implies, are necessarily relative to a possible war' and described the power as carrying a wide discretion to authorise action by the Parliament to protect Australia against aggression.[61] The practical effect of this position is that if there is a real possibility of war, then any legislation conceivably or incidentally related to defence will be valid.

Lee argues that this case indicates that the Parliament 'has ample legislative flexibility encompassing a wide range of subject-matters to put the nation on a war footing, provided the court will accept the need for preparation'.[62] In establishing whether such a need existed, and therefore in establishing a connection between the legislation and the defence power, Webb J took judicial notice of the notorious fact that, during this Cold War and Korean War period, there was considerable international tension and a distinct possibility of a third world war.[63] However, Sawer is critical of the outcome on the basis that the legislation fell short of vesting in the judiciary the power to decide whether a sufficient connection existed between the refusal of capital and the expansion of the armed forces.[64] The most the legislation did was to allow the Court to satisfy itself that the Treasurer was of the bona fide opinion that the connection existed and had acted on relevant considerations.[65] As discussed in the following section, where the defence power is at its widest, this approach places a significant limit on the extent to which the judiciary is in fact able to undertake a subjective review of the appropriateness of a particular measure where that measure limits the rights of individuals.

V THE DEFENCE POWER DURING WARTIME

The defence power has been given its broadest interpretation during times of war. During such periods, the Commonwealth has introduced extensive and detailed controls on the community of a kind that, in time of peace, would be thought to have nothing to do with the defence power.[66] The High Court has tended to defer to the Parliament on what measures it considered necessary for the successful prosecution of the war, although judicial control was not entirely absent during such periods. During World War

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[59] Ibid 248, quoting *Farey v Burvett* (1916) 21 CLR 433, 455 (Isaacs J).
[60] *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 246 (Webb J).
[61] Ibid 226-7.
[62] Lee, above n 2, 32.
[63] *Marcus Clark & Co Ltd v Commonwealth* (1952) 87 CLR 177, 246.
[64] Sawer, above n 11, 223.
[65] Ibid.
[66] Lee, above n 2, 10.

I and World War II, the power was held to extend to legislation addressing not only defence necessities such as war service and supply, but also to industry in general, for instance price regulation and economic controls. The implications of this broad approach for individuals were significant, particularly where the legislative measures were dependent on the opinion of a member of the executive.

A *The World War I Cases*

World War I was the first major war that Australia had been involved in since Federation. The conflict began when the United Kingdom and Germany went to war in August 1914, and Australia's involvement commenced shortly after Prime Minister Andrew Fisher had declared full support for the United Kingdom. It continued for a period of four years, during which time there were few elements of life which remained untouched by the war effort. At the outbreak, Australia enacted the broad-reaching *War Precautions Act 1914* (Cth). Sections 4 and 5, respectively, enabled the Governor-General to make regulations for securing the public safety and defence of the Commonwealth, and to issue an order which made provision 'for any matters which appear necessary or expedient with a view to the public safety and the defence of the Commonwealth'. As discussed below, the Act was used to introduce regulations on a broad range of subjects, many of which were challenged.

One of the most controversial measures during World War I was the internment provisions which permitted the detention of a person who was not charged with an offence, would not be entitled to a court hearing and might not be made aware of the grounds upon which they were detained. These provisions had significant consequences for the right to liberty of the person. In 1915 in *Lloyd v Wallach*,[67] the respondent was arrested and detained under a regulation enacted pursuant to the *War Precautions Act 1914* (Cth), which provided that where the Defence Minister had reason to believe that any naturalised person was disaffected or disloyal, he could order him to be detained in military custody during the continuance of a state of war. In considering the authority of the Court to review the Minister's actions, Griffith CJ made the following observation:

> I think that his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it. If this be so, the only inquiry which could possibly be made by the Court … would be whether the Minister had in fact a belief arrived at in the manner I have indicated. That belief is a matter personal to himself, and must be formed on his personal and ministerial responsibility. It is quite immaterial whether another person would form the same belief on the same materials, and any inquiry as to the nature and sufficiency of those materials would be irrelevant. Further, having regard to the nature of the power and the circumstances under which it is to be exercised, it would, in my opinion, be contrary to public policy, and, indeed, inconsistent with the character of the power itself, to allow any judicial inquiry on the subject in these proceedings.[68]

Such an approach was confirmed by Isaacs J, who stated that the Minister 'is the sole judge of what circumstances are material and sufficient to base his mental conclusion upon, and no one can challenge their materiality or sufficiency or the reasonableness of

[67] (1915) 20 CLR 299.
[68] Ibid 304-5.

the belief founded upon them'.[69] Griffith CJ narrowly accepted that if it could be proved that the Minister had not formed such a belief, then an aggrieved person might have a redress against him.[70] However, it would be difficult to establish such an argument, given that the Minister's opinion was subjective and he was not required to establish a basis for that opinion. A person's right to liberty could therefore be infringed without judicial involvement.

A similar approach was taken the following year in *Welsbach Light Company of Australasia v Commonwealth*,[71] in which the Governor-General proclaimed that any transaction with a company declared by the Attorney-General to be managed or controlled for the benefit of persons of enemy nationality, was trading with the enemy and was prohibited. Griffith CJ applied the rule that 'the intention of a legislative authority is to be ascertained, not by any technical rules applicable to proceedings in criminal cases, but by having regard to the subject matter, the evil to be remedied, and the nature of the remedy'.[72] His Honour determined that it was sufficient for the Attorney-General to declare that in his opinion a company fell within a prohibited category, and that he did not have to 'hold the Attorney-General's hand' in making such an investigation.[73] This limited the right of individuals to work and earn a living, with little scope for judicial review.

Financial restrictions impinging on economic freedoms were also addressed in *Farey v Burvett*[74] in the same year. Here, the Governor-General made a regulation under the *War Precautions Act 1914* (Cth) that declared that certain areas were 'proclaimed areas' in which he could set maximum prices for the sale of bread and flour. The appellant, who was convicted of selling bread above the maximum price, was unsuccessful in his challenge of the Act. Griffith CJ held that the scope of the defence power must be considered in light of the prevailing circumstances, and it could extend to any law 'which may tend to the conservation or development of the resources of the Commonwealth so far as they can be directed to success in war, or may tend to distress the enemy or diminish his resources'.[75] The test his Honour set out for determining whether legislation was for defence purposes was: 'Can the measure in question conduce to the efficiency of the forces of the Empire, or is the connection of cause and effect between the measure and the desired efficiency so remote that one cannot reasonably be regarded as affecting the other?'[76]

Barton J was careful to distinguish between the roles of the judiciary and the legislature, including the basis on which the judiciary is permitted to review defence measures objectively:

> If the thing is capable, during war, of aiding our arms by land or sea, here or elsewhere, we are to say so, but we say no more … If it is thus capable, then the

[69] Ibid 308.
[70] Ibid 305.
[71] (1916) 22 CLR 268.
[72] Ibid 276.
[73] Ibid.
[74] (1916) 21 CLR 433.
[75] Ibid.
[76] Ibid.

> question of the necessity, or the wisdom or expediency, of invoking such aid, is for Parliament.[77]

In terms of the subject matter of defence legislation, Barton J accepted that almost any resource can be used to ensure a nation's success in war, regardless of whether the resource is mental or material.[78] The control of food supplies is a legitimate means of defence in time of war, and whether these means are necessary in the prevailing circumstances is a question for the Parliament, which has 'the best knowledge of the facts relating to the strategy of the War and the conditions under which the people can be victorious'.[79]

Isaacs J focused on the scope and construction of the defence power in the context of the *Constitution* itself, recognising that in exercising its duty to defend itself, the Commonwealth has the legislative power to do whatever is advisable in relation to defence.[80] While his Honour did accept that this power is one that 'is commensurate with the peril it is designed to encounter',[81] his Honour contended that the *Constitution* 'is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled'.[82] As compared to the test set out by Griffith CJ, which looked to the efficiency of the particular measure, Isaac J's test appears to be more deferential to the legislature in determining the most appropriate measures to be taken.

> If the measure questioned may conceivably in such circumstances even incidentally aid the effectuation of the power of defence, the Court must hold its hand and leave the rest to the judgment and wisdom and discretion of the Parliament and the Executive it controls—for they alone have the information, the knowledge and the experience and also, by the Constitution, the authority to judge of the situation and lead the nation to the desired end … As to the desirability or wisdom of the Regulation complained of, it is not my province to speak; but as a matter of law I have no hesitation in holding that such a Regulation is one which, as a defence Regulation, is within the competency of the Legislature in the condition of affairs that now exist.[83]

There is a question as to whether this broad approach can be maintained in light of *Australian Communist Party v Commonwealth*,[84] given that such a test would vest in the Parliament an almost unquestionable discretion, since it does not require the legislature to establish that the 'desired end' justifies the measure and its effect on individuals' rights. This appears to be the concern of the dissenting justices. Gavan Duffy and Rich JJ could not accept the proposition that the defence power enables the Parliament to make such laws as it chooses, provided they are, in its opinion, conducive to the defence of the Commonwealth.[85]

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[77] Ibid 449.
[78] Ibid 447.
[79] Ibid 448-9.
[80] Ibid 455.
[81] Ibid.
[82] Ibid 451.
[83] Ibid 455-6.
[84] (1951) 83 CLR 1.
[85] *Farey v Burvett* (1916) 21 CLR 433, 462.

After the decision in *Farey v Burvett*,[86] the High Court upheld all defence measures that were challenged during World War I.[87] For example, in *Pankhurst v Kiernan,*[88] legislation provided that '[w]hoever advocates or encourages, or incites or instigates to the taking or endangering of human life, or the destruction or injury of property, shall be guilty of an offence'.[89] Barton J was satisfied that Parliament could pass legislation preventing any dislocation of the War effort.[90] Isaacs J went so far as to say that 'no one can ever say that anything is useless for war purposes, even in the narrowest sense'.[91] The legislation was upheld on the basis that it was designed for the preservation of Australian life and property (which are essentials for national defence), even though the Parliament did not have power to make laws with regard to the protection of property. This was also despite the effect it had on economic freedoms.

In August 1918, only months prior to the end of World War I, came the case of *Ferrando v Pearce and another*.[92] The Minister ordered the plaintiff's deportation under legislation which allowed the Defence Minister to order the deportation of any alien.[93] Barton J said of the validity of the order:

> It is obvious that deportations must in many cases be expedient with a view to public safety and defence. That they are capable of being so is enough. Being thus capable, whether they are so in fact is a matter which legislative authority, or authority delegated by the Legislature, alone can determine.[94]

The plaintiff claimed that the purpose of the order was to compel him to return to Italy so that he could render compulsory military service. Gavan Duffy J concluded that such a motive does not in itself make the order invalid, because 'here the power is given to be exercised at the Minister's discretion, and the purpose which he hopes to attain by its exercise is immaterial'.[95] In light of this, the majority confirmed the validity of the order.

Within months of this decision came *Burkard v Oakley*,[96] and *Sickerdick Informant v Ashton*.[97] In the former, regulations empowered the Attorney-General to declare that certain shares were transferred to the Public Trustee. The High Court confirmed that this could be considered a reasonable precaution for public safety and the defence of the Commonwealth.[98] Similarly, in the latter case, the defendant was charged with having printed a publication in which statements were made which were likely to prejudice the recruiting of military forces. Again, the relevant regulation was accepted as a regulation for securing safety and defence. Despite the effect such restriction could have on the implied constitutional freedom of political communication, Barton J stated that the wisdom or otherwise of any regulation is a matter for the legislature and the Court is not

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[86] Ibid.
[87] Lee, above n 2, 28.
[88] (1917) 24 CLR 120.
[89] *Unlawful Associations Act 1916 (Cth)* s 4.
[90] *Pankhurst v Kiernan* (1917) 24 CLR 120, 129.
[91] Ibid 132.
[92] (1918) 25 CLR 241.
[93] *War Precautions Act 1914 (Cth) s 5.*
[94] *Ferrando v Pearce and another* (1918) 25 CLR 241, 253.
[95] Ibid.
[96] (1918) 25 CLR 422.
[97] (1918) 25 CLR 506.
[98] *Burkard v Oakley* (1918) 25 CLR 422, 524 (Knox CJ).

concerned with such matters.[99] Both cases confirmed the validity of the broad principles outlined in *Farey v Burvett*.[100]

B *The World War II Cases*

Australia's involvement in World War II commenced in September 1939 with a radio announcement by the then Prime Minister Robert Gordon Menzies. Australia was better prepared for World War II, although specialist legislation, including the *National Security Act 1939 (Cth),* was still widely litigated. Section 5 allowed the Governor-General to make regulations for securing public safety and the defence of the Commonwealth and for prescribing all matters which were necessary or convenient to be prescribed for the more effectual prosecution of any war in which the King was engaged. During the six year war, there were 17 major cases in which the High Court considered the scope of the defence power and legislation enacted pursuant to it.[101] However, the High Court did not repeat the same liberal approach it had adopted in World War I, where it had allowed a wide latitude to the Parliament. These cases had varying outcomes, with the High Court not convinced in some instances that certain regulations could be said to deal with matters associated with the prosecution of the war, particularly where the rights of individuals were affected without justification. In these decisions, the Court drew a distinction between matters which might relate to the general well-being of a community at war, and matters which have a specific connection with defence. In this context, Dixon J stated of the defence power:

> Its meaning does not change, yet unlike some other powers its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law … Whether it will suffice to authorise a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto.[102]

In 1943 in *Adelaide Company of Jehovah's Witnesses*,[103] the Governor-General declared a Jehovah's Witnesses organisation unlawful under regulations on the basis that, in his opinion, the organisation was prejudicial to the defence of the Commonwealth or the efficient prosecution of the war.[104] Following the declaration, the organisation was dissolved and its property confiscated. It challenged the validity of these laws on the basis that the regulations were not authorised by the *National Security Act 1939 (Cth),* or alternatively that the Act was ultra vires the defence power. A key question was whether the s 116 constitutional freedom of religion prevented the Parliament from legislating to restrain the activities of a religious organisation which the Governor-General considered to be prejudicial.

In relation to the capacity of the legislature to interfere with personal freedoms during times of war, Starke J stated that laws are not within power if 'arbitrary or capricious':

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[99] *Sickerdick Informant v Ashton* (1918) 25 CLR 506, 512-3.
[100] (1916) 21 CLR 433.
[101] Sawer, above n 11, 295.
[102] *Andrews v Howell* (1941) 65 CLR 255, 278.
[103] (1943) 67 CLR 116.
[104] *National Security (Subversive Associations) Regulations 1940* (Cth) reg 3.

> In other words, if the regulation involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, then a court might well say: "Parliament never intended to give authority to make such rules." A regulation of that character would not be a law or regulation "with respect to defence" or for securing the public safety or defence of the Commonwealth.[105]

That being said, the majority accepted that a state of war justifies defence legislation which subjects personal freedoms to temporary restrictions which would otherwise not be legitimate during times of peace. On this basis, s 116 did not prevent the Commonwealth from making laws which prohibited the promotion of religious doctrines.[106] In justifying legislative interference with personal liberties during times of war, Latham CJ stated:

> No organized State can continue to exist without a law directed against treason. There are, however, subversive activities which fall short of treason (according to the legal definition of that term) but which may be equally fatal to the safety of the people ... Such obstruction may be both punished and prevented. So also propaganda tending to induce members of the armed forces to refuse duty may not only be subject to control but may be suppressed.[107]

It is clear that in this case the High Court showed its willingness to accept that an infringement of human rights could be justified in times of war. Indeed, Starke J acknowledged that s 116 is subject to limitations and '[t]herefore there is no difficulty in affirming that laws or regulations may be lawfully made by the Commonwealth controlling the activities of religious bodies that are seditious, subversive or prejudicial'.[108] According to Rich J, the freedom of religion is not absolute, but is 'subject to powers and restrictions of government essential to the preservation of the community'.[109] Williams J offered the example of a person detained on mere suspicion, without trial, and for the duration of the war because the Minister is of the opinion that their liberty is prejudicial to safety. This, his Honour said, would be a valid exercise of plenary administrative power.[110] Such a position is consistent with World War I decisions such as *Lloyd v Wallach*.[111]

Nevertheless, ultimately it was held that the regulations did exceed the defence power. Starke J held that while the Parliament is responsible for national security and is the best judge of what national security requires, the regulations were arbitrary, capricious, and oppressive and had little, if any, real connection with the defence of the Commonwealth or the efficient prosecution of the war.[112] To this end, while the High Court accepted that the Commonwealth had the power to suppress subversion, in contrast to the earlier cases the regulations here were held to go beyond the defence power.

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[105] *Adelaide Company of Jehovah's Witnesses* (1943) 67 CLR 116, 151-2.
[106] Ibid 149 (Rich J).
[107] Ibid 132-3.
[108] Ibid 155.
[109] Ibid 149.
[110] Ibid 162.
[111] (1915) 20 CLR 299.
[112] *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 154.

The following year in *Reid v Sinderberry*,[113] the respondents were convicted under regulations which made it an offence to disobey a direction 'to engage in employment under the direction and control of the employer specified in the direction'. The regulations were made under s 13A of the *National Security Act 1939* (Cth). The respondents argued that s 13A was invalid on the basis that it was unconstitutional for the Governor-General to make regulations simply because he holds the opinion that it is necessary for defence. Latham CJ and McTiernan J stated the question for the Court as— "Is the regulation really a law with respect to securing the public safety, the defence of the Commonwealth, or the efficient prosecution of the war?"[114] The Court held that s 13A was valid because steps to ensure that the production of food for civilians so that the population does not become starved and disorderly are sufficiently connected with defence.[115] The fact that the opinion of the Governor-General was an element of the conditions which had to be satisfied before a regulation could be made under the section was not an objection to the regulation's validity.[116] Here, the test adopted by the High Court was whether the measure can reasonably be regarded as a means towards attaining an object which is connected with defence; the Court was not concerned with the actual wisdom or effectiveness of the measure.[117]

This decision was followed later that year in *Stenhouse v Coleman*.[118] Here, the plaintiff challenged an order made under regulation 59 of the *National Security (General) Regulations*, which provided, inter alia, that a Minister, 'so far as appears to him to be necessary in the interests of defence or the efficient prosecution of the war ..., may by order provide ... for regulating, restricting or prohibiting the production... of essential articles'. The plaintiff argued that the production of goods for civilian use fell outside the scope of the defence power but, on the basis of *Farey v Burvett,*[119] this argument was rejected.[120] The maintenance of essential supplies and services was found to be 'plainly and necessarily a matter having the most direct connection with the war'; it was said that '[i]f the life of the community cannot be maintained the armed forces cannot be maintained'.[121] On the issue of the application of reg 59 being dependent on the opinion of the Minister, Latham CJ referred to *Reid v Sinderberry,*[122] and confirmed that what reg 59 authorised was confined to the making of orders which had a real connection with the subject of defence.[123] To this end, in both cases the High Court limited its role of review to simply determining whether a connection between defence and the legislation exists, rather than reviewing the merits of the legislation or the implications the measure may have on human rights more broadly. This places great power in the hands of the Parliament.

A similar issue was addressed in 1947 in *Little v Commonwealth*.[124] Here the plaintiff sought to recover damages from the Commonwealth for false imprisonment after

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[113] (1944) 68 CLR 504.
[114] Ibid 512.
[115] Ibid 512-3 (Latham CJ and McTiernan J).
[116] Ibid 511.
[117] Leslie Zines, *The High Court and the Constitution* (Butterworths, 4th ed, 1997) 304.
[118] (1944) 69 CLR 457.
[119] (1916) 21 CLR 433.
[120] *Stenhouse v Coleman* (1944) 69 CLR 457, 462 (Latham CJ).
[121] Ibid.
[122] (1944) 68 CLR 504.
[123] *Stenhouse v Coleman* (1944) 69 CLR 457, 464.
[124] (1947) 75 CLR 94.

being detained for two separate periods of 10 days and four months in 1942. The orders were made under regulations 25-26 of the *National Security (General) Regulations*, which stated that the Minister could exercise the powers conferred if satisfied that to do so would prevent the person acting in any manner prejudicial to the public safety or the defence of the Commonwealth. Among other arguments, the plaintiff contended that the Minister was not, and could not have been, so satisfied in this case. Dixon J referred to the position in *Lloyd v Wallach,*[125] and reiterated that theoretically the existence of the Minister's opinion was examinable, but that as the Minister was the sole judge of the truth, reliability, relevance, and sufficiency of the information before him and of the reasonableness of his conclusion, no practical challenge to his opinion could be made.[126] In fact, Dixon J went so far as to say that 'an erroneous opinion is none the less an opinion'.[127] Thus, even though there was no evidence which justified any suggestion against the plaintiff's loyalty to the allied cause, there was no evidence that the Minister was mistaken in his opinion, and therefore the plaintiff's action was dismissed.

In instances involving an order or instrument made on the opinion of a member of the executive, the High Court is not empowered to examine de novo the factual findings and discretions of the administrator, but is limited to such matters as relevant considerations, proper purposes and errors of law.[128] This falls short of the degree of control that the Court has insisted on in cases involving other heads of constitutional power.[129] In relation to orders made on the basis of the opinion that such orders were necessary for the defence of the Commonwealth, '[t]here could be no more striking illustration of the exceptional status of the defence power'.[130] The powers of the executive during times of war have been interpreted very broadly.

VI THE DEFENCE POWER IN THE AFTERMATH OF WAR

During the aftermath of war when the nation was in transition from war to peace, for example the periods immediately after World War I and World War II, the High Court accepted that the defence power still operates with an expanded scope. Extended powers during this period are based on the premise that an official declaration of the end of the war does not necessarily mean that the prevailing financial, economic and social conditions immediately revert back to that of peacetime. However, there is a question as to how long this transition period continues. Generally speaking, the extent to which defence measures are permitted during the aftermath of war depends on the nature of the measure. For example, petrol rationing or preferential employment of ex-servicemen may reach a point when they can no longer be considered incidental to a winding up process. These post-war measures had primarily economic implications for individuals.

There was a raft of decisions in the years following the end of World War I in which the High Court was supportive of the Parliament's post-war measures. In 1920 in *Attorney-General (Commonwealth) v Balding*,[131] legislation making continuing provision for the welfare of returned soldiers was held valid on the basis that it was 'a matter so intimately

[125] (1915) 20 CLR 299.
[126] *Little v Commonwealth* (1947) 75 CLR 94, 103.
[127] Ibid.
[128] Zines, above n 117, 306.
[129] Ibid.
[130] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 257 (Fullagar J).
[131] (1920) 27 CLR 395.

connected with the defence of the Commonwealth as manifestly to be included within the scope of the power'.[132] Also that year, the High Court confirmed the continuing validity of the *War Precautions Act 1914 (Cth)* and its associated regulations in *Jerger v Pearce*.[133] Here, the Minister for Defence had authorised the deportation of the plaintiff. The plaintiff argued that as the war had ended, the defence power could no longer support the legislation. The High Court determined that despite the hostilities ceasing, a state of war technically continued.[134]

In the aftermath of World War II, the High Court adopted a similar approach. In *Shrimpton v Commonwealth*,[135] a 1945 case, regulations prohibited the transfer of land unless the Treasurer's consent was provided.[136] After the Treasurer refused to give his consent unless certain conditions were satisfied, the plaintiff contended that the regulations were invalid on the basis that the power of the Treasurer to give or withhold consent 'in his absolute discretion' and 'subject to such conditions as he thinks fit' without any requirement of a connection with defence, was an excess of power. The majority (Latham CJ, Starke, Dixon and McTiernan JJ) held that the regulations were intra vires the defence power. Latham CJ confirmed *that the National Security Act 1939 (Cth)* authorised the making of regulations fixing the prices of goods and services, which could include regulations relating to the purchase of land.[137] Additionally, the Treasurer's discretion was not arbitrary and unlimited, despite being described as absolute, since it had to be exercised bona fide and for the purposes of the regulations.[138]

These regulations were again challenged in 1946 in *Dawson v Commonwealth*,[139] where the applicant argued that the *National Security Act 1939 (Cth)* was no longer valid given the surrender of the Japanese. The High Court was similarly divided and accordingly the view of Latham CJ, who followed the decision in *Shrimpton v Commonwealth*,[140] prevailed. His Honour accepted that it could not be said that overnight the Commonwealth turned from being engaged in war to not being engaged in war.[141] The allied forces were in occupation of enemy countries by virtue of conquest, and such a state of affairs could not be described as a state of peace. The defence power does not cease instantaneously with the termination of hostilities, and the defence power must extend to the wind-up after war and to the restoration of conditions of peace.[142]

There were similar outcomes in *Real Estate Institute of NSW v Blair*[143] and *Morgan v Commonwealth*.[144] The former case concerned preferential housing for service members. Latham CJ identified the difficulties brought about by the war, such as housing shortages, and considered that legislative provisions concerning the re-establishment in

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[132] Ibid 398 (Knox CJ, Isaacs, Gavan Duffy, Powers and Rich JJ).
[133] (1920) 28 CLR 588.
[134] Ibid, 592-4 (Starke J).
[135] (1945) 69 CLR 613.
[136] *National Security (Economic Organization) Regulations 1942* (Cth) reg 6
[137] *Shrimpton v Commonwealth* (1945) 69 CLR 613, 622.
[138] Ibid 619-20. Ultimately, the majority held that while the regulations were valid, the conditions imposed by the Treasurer were not authorised by the regulations as they did not have a relation to the purchase or disposition of land.
[139] (1946) 73 CLR 157.
[140] (1945) 69 CLR 613.
[141] *Dawson v Commonwealth* (1946) 73 CLR 157, 174.
[142] Ibid 175.
[143] (1946) 73 CLR 213.
[144] (1947) 74 CLR 421.

civil life of persons who have served in the defence forces were still within power even though hostilities had ceased.[145] Rich J affirmed that 'the function of the defence power does not, of course, begin when the first shot is fired nor end with the last'.[146] In the latter case, the High Court rejected the argument that the varying application of a food rationing order among different States infringed the s 99 constitutional prohibition on the Commonwealth giving preference to one State over another. It was said of the application of s 99 that

> [i]t would, indeed, be a remarkable thing for a *Constitution* to provide that laws for the defence of a country, at a time possibly of the most critical threat to national existence, should be limited by a requirement that they should not have the effect of giving some commercial preference to parts of the country over other parts.[147]

Nevertheless, the High Court ultimately determined that 1949 was the cut-off point at which an expanded scope of the defence power could no longer be applied. This came about in *R v Foster*; *Ex parte Rural Bank of NSW*,[148] where four years after hostilities had ended the 'aftermath of war' argument was finally rejected, even though peace treaties had not been signed. The challenge was to the validity of certain regulations providing for the employment of women during the war, the rationing of liquid fuel, and housing for discharged servicemen and their dependants. The High Court accepted that in order to restore a community ravaged by war to conditions of peace, it might be necessary to continue some wartime controls for a certain period of time.[149] Repatriation and rehabilitation of soldiers, and the rebuilding of a city destroyed by bombing, were listed as obvious examples.[150] However, the High Court reiterated that the wide scope of the defence power does not continue indefinitely: 'it does not place within Federal legislative authority every social, economic or other condition might not have arisen except for the war', as this would allow legislation on virtually any subject matter, since that almost no aspects of life were untouched by the war:[151]

> The effects of the past war will continue for centuries. The war has produced or contributed to changes in nearly every circumstance which affects the lives of civilized people. If it were held that the defence power would justify any legislation at any time which dealt with any matter the character of which had been changed by the war, or with any problem which had been created or aggravated by the war, then the result would be that the Commonwealth Parliament would have a general power of making laws for the peace, order and good government of Australia with respect to almost every subject. Nearly all the limitations imposed upon Commonwealth power by the carefully framed *Constitution* would disappear...[152]

Ultimately, the legislation was held invalid on the basis that the regulations were not obviously connected with the prosecution of the war, were not incidental to any winding-up process, and were not incidental to any endeavour to restore conditions which might

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[145] *Real Estate Institute of NSW v Blair* (1946) 73 CLR 213, 221.
[146] Ibid 225.
[147] *Morgan v Commonwealth* (1947) 74 CLR 42, 453-4 (Latham CJ and Dixon, McTiernan and Williams JJ).
[148] (1949) 79 CLR 43.
[149] Ibid 84 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).
[150] Ibid 83.
[151] Ibid 85.
[152] Ibid 83.

be regarded as part of the peacetime organisation of industry.[153] Sawer argued that the decision of the High Court in this final 'unwinding' case

> amounted in substance to a policy decision that the Commonwealth had been given sufficient time for post-war reconstruction. It was not an arbitrary decision in the sense of having no support at all in reason, but it was arbitrary in the sense that the arguments for treating the Commonwealth's transition power as ending in about December 1949 were no better than the arguments for ending them, say, in December 1948 or December 1950.[154]

There also appears to be an antinomy between the Court's professed inability to query the opinion of a member of the executive in undertaking a particular course of action, and the apparent ease with which it concludes that an extended scope of the defence power no longer exists.

Thc post-World War II contraction of the defence power was confirmed in 1951 in *Queensland Newspapers Pty Ltd v McTavish*,[155] where regulations providing for the accommodation of returned servicemen did not, apart from their application to servicemen, 'appear to have any present connection with the power to make laws with respect to defence.'[156] Fighting had ceased more than four years prior, and this should have been sufficient to overcome the shortage due to war conditions.[157] Although it was possible for the defence power to be used to make laws for the purpose of conferring certain benefits and privileges upon former servicemen, the regulations here went beyond this and attempted to prolong a regulation in 'an attempt to exercise a power incidental to defence after the conditions to which the regulation was incident have passed'.[158] This was particularly so because the regulations affected the property rights of house owners who were required to provide housing to the returned servicemen.

VII THE CURRENT CLIMATE POST-SEPTEMBER 11

In terms of the current climate, Australia is not currently engaged in war, but nor can the climate be described as one of peace — at least not since 11 September 2001. As such, while the defence power is not at its widest scope, it can be considered to be operating at an expanded scope which is most comparable to periods of increased international tension. This conclusion is supported by the approach of the High Court in 2007 in *Thomas v Mowbray*.[159] It is unlikely that the climate will revert back to peacetime in the near future, and this has implications in terms of the ability of the Parliament to use the defence power to enact legislation which impacts on the rights of individuals.

Following the United States terrorist attacks on 11 September 2001, the Australian Parliament introduced a raft of anti-terrorism legislation in support of the 'War on Terror' which created new terrorism offences and provided for the issue of control orders and preventive detention orders. This legislation sought to address the perceived inadequacies of the existing law to deal with the threat of terrorism, not only by

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[153] Ibid 88.
[154] Sawer, above n 11, 214.
[155] (1951) 85 CLR 30.
[156] Ibid 45 (Dixon, McTiernan, Webb, Fullagar and Kitto JJ).
[157] Ibid 51.
[158] Ibid 48.
[159] (2007) 233 CLR 307.

punishing terrorists but also by providing mechanisms to prevent the commission of terrorist attacks. As explained by former Attorney-General Philip Ruddock, '[t]he law should operate as both a sword and a shield – the means by which offenders are punished but also the mechanism by which crime is prevented'.[160] However, the legislation has given rise to considerable controversy, with criticisms that Australia overreacted to the threat of terrorism. The control order regime in *Criminal Code* division 104 in particular, whereby persons can have their movements restrained or 'controlled', can potentially infringe an individual's right to liberty where they have not been found guilty or event charged with a criminal offence. While an order does not involve imprisonment, depending on the severity of the restrictions a control order can effectively amount to house arrest. According to McGarrity, Lynch and Williams, '[t]he sacrifices that these countries have been prepared to make to the liberty of their citizens in order to achieve, or, more accurately, pursue, security raises alarm bells about the health of the democratic project itself'.[161] Indeed, there is no apparent public emergency on a scale sufficient to justify laws which suspend fundamental human rights such as the right to personal liberty.

The High Court considered the validity of interim control orders in *Thomas v Mowbray*,[162] after Australia's first control order was issued. The case was significant in several respects, as the Court contemplated the constitutional validity of control orders with respect to the defence power, and also the wider implications of permitting the executive to impose restrictions on liberty in the absence of criminal charge. Although the interim control order regime was held to be valid, the High Court did note the human rights issues. As Justice von Doussa argues extra-judicially, an interesting question is whether the outcome in this case would have been different had the question been whether control orders are compatible with human rights standards.[163]

In this case, Thomas had originally been convicted of a terrorist act, but the conviction was overturned by the Victorian Court of Appeal on the basis that his confession was inadmissible because it was obtained under duress.[164] Within a week of his release from custody the defendant, a Federal Magistrate, placed an interim control order on the plaintiff at an ex parte hearing. The order was made on a number of grounds including that the plaintiff had admitted training with al-Qaeda and that there were good reasons to believe that he could be used to commit terrorist acts on behalf of al-Qaeda or related terrorist cells. The defendant also relied on the confession, which he deemed admissible at the ex parte hearing as it was an interlocutory civil case.[165] The restrictions and obligations contained in the order included, inter alia, a curfew confining the plaintiff to his home between midnight and 5am, a requirement that he report to police three times per week, and restrictions from using certain communication technology and communicating with a list of persons identified as terrorists. It was considered that the

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[160] Philip Ruddock,'Legal Framework and Assistance to Reigons' (Paper presented to the Regional Ministerial Counter-Terrorism Conference, Bali, February 2004) [49].
[161] Nicola McGarrity, Andrew Lynch and George Williams, 'The Emergence of a 'Culture of Control'' in Nicola McGarrity, Andrew Lynch and George Williams (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Abingdon, Oxon Routledge, 2010) 3, 3.
[162] *Thomas v Mowbray* (2007) 233 CLR 307.
[163] Justice John von Doussa, 'Reconciling Human Rights and Counter-Terrorism - a Crucial Challenge' (2006) 13 *James Cook University Law Review* 104, 116.
[164] *R v Thomas* (2006) 14 VR 475.
[165] See *Jabbour v Thomas* (2006) 165 A Crim R 32, 34.

controls 'would protect the public and substantially assist in preventing a terrorist act'.[166] Prior to the Court confirming the order, the plaintiff commenced proceedings to have the interim order quashed on the basis that division 104 was wholly invalid. Key questions asked of the Court included whether division 104 was within the legislative power of the Commonwealth and whether it invalidly conferred on a federal court non-judicial power.

The Court ruled by a 5:2 majority comprising Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ (Kirby and Hayne JJ dissenting) that the regime was not unconstitutional. Among other issues, the majority accepted that the legislation was indeed supported by the primary aspect of the defence power.[167] In a joint judgment, Gummow and Crennan JJ described the scheme as 'directed to apprehended conditions of disturbance, by violent means within the definition of "terrorist act", of the bodies politic of the Commonwealth and the States', and determined that 'restrictions aimed at anticipating and avoiding the infliction of the suffering which comes in the train of such disturbances are within the scope of federal legislative power'.[168] Their Honours concluded that it is the definition of 'terrorist act' that necessarily engages the defence power, rather than whether a connection exists between the defence power and the interim control order system.[169] Additionally, their Honours held that the defence power was not confined to waging war in a conventional sense, or the protection of bodies politic as distinct from the public.

The proposition in *Australian Communist Party v Commonwealth* that the purpose of the power was to respond to 'external enemies' was rejected on the basis that the defence power is not limited to meeting the threat of foreign aggression.[170] Callinan J in particular was critical of the majority in that case for not paying sufficient attention to the threat from internal sources during periods falling short of war.[171] This is relevant in terms of the power of the Parliament to legislate to restrict the rights of citizens in Australia. According to Gleeson CJ the defence power

> is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public.[172]

There were also intimations that Australia is in a period of increased international tension (or at least a period falling short of ostensible peace) which has significant implications for the use of the defence power into the future and its effect on rights. Kirby J compared the current threat of violence faced by Australia to the types of activity that the defence of Australia has traditionally involved, and stated that '[a]ll of these elements represented potential dangers to Australia's constitutional system which, in given circumstances, this country would be entitled to protect and defend itself from'.[173] Similarly, Callinan J stated that '[t]here will always be tensions in times of danger, real

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[166] *Thomas v Mowbray* (2007) 233 CLR 307, 322-3.
[167] Ibid 324 (Gleeson CJ), 363 (Gummow and Crennan JJ), 503-4 (Callinan J), 525 (Heydon J).
[168] Ibid 362.
[169] Ibid.
[170] Ibid 362, 511 (Callinan J), citing *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 194 (Dixon J).
[171] *Thomas v Mowbray* (2007) 233 CLR 307, 503.
[172] Ibid 324.
[173] Ibid 397.

or imagined … They will no doubt continue while terrorism of the kind proved here remains a threat'.[174]

On the issue of judicial power, the Court considered separation of powers matters arising from division 104. Gleeson CJ summarised the plaintiff's contention that division 104 conferred non-judicial power on a federal court because it conferred the power to deprive a person of liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what that person has done.[175] It was argued that the power exercised when control orders are made is distinctively legislative or executive, and therefore is not a power that may be conferred upon the judiciary.[176] His Honour rejected these arguments because the power to restrict or interfere with a person's liberty on the basis of what they might do in the future is a power that is exercised by the judiciary in a variety of circumstances such as bail applications or apprehended violence orders.[177] Similarly, Gummow and Crennan JJ determined that the jurisdiction to bind over does not depend on a conviction and it can be exercised in respect of a risk or threat of criminal conduct against the public at large.[178] In fact, Gleeson CJ stated 'the exercise of powers, independently, impartially and judicially, especially when such powers affect the liberty of the individual would ordinarily be regarded as a good thing, not something to be avoided'.[179] This is an interesting perspective which may indicate the willingness of the High Court to be involved in assessing human rights issues.

Kirby J dissented on the basis that division 104 lacked an established source in federal constitutional power and that it breached the requirements of Chapter III.[180] In relation to the latter, Kirby J expressed his concern with how the scheme may undermine the position of the federal courts which the doctrine of separation of powers serves to defend: 'If the courts are seen as effectively no more than the pliant agents of the other branches of government, they will have surrendered their most precious constitutional characteristic.'[181] Kirby J also discussed the human rights implications of restricting the liberty of an individual on the basis of what another individual has or might do.[182]

> To uphold the validity of that type of control order for which Div 104 of the *Code* provides would be to erode the well-founded assumption that the judiciary in Australia under federal law may only deprive individuals of their liberty on the basis of evidence of their past conduct. It would seriously undermine public confidence in federal courts for judges to subject individuals to any number of "obligations, prohibitions and restrictions" for an indeterminate period on the basis of an estimate that some act, potentially committed by somebody else, may occur in the future. To do this is to deny persons their basic legal rights not for what they have been proved to have done (as established in a criminal trial) but for what an official suggests that they might do or that someone else might do. To allow judges to be involved in making such orders, and particularly in the one-sided procedure contemplated by Div 104, involves a serious and wholly

[174] Ibid 506.
[175] Ibid 327.
[176] Ibid 327-8.
[177] Ibid 328.
[178] Ibid 357.
[179] Ibid 329.
[180] Ibid 366.
[181] Ibid 436.
[182] Ibid 425.

> exceptional departure from basic constitutional doctrine unchallenged during the entire history of the Commonwealth. It goes far beyond the burdens on the civil liberties of alleged communists enacted, but struck down by this Court, in the Communist Party Case. Unless this Court calls a halt, as it did in that case, the damage to our constitutional arrangements could be profound.[183]

From this case it can be concluded that a broader operation of the defence power is currently available to the Parliament. This power is not limited to responding to overseas threats, but can also be used to respond to internal threats, which would likely include legislation designed to address the threat posed by 'home grown' terrorists. Applying the body of precedent discussed in this article, it would not be difficult for the Parliament to conclude that measures which restrict individual rights for such purposes are a proportionate response to the threat faced in today's climate. This would include measures as drastic as stripping citizenship from terrorist suspects or increasing the duration for which individuals can be held in detention without charge. The availability of the primary aspects of the defence power to respond to such internal threats poses great risk to the right to liberty of the person, and is reminiscent of some of the wartime cases above where liberty was restricted based on the opinion of the Minister.

VIII CONCLUSION

As a purposive power which expands and contracts according to the extant political climate, the s 51(vi) defence power is clearly unlike any other constitutional head of power. During peacetime, the High Court has been restrictive in its interpretation, while during wartime it has historically adopted a broader approach, allowing governments a wide discretion to enact legislation thought necessary for the successful prosecution of the war. Because of the elasticity of the defence power and its status as a purposive power, its scope in periods falling short of ostensible peace is wide enough, in the absence of constitutionally protected rights, to lead to an acceptance of measures restrictive of individual rights. The above body of precedent demonstrates how the defence power can be used to limit rights.

Australia is currently in a period of increased international tension, and therefore the defence power operates at an expanded scope. This is particularly disconcerting in light of the current anti-terrorism legislation and the continuing rhetoric regarding how Australia should respond to the threat. The High Court must be careful, now and in the future, not to take a narrow view of the problems with which the government must deal 'when it is entrusted with the supreme responsibility of the defence of the country'.[184] However, it must ensure that the law strikes a correct balance between protection of the nation and protection of individual rights.

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[183] Ibid 432.
[184] *R v Foster*; *Ex parte Rural Bank of NSW* (1949) 79 CLR 43, 83 (Latham CJ, Rich, Dixon, McTiernan, Williams and Webb JJ).

CAUTIOUS CONSTITUTIONALISM: COMMONWEALTH LEGISLATIVE INDEPENDENCE AND THE STATUTE OF WESTMINSTER 1931-1942

DAVID CLARK*

This paper considers the thesis that Australia was practically independent in 1931. It criticises this argument by showing that the Commonwealth was dependent in various ways on the British Parliament between 1931 and 1942. The evidence of the period used in the paper includes archival material, parliamentary sources, legal cases and statutes. The reasons for the reluctance to adopt the Statute of Westminster, as well as the reasons for adoption in 1942, are explained. The conclusion is that legal and political opinion during this period drew a distinction between political and legal independence and that the actors of the 1930s were cautious constitutionalists.

I INTRODUCTION

Australia has no declaration of independence nor does it have an independence act, unlike most of the other former British colonies.[1] Despite this, several writers have written about Australia's independence, most notably Anne Twomey in her major study of the States in *The Australia Acts: Australia's Statutes of Independence* (2010).[2] This paper addresses a precise question: was the Commonwealth Parliament independent of the British Parliament with the passage of the *Statute of Westminster 1931* (UK) (the '*Statute*')? There is an argument that Commonwealth legislative independence was effectively achieved in 1931. The paper will criticise this argument by identifying the British legislative restrictions that applied to the Commonwealth in 1931, show how they operated between 1931 and 1942, and support the critique by arguing that judges, commentators and senior legal officers in the 1930s took the view that the Commonwealth remained dependent on the British Parliament to make laws affecting the Commonwealth. Moreover, the restrictions that remained between 1931 and 1942 were significant and could not be ameliorated by constitutional conventions.

* Professor of Law, Flinders University.

[1] But see Robert Menzies, 'The Statute of Westminster' (1938) 11 *Australian Law Journal* 368, 371, who refers to '…the independence declared by the Balfour Declaration…' See also, *Tagaloa v Inspector of Police* [1927] NZLR 883, 900 where Ostler J referred to the 1926 conference as showing '[t]he older conception of subordination to a central legislative authority has been superseded by the conception of a partnership of independent nations…' Formally the Balfour declaration did not have legislative status: *References re The Weekly Rest in Industrial Undertaking Act* [1936] SCR 461, 476 (Duff CJ). The word independence did not appear in the Balfour Declaration apparently at the insistence of the Canadians: Denis Judd, *Balfour and The British Empire* (MacMillan, 1968) 330.

[2] First written about in her paper Anne Twomey, 'Sue v Hill: The Evolution of Australian Independence' in A Stone and G Williams (eds), *The High Court at the Crossroads* (Federation Press, 2000) 77–108.

The paper treats constitutional law as an amalgam of law, politics and history.[3] This means that the law should be located in its context, especially in this case, since the paper seeks to explain the state of the law in the 1930s. That a later generation might take a different view of what the law should have been in the 1930s is not disputed, and one of the matters addressed in the paper is why certain constitutional powers available in the 1930s, in the opinion of 21st century writers, were not relied upon. This failure might puzzle a 21st century lawyer, but it will be argued that the law of the time only makes sense when it is remembered that Australian lawyers, including judges, in the period 1931 to 1942 lived in a different era with different problems. It was a time dominated by the Imperial connection to Britain, the Great Depression, the crisis in Europe, and the onset of war. But above all, the law was different in the 1930s to what it is today in that the British Parliament had the capacity to legislate for the Dominions by virtue of paramount force, a doctrine that was abrogated with the adoption of the *Statute* by the Commonwealth Parliament in 1942. This means that in the period before adoption the British Parliament had the power '…to legislate for the Colony, although a local legislature had been given'.[4]

The first issue is whether it makes sense to identify a date for independence at all. The initial problem is conceptual since most of the case law refers to sovereignty rather than independence. However, it is accepted by many writers that sovereignty and independence are interchangeable terms and they will be used as such in this paper.[5] Certainly, the *Statute* was seen at the time and later as establishing the equal sovereign status or independence of the Dominions,[6] even though the word independence does not appear anywhere in the *Statute*. Indirect support for this view is to be seen in s 6 of the *Indian Independence Act 1947* (UK), which relieved the legislatures of India and Pakistan from the same limitations that were dealt with in the *Statute*. In other words, independence in 1947 entailed, amongst other things, legislative independence in the form provided for in 1931.

For Australia, the question is: did it acquire independence by stages or was it like the majority of British colonies in the 20th century that could point to a specific date on

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[3] *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 37 [12] (Gleeson CJ, Gummow and Hayne JJ).

[4] *R v Marais, ex parte Marais* [1902] AC 51, 54 (Lord Halsbury LC), also cited in *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148, 166 (Isaacs J).

[5] International law supports treating the two terms as alternatives: See, *German/Austrian Customs* Case [1931] PCIJ (ser A/B) No 41, 36, 57.

[6] See General Smuts, 'Memorandum on The Constitution of the British Commonwealth' in J Van Der Poel (ed), *Selections from the Smuts Papers* (Cambridge University Press, first published 1966, 1973 ed) vol 5, 67–77; Government of the Free Irish State, *Memorandum by the Irish Free State Delegation to the 1926 Imperial Conference, 'Existing Anomalies in the British Commonwealth of Nations'* (2 November 1926), [1]; http://www.difp.ie/docs/1926/Existing-anomalies-in-the-British-Commonwealth-of-Nations/772.htm; Thomas Mohr, 'The Statute of Westminster, 1931: An Irish Perspective' (2013) 31 *Law & History Review* 749–61; H Duncan Hall, 'The Genesis of the Balfour Declaration of 1926' (1963) 1 *Journal of Commonwealth Political Studies* 169, 175, 178; W N Harrison, 'The Statute of Westminster and Dominion Sovereignty Pt 1' (1944) 17 *Australian Law Journal* 282: 'The object of the Statute of Westminster was to give legal expression to the legislative independence which the Dominions had already achieved in political practice'; Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1948, 1060, 1067 (Mr Calwell); *In re Brassey's Settlement* [1955] 1 WLR 192, 196 (Danckwerts J); *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 722C–D (Lord Reid).

which independence was acquired? [7] In practice, Australia succeeded to British sovereignty over the continent as Windeyer J put it in 1969: '… because Australia has grown into statehood. With the march of history, the Australian colonies are now the Australian nation.'[8] To decide upon a date of when Australia attained independence runs the risk of asking the wrong question as it may lead to the wrong answer. Since independence was attained by degrees and by different parts of the federation at different times, no single date will do.[9] In this paper, the focus is on the legislative independence of the Commonwealth, not political independence, executive independence, judicial independence or the position of the States.

II THE AUSTRALIAN INDEPENDENCE THESIS

The real matter in dispute is whether a date for Commonwealth legislative independence can be identified. At least two historians[10] and three legal writers[11] have settled upon 1931 as the date when the Commonwealth achieved legislative independence. The premises of the argument for 1931 are:

1. That independence includes either the *capacity* to enter into relations with other states[12] or *freedom from external restraint*.[13]

These characteristics are not the same and will be analysed separately. Australia had entered into relations with other states, albeit in the limited way before 1942,[14] but this ignores the issue of whether the Commonwealth exercised *legislative* power within Australia free from external restraint. The capacity to enter into relations with other states refers to the exercise of common law (ie prerogative) executive power and thus does not reach the question of legislative power, except to the extent that legislation was

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[7] See, eg, *Indian Independence Act 1947* (UK); *Ghana Independence Act 1957* (UK).
[8] *Bonser v La Macchia* (1969) 122 CLR 177, 223. For other statements of the gradual nature of the emergence of Australia as an independent nation, see *Commonwealth v Kreglinger & Fernau Ltd* (1925) 37 CLR 393, 414 (Isaacs J); *Sue v Hill* (1999) 199 CLR 462, 467 [50] (Gleeson CJ, Gummow and Hayne JJ); *Shaw v MIMIA* (2003) 218 CLR 28, 38 [13]–[14] (Gleeson CJ, Gummow and Hayne JJ), 83 [171] (Callinan J). See also Lord McNair, *The Law of Treaties* (Clarendon Press, 1961) 648; '…the acquisition by the British Self-governing Dominions of independent statehood was a process rather than an event….' in *White v New Zealand Stock Exchange* [2001] 1 NZLR 683, 701 [89] (CA) and *R v Mason* [2012] 2 NZLR 695, 704 [34] (HC) the same process of gradualism, but with different dates for the New Zealand case, was set out.
[9] *Shaw v MIMA* (2003) 218 CLR 28, 41 [24], where Gleeson CJ, Gummow and Hayne JJ warn that '[t]o ask when Australia achieved complete constitutional independence …is to assume a simple answer to a complex issue…'.
[10] W H Hudson and M P Sharp, *Australian Independence* (Melbourne University Press, 1988), 138.
[11] Anne Twomey, above n 2, 'Sue v Hill', 77–108; Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 116; George Winterton, 'The Acquisition of Independence' in R French et al (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 31 and Geoffrey Lindell, 'Further Reflections on the Date of the Acquisition of Australia's Independence' in R French et al, 54, 59. cf Anne Twomey, *The Australia Acts: Australia's Statutes of Independence* (Federation Press, 2010) 460, where a more nuanced view is taken as she accepts that '…no single date will provide a complete answer for each constitutional question concerning independence.'
[12] Twomey, *The Constitution of New South Wales* n 11, 115. In *The Australia Acts,* n 11, 2 Twomey wrote '[a]lthough Australia did not immediately take steps to exercise its independence, it had the capacity to do so'.
[13] Winterton, above n 11, 32; Twomey, *Sue v Hill*, n 2, 79.
[14] Robert B Stewart, *Treaty Relations of the British Commonwealth of Nations* (MacMillan, 1939) 201–203, 250–255.

necessary to implement an international agreement. As will be discussed later, this necessitated British legislation for Australia between 1931 and 1942. The second sense of independence, meaning the absence of external restraint, is consistent with legal definitions of independence.[15] In the classic statement on the subject, Judge Anzilotti wrote in the *German/Austrian Customs* case in 1931 that an independent '… State has over it no other authority than that of international law.'[16] In contrast, he noted that dependent states are 'subject to the authority of one or more other States'. On the basis of this criterion it will be argued that Australia was not legislatively independent between 1931 and 1942 because it remained dependent on the authority of the British Parliament.

2. The *Statute* conferred legislative independence on the Commonwealth.[17]

This is largely but not wholly true since certain restrictions remained.[18] In any event, the *Statute* made plain in s 10 that in Australia ss 2–6 of the *Statute* would not take legal effect until adopted by the Commonwealth Parliament. It is clear as a matter of law that most of the *Statute* did not apply to Australia during the period before 1942, as pointed out by several judgments of the High Court during this period.[19] This means that British legislative limitations on the Commonwealth Parliament, apart from the *Constitution* itself, continued to apply to the Commonwealth until the adoption of the *Statute* in 1942. As one Canadian commentator put it, referring to the Dominions that did not adopt the *Statute*, '….their former subordinate position remained after 1931, no less real because it was henceforth removable'.[20] On the other hand, once the *Statute* came into effect in Australia, Commonwealth legislative power no longer flowed from a higher Imperial source.[21] At that point the Commonwealth Parliament was legislatively independent of the British Parliament.

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[15] Charles Rousseau, 'L'Independence De L'Etat Dans L'Ordre International' (1948) 73 *Receuil De Cours* 167, 217, 220; James Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed, 2006) 62–66; Stephen Hall, *Principles of International Law* (Oxford University Press, 3rd ed, 2011) 198–99; H J Schlosberg *The King's Republics* (Stevens & Sons, 1929) 20–24. For cases see *The Schooner Exchange*, 11 US (7 Cranch) 116, 133 (1810) (Marshall CJ); *Island of Palmas Case (Netherlands/USA)* (1928) 2 RIAA 829, 838 (Max Huber): 'Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, *to the exclusion of any other State*, the functions of a State' (emphasis added); *Ex parte Leong Kum* (1888) 9 NSWLR(L) 250, 255–56 (Darley CJ); *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1121 (Griffith CJ).

[16] [1931] PCIJ, (ser A/B) No 41, 36, 57, also cited in *R v Hape* [2007] 2 SCR 292, 317 (SCC) (Le Bel J).

[17] Twomey, *Sue v Hill*, n 2, 102 and Twomey, *The Australia Acts,* n 11, 1, 'It had full legislative power…'

[18] See text at footnote 31–34 below. See also *R v Foreign Secretary, ex parte Indian Association* [1982] 1 QB 892, 917F–G (Lord Denning): 'The Statute of Westminster 1931 gave considerable independence to the Dominions'. At 918A–B he notes that this independence was not complete and only became complete in Canada's case with the *Canada Act 1982* (UK): 918E–F; *Manuel v Attorney-General* [1983] 1 Ch 77, 100G (Slade LJ): 'The Statute substantially gave legislative independence….'

[19] *The Trustees Executors and Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220, 233 (Evatt J); *Crowe v Commonwealth* (1935) 54 CLR 69, 85 (Starke J); *R v Burgess ex parte Henry* (1936) 55 CLR 608, 635 (Latham CJ); *Ffrost v Stevenson* (1937) 58 CLR 528, 603 (Evatt J); *South Australia v Commonwealth* (1942) 65 CLR 373, 422 (Latham CJ). Later judges were of the same view: *R v Sharkey* (1949) 79 CLR 121, 136 (Latham CJ); *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 364 (Gibbs CJ); *Joosse v ASIC* (1998) 73 ALJR 232, 236 (Hayne J).

[20] F R Scott, 'The End of Dominion Status' (1944) 38 *American Journal of International Law* 34, 38.

[21] *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 410 (Brennan J).

3. That it did not matter that Australia had not adopted the *Statute* before 1942, because what counted was that the Commonwealth Parliament could have adopted the *Statute* but chose not to do so, and that the voluntary retention of various legislative restrictions '[did] not detract from [Australia's] effective independence.'[22]

This argument for the 1931 date is rather threadbare as it contends that, because the Commonwealth could have adopted the *Statute,* the acceptance of continued British legislative restrictions was an indication of independence. This entails accepting the paradox that the retention of legal restrictions nevertheless indicated their practical absence, and confuses *potential* legislative power with *actual* legislative power. In turn this amounts to saying that the refusal to remove legislative restrictions before 1942 was on a par with the decision to adopt the *Statute* in 1942. This argument rather awkwardly ignores the actual state of the law and, in fact, two proponents of 1931 skate over this and prefer the term 'effective' independence.[23] The preference for practicality over the law obscures the difference between constitutional practices or conventions and the law itself. The argument for 1931 also necessarily treats the learned opinion in the 1930s, that real legislative restrictions still applied to the Commonwealth, as unimportant. As we shall see, the preponderance of Australian legal opinion during the 1930s and 1940s supports the view that British legislative restrictions on the Commonwealth remained after 1931, and these restrictions were regarded at the time as serious matters.

III THE STATUTE OF WESTMINSTER: INDEPENDENCE IN LEGISLATIVE MATTERS

The Balfour Declaration in 1926 [24] declared of the Dominions that: '[t]hey are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations'.[25] Following the Balfour Declaration it was agreed that a committee of legal experts would meet to identify specific legal obstacles to equality and this committee met in 1929.[26] The report of the committee was then taken to the Imperial Conference of 1930, which produced draft clauses for a bill that resulted in the *Statute* in which most of the restrictions on Dominion legislative power were swept away.

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[22] Winterton, n 11, 43; Twomey, *Australia Acts* above n 11, 2 refers to the capacity of the Commonwealth in 1931 to 'take steps to exercise its independence' as she did in *Sue v Hill*, n 2, 102.
[23] Winterton, n 11, 43; Twomey, *The Australia Acts,* n 11, 479, where she refers to 'de facto and effective independence'. Of course, de facto by definition is not de jure. See also G G Phillips, 'The Dominions and The United Kingdom' (1932) 4 *Cambridge Law Journal* 164, 172 who refers to 'practical independence'.
[24] The Imperial Conference of 1926 was chaired by the British Prime Minister Stanley Baldwin. But a sub-committee of the conference on inter-imperial relations chaired by Lord Balfour came up with the famous formula, hence the name the Balfour Declaration. This is not to be confused with the Balfour Declaration of 1917.
[25] Commonwealth, *Imperial Conference 1926: Summary of Proceedings*, Parl Paper No 99 (1926–27) 10. The Dominions were defined in s 1 of the *Statute of Westminster 1931* (UK) as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.
[26] Commonwealth, *Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation, 1929*, Parl Paper No 102 (1929–30) ('*1929 Report*'). See also Commonwealth, *Report of the Royal Commission on the Constitution*, Parl Paper No 16 (1929–30–31) 71–72 where the restrictions identified in the 1929 report are noted.

Five legislative restrictions were removed by the *Statute*:

1. Section 2(1) removed the fetter of the *Colonial Laws Validity Act 1865* (UK);
2. The doctrine of repugnancy to the laws of England was removed by s 2(2);
3. The rule that a Dominion could not make laws of an extra-territorial nature, unless given such a power by British legislation, was removed with s 3;[27]
4. Relief from the restrictions in ss 735 and 736 of the *Merchant Shipping Act 1894* (UK) was provided by s 5; and
5. Finally, the reservation requirement in the *Colonial Courts of Admiralty Act 1890* (UK) was removed by s 6.[28]

The operative sections of the *Statute* were confined to legislative powers and did not cover the prerogative powers over foreign relations, war and peace, the title of the King,[29] and the royal succession. Nor did these sections directly deal with appeals to the Judicial Committee of the Privy Council, except to the extent that the *Statute* endowed the jurisdiction with legislative powers generally that could be used to legislate for appeals to the Privy Council.[30]

Although the *Statute* was intended to relieve the Commonwealth of most of the British legislative restrictions on the Commonwealth Parliament, four remained in 1931:

1. Nothing in the *Statute* conferred a power to repeal or alter the *Commonwealth of Australia Constitution Act 1900* (UK) otherwise 'than in accordance with the law existing before the commencement of the Act'.[31] In other words, although the *Statute* conferred a wide legislative power on the Commonwealth by relieving it of the restrictions mentioned in s 2, s 8 made it plain that the *Statute* did not confer a new power to amend the Commonwealth *Constitution*;[32]
2. The requirement that future British legislation would only be passed at the request of and with the consent of the Parliament of the Commonwealth, and such request and consent had to be expressed in both Commonwealth and British legislation, though this section of the *Statute* was removed from Australian law in 1986;[33]
3. The bar on using the *Statute* to legislate for matters exclusively the province of the states;[34] and
4. That according to s 10 of the *Statute*, ss 2–6 would only apply to the Commonwealth if adopted by Commonwealth legislation. It is clear from this

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[27] *R v British Columbia Electric Railway Co Ltd* [1945] SCR 235, 247 (SCC) (Rand J).
[28] *Tropwood A.G v Sivaco Wire and Nail Company* [1979] 2 SCR 157, 161 (SCC) (Laskin CJ).
[29] This was discussed in Commonwealth, *Imperial Conference 1926: Summary of Proceedings*, Parl Paper No 99 (1926–27) 11 and provided for in the *Royal Style and Titles Act 1927* (UK) which authorised a change and when made separated Ireland from Great Britain at the insistence of the Irish: R P Mahaffy, *The Statute of Westminster 1931* (Butterworth, 1932) 6. For the new title see Order in Council Approving the Proclamation altering the Style and Titles of the Crown, 1927 No 422 in Great Britain, *Statutory rules and orders and statutory instruments revised to December 31, 1948* (His Majesty's Stationary Office, vol II, 1949–52) 802–803.
[30] C J Burchell, *The Statute of Westminster and Its Effect on Canada* (South African Institute of International Affairs, 1945) 12. Burchell was a Canadian delegate to the Imperial Conferences in 1926 and 1929 and later the High Commissioner to Canberra.
[31] *Statute of Westminster 1931* (UK) s 8.
[32] *Contra Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 405 (Brennan J).
[33] *Australia Act 1986* (Cth) s 12.
[34] *Statute of Westminster 1931* (UK) s 9.

> that, apart from s 7, which applied to Canada alone, the rest of the *Statute*, that is, the preamble, and ss 1, 8, 9, 10, 11 and 12, did apply to the Commonwealth upon enactment.

This meant that the various legislative disabilities that the *Statute* was intended to remove nevertheless remained applicable to the Commonwealth until the *Statute* was adopted in 1942. In the case of New Zealand, Newfoundland and Australia, the *Statute* required specific adoption of the *Statute* by their legislatures.[35] While the *Statute* conferred legislative independence, the terms of s 10 withheld this independence from Australia because the *Statute* did not apply to the Commonwealth immediately. Section 10(1) of the *Statute* stated that ss 2–6 would not apply to the Commonwealth of Australia unless the Commonwealth Parliament adopted legislation to that effect.[36] When it did so, the Commonwealth legislation made the *Statute of Westminster (Adoption) Act 1942* (Cth) retrospective from 3 September 1939, the beginning of World War Two.[37]

Despite a dissenting view by Justice Murphy that the Commonwealth was not bound by some of the restrictions dealt with in the *Statute*, because full independence was conferred by the Constitution in 1901,[38] the Commonwealth of Australia was not independent in 1901 since the British insisted that the new Commonwealth *Constitution* was still subject to the *Colonial Laws Validity Act 1865* (UK) ('the 1865 Act'),[39] and that Act 'reaffirmed the superior power of the Westminster Parliament…'.[40] In 1925, the High Court held that the 1865 Act applied to Commonwealth legislation when it concluded that the *Navigation Act 1912* (Cth) ('the 1912 Act') was a colonial law within the meaning of the 1865 Act. The Court also held that the provisions in the 1912 Act that were repugnant to Imperial legislation were void and inoperative.[41]

The prevailing judicial view was stated by Justice Stephen in 1979 that:

> '[f]or eleven years, until 1942, the Commonwealth was content, despite the enactment of the *Statute*, to defer its adoption and to permit the respective

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[35] *Statute of Westminster 1931* (UK) s 10. Newfoundland never adopted the Statute because it reverted to Crown Colony status: *Newfoundland Act 1933* (UK); *Re Newfoundland Continental Shelf* [1984] 1 SCR 86, 104–07. However, when Newfoundland joined the Canadian federation in 1949, art 48 of the agreement stated that the *Statute of Westminster* applied there as it did to the other provinces: *British North America Act (No I) (UK),* SC 1949, sch.

[36] An idea first suggested by New Zealand in July 1931. See New Zealand, *Parliamentary Debates*, House of Representatives, 21 July 1931, 549; *Evening Post* (Wellington), *22* July 1931, 8.

[37] Commonwealth, *Gazette*, No 274, 15 October 1942, 2449.

[38] *Bistricic v Rokov* (1976) 135 CLR 552, 566–67 (Murphy J), but this was rejected by Gibbs J in *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 194. See also Barwick CJ at 181 who said of the 1901 claim that it also was in flat contradiction to historical fact and Stephen J at 208 noted that Murphy J's views were in a dissenting judgment were not accepted by any other member of the court and were contrary to settled authority.

[39] See 'Memorandum of Australian Delegates', 23 March 1900 in Victoria, *Papers Relating to the Federation of the Australian Colonies*, Parl Paper No 20 (1900) 29–30 and in the 'Memorandum of the Objections of Her Majesty's Government to Some of the Provisions of the Draft Commonwealth Bill', 29 March 1900. The insistence that the Constitution was a colonial law for the purposes of the 1865 Act was also stated by Joseph Chamberlain, the Secretary of State for the Colonies in United Kingdom, *Parliamentary Debates*, House of Commons, 14 May 1900, col 87.

[40] *Al Sabah v Grupo Torras SA* [2005] 2 AC 353, 342–343 [12] (PC).

[41] *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 130, 141 (Knox CJ); 147–151 (Isaacs J).

> standing of its laws and of Imperial laws to remain as they had ever been since federation, still governed by the *Colonial Laws Validity Act 1865* and by notions of repugnancy'.[42]

As Stephen J pointed out in the *China Shipping Co v South Australia*, the problem with the argument that British law ceased to operate in Australia in 1901 was that it would have created a legal vacuum. He gave as the example copyright law, which in 1901 was based on a British enactment, and between 1901 and 1907, when the first Commonwealth *Copyright Act* was proclaimed, there would have been no copyright law or protection in Australia at all.[43] Thus, it was clear to the court in the 1930s that the Commonwealth *Constitution*, though part of a later Imperial Act than the *Colonial Laws Validity Act 1865* (UK) and later than Imperial legislation of the 1890s on shipping and admiralty matters, did not impliedly repeal those acts for the Commonwealth under the principle of the implied repeal of earlier acts by later acts. As a Canadian judge pointed out in 1933, the *British North America Act 1867* (UK) did not limit the supreme power of the Imperial government and did not abrogate the earlier *Colonial Laws Validity Act 1865* (UK).[44] Once the *Statute* was adopted, the legal position changed, and judges after 1939 accepted that subsequent Commonwealth legislation might impliedly amend Imperial legislation.[45] Similarly, once the doctrine that some Imperial legislation applied to the Commonwealth by paramount force was lifted, the High Court gave s 76(iii) of the Commonwealth *Constitution*, which conferred on the High Court an original jurisdiction in admiralty and maritime matters, a much wider reach than it had in the 1920s.[46]

The only caveat to notice is that some judges have commented that some of the restrictions existing before the adoption of the *Statute* were 'real or supposed.'[47] In other words, although it might be argued, as it has been in later cases, that some of the restrictions removed by the *Statute* were not real at all,[48] they were treated as real legal restrictions at the time and the legislation to remove them both in the United Kingdom and in the Commonwealth proceeded on that basis.

IV THE DIFFERENCE BETWEEN CONSTITUTIONAL CONVENTIONS AND THE LAW

The advocates of effective or de facto independence are obliged to refer to the practice of the British Parliament of seeking Australia's consent before passing legislation that affected the Commonwealth as evidence of effective independence. There is no doubt that a constitutional convention to this effect emerged in the 1920s,[49] and was stated as such in the Balfour Declaration in 1926, where the British indicated that they would not

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[42] *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 211. See also to the same effect *Asiatic Steam Navigation Co Ltd v Commonwealth* (1956) 96 CLR 397, 418 (Dixon CJ, McTiernan J, Williams J).
[43] (1979) 145 CLR 172, 213.
[44] *Canada Steamship Lines Ltd v Emile Charland Ltd* [1933] Ex CR 147, 149–50 (Demers LJA).
[45] *Bice v Cunningham* [1961] SASR 207, 210–11 (Mayo J), where the court held that the *Navigation Act 1958* (Cth) impliedly amended the *Merchant Shipping Act 1894* (UK).
[46] *Owners of Shin Kobe Maru v Empire Shipping Co* Inc (1994) 181 CLR 404, 423–25.
[47] *Bonser v La Macchia* (1969) 122 CLR 177, 223 (Windeyer J).
[48] *R v Foster; Ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 300 (Menzies J), who refers to the extraterritorial restriction on Commonwealth legislation as a 'misconception'. Also cited in: *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 633 (Dawson J).
[49] *1929 Report*, above n 26, 14 [54]. See also Peter W Hogg, 1 *Constitutional Law of Canada* (Carswell, 5th ed, 2007) 3.3.

legislate for a Dominion, such as Australia, without the consent of the Dominion concerned.[50]

Although one commentator thought that this was a considerable innovation at the time,[51] the better view is that the convention was well established by 1926. One judge even described it as a 'long tradition' by 1931,[52] while Latham CJ noted in 1936 that '[t]his 'established position' is recognised rather than created by the *Statute*.'[53] Although before 1914 legislation passed for the empire included provisions that did apply to the Dominions, other British legislation before World War One allowed for a measure of Dominion autonomy. Thus, bankruptcy courts in the Empire were regarded as bankruptcy courts for the purposes of British legislation,[54] while British legislation on the Geneva Convention applied to 'His Majesty's Possessions.'[55] A greater measure of autonomy was permitted by the *Naval Discipline (Dominion Naval Forces) Act 1911* (UK) ('the 1911 Act'), which applied to Dominion legislation made both before and after the 1911 Act came into force, and which allowed Dominion statutes to have effect by applying the *Naval Discipline Act 1866* (UK) to the Dominions with some necessary adaptions.[56] In contrast, the *Copyright Act 1911* (UK) did not apply to the self-governing Dominions 'unless declared by the Legislature of that Dominion to be in force therein either without any modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the Dominion as may be enacted by such Dominion.'[57] Within limits, the Dominions were allowed to depart from some aspects of this British legislation, which Australia did in 1912.[58] A second example was the passage of nationality legislation that only applied to a Dominion after adoption by the Parliament of the Dominion.[59] But none of this amounted to a request and consent condition, though a commitment was made in 1917 for 'continuous consultation in all important matters of common Imperial concern'.[60] Rather, these acts allowed limited departures from Imperial legislation, a situation in which the Dominion could either adopt the relevant Imperial Act as its own, or, within severely modest limits, depart from it. But it could not exceed the limits in the British Act altogether.

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[50] Commonwealth, *Imperial Conference 1926: Summary of Proceedings*, Parl Paper No 99 (1926–27) 13.
[51] Manley O Hudson, 'Notes on the Statute of Westminster' (1932–33) 46 *Harvard Law Review* 261, 269–270. cf K C Wheare, *The Statute of Westminster and Dominion Status* (Oxford University Press, 5th ed, 1953) 82 who thought that the convention was established by 1926.
[52] *Manuel v Attorney-General* [1983] 1 Ch 77, 85H (Sir Robert Megarry V-C).
[53] *R v Burgess, ex parte Henry* (1936) 55 CLR 608, 635.
[54] *Bankruptcy Act 1914* (UK) s 122 retained by the *Bankruptcy Act 1966* (Cth) s 29(2) but removed in the *Bankruptcy Amendment Act 1980* (Cth). See also *Re Clunies-Ross Ex parte Totterdell* (1988) 82 ALR 475, 482–83 [19]–[21].
[55] *Geneva Convention Act 1911*(UK) s 1(2). A term that included the self-governing Dominions: *Interpretation Act 1889* (UK) s 18.
[56] *Naval Discipline Act 1910* (Cth).
[57] Section 25(1). Section 29(1)(b) listed the self-governing Dominions as including the Commonwealth of Australia. For the Commonwealth legislation see *Copyright Act 1912* (Cth) ss 8–9. See the history set out in *Phonographic Performance Co of Australia Ltd v Commonwealth* (2012) 246 CLR 561, 572–74 [14]–[23] (French CJ, Gummow, Hayne and Bell JJ).
[58] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1912, 4861.
[59] *British Nationality and Status of Aliens Act 1914* (UK) s 9 adopted in the *Nationality Act 1920* (Cth) s 17(1) and sch 1.
[60] Imperial War Conference, 20 March–27 April 1917, Article IX extracted in F Madden and J Darwin (eds) The *Dominions and India Since 1900* (Greenwood Press, 1993) 42.

The terms of the convention as it was understood in the late 1920s were intended to be placed on record as a statement 'embodying the conventional usage'[61] and appeared as a recital in the *Statute*.[62] The third recital of the preamble to the Act provided that '…it is in accord with the *established* constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of the Dominion *otherwise than at the request and with the consent of that Dominion*'.[63] It was the opinion of the committee in 1929 that if this proposition were adopted, 'the acquisition by the Parliaments of the Dominions of full legislative powers will follow as a necessary consequence.'[64] It seems to follow as a matter of logic that the non-adoption of this approach (ie the Commonwealth position between 1931 and 1942) would mean that such a Dominion did not have full legislative powers. As to the legal status of the conventions in the recital, Owen Dixon pointed out in 1936 that the recitals did not change the constitutional law of the Empire and 'they are not the prime concern of lawyers'.[65]

To their credit, the British adhered to this convention and this was made clear by the very manner in which the *Statute* was constructed. As a first step in 1929, a committee that included two Australian representatives produced a report on the technical aspects of the inter-imperial relationship.[66] At the Imperial Conference in 1930 the main terms of the Statute were set out in a schedule to the report of the Conference.[67] It was agreed that the Dominions were each to signify their agreement to the Bill and to forward any suggested clauses for the Bill by 1 July 1931 and, if that was not possible, not later than 1 August 1931.[68] At Australia's request, one amendment of practical importance was made, namely, that the signification of Australia's request and consent to British legislation was to be indicated by the Commonwealth Parliament and not merely by the executive.[69] One suggested clause by the States, that the Commonwealth could not seek British legislation on matters relevant to the States without the concurrence of the States, was not included

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[61] *1929 Report,* above n 26, 14 [54].
[62] *The Statute of Westminster 1931* (UK) did not have retrospective effect: *Croft v Dunphy* [1933] AC 156, 167 (PC); *Re Offshore Mineral Rights of British Columbia* [1967] SCR 792, 815 (SCC); *R v Lay Tung-sing* [1989] 1 HKLR 490, 497 (CA).
[63] Italics added for emphasis. The recitals had no legal effect: K H Bailey, 'The Statute of Westminster Pt 1' (1932) 5 *Australian Law Journal* 362, 365, but were intended at the time to be evidence of existing constitutional practice: W Ivor Jennings and C M Young, *Constitutional Laws of the British Empire* (Clarendon Press, 1938) 106.
[64] *1929 Report,* above n 26, 15 [57].
[65] Owen Dixon, 'The Statute of Westminster 1931' (1936) 10 *Australian Law Journal Supplement* 96, 97–98. As he explained, that covered the matters in the *Statute* itself. See also the comment by Sir Lyman Duff CJ in *Reference Re Power of Disallowance and Power of Reservation* [1938] SCR 71, 78: 'We are not concerned with constitutional usage. We are concerned with questions of law….'
[66] Robert Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 325. They were Robert Garran, Solicitor-General of the Commonwealth, 1916–32 and Francis Brennan, Attorney-General of the Commonwealth, 1929–32.
[67] See Commonwealth, *Imperial Conference 1930: Summary of Proceedings*, Parl Paper No 293 (1929–30–31) 12–14; Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3415; W P M Kennedy, 'The Statute of Westminster' (1933) 45 *Juridical Review* 330, 333. The Kennedy view was cited with approval in *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172, 211 (Stephen J).
[68] For the Australian resolutions see Commonwealth, *Journal of the Senate*, No 123, 29 July 1931, item 5, 345–47; Commonwealth, *Journal of the Senate*, No 138, 28 October 1931, item 7, 409, 411; *Votes and Proceedings of the House of Representatives*, No 178, 28 July 1931, item 8, 774–77.
[69] Commonwealth, *Votes and Proceedings of the House of Representatives*, No 178, 28 July 1931, 775.

in the draft of the *Statute*. Apparently the British thought that it was unnecessary but later admitted that they had misunderstood the Australian situation.[70]

Once the views of the Dominions were ascertained, the British introduced the legislation, during the passage of which the Solicitor-General noted that the Bill was '…the product of the mature consideration of the representatives of all of the Dominions…'.[71] He also warned the House of Commons against making amendments to the Bill, 'which would go contrary to the expressed desire of any of our Dominions.'[72] In short, though enacted by the Imperial Parliament, the *Statute* was the product of the Convention announced in 1926. This process undermines the claim that 1931 is the date of effective independence since as a practical matter independence in this sense really dates from 1926 not 1931.

After the passage of the *Statute*, the British continued to apply the convention to Australia since Australia had not adopted the *Statute*. The fact that the convention was relied upon is evidence that neither the British nor the Australians thought that the *Statute* itself applied. In 1933, for example, when the West Australian Parliament petitioned the British Parliament to amend the Commonwealth *Constitution* in order to permit the State to secede from the federation, the Joint Committee of the House of Lords and the House of Commons decided that Western Australia did not have standing to present the petition, thereby adroitly avoiding entanglement in internal Australian affairs.[73] Two paragraphs in the Committee's report referred to the *Statute* and the convention that the British Parliament would not intervene in the affairs of a Dominion save at the request of the government or Parliament of the Dominion. This was, the committee wrote, a rule 'well established before 1900',[74] though it gave no examples of this. The comment may have been an allusion to the process by which the Commonwealth Constitution was drafted in Australia and then negotiated and passed in London. After all, the Australians secured nearly everything they wanted in that process.[75] Since the petition concerned the Commonwealth *Constitution*, the Committee held that only the Commonwealth government or Parliament could be heard on the matter. In paragraph 10, the committee referred to the preamble of the *Statute* as supporting the view that the United Kingdom Parliament would not pass any law extending to a Dominion except at the request of the Dominion. Since the term Dominion in s 1 of the *Statute* meant the Commonwealth, not the States, the request would have to come from the Commonwealth, not Western Australia.[76]

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[70] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 November 1931, 1927; Twomey, above n 10, 52–53. The British misunderstanding of the Australian position was pointed out by Robert Garran in James Faulkner and Robert Orr (eds) *Opinions of the Attorneys-General of the Commonwealth of Australia* (AGPS, 2013) 276–77.

[71] United Kingdom, *Parliamentary Debates*, House of Commons, 20 November 1931, col 1244. See also 24 November 1942, cols 639–40: 'The terms of the Statute of Westminster were approved in advance, before its passage through Parliament here, by the Parliaments of all the Dominions'.

[72] Ibid col 1247.

[73] David Maugham, 'The Statute of Westminster' (1939) 13 *Australian Law Journal* 152, 164, quotes Dominions Office officials who told him: 'Their whole attitude is to leave the Dominions to settle these things amongst themselves'.

[74] Commonwealth, *Report by the Joint Committee of the House of Lords and the House of Commons appointed to consider the Petition of the State of Western Australia in relation to Secession*, Parl Paper No 153 (1934–35) 3 [7].

[75] Except the removal of appeals to the Judicial Committee: J L La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 254–69.

[76] The Commonwealth opposed secession: Commonwealth, *Parliamentary Debates*, Senate, 4 July 1934, 145.

To bolster its position, the committee sought an opinion on the issue by the law officers in Britain who not only referred to the convention but also dated it to 1926, if not earlier. Although in strict law, the British Parliament could legislate for Australia in 1934 without the consent of the Commonwealth, because it had not adopted s 4 of the *Statute*, the issue was whether this would be in accordance with 'constitutional practice.'[77] The law officers advised that, while in strict theory the *Commonwealth of Australia Constitution Act 1900* (UK) could be amended or repealed in the ordinary way, the declaration of 1926 established a 'constitutional practice that was conclusive and the change would only be made with the consent of the Dominion concerned'.[78]

The third example of the reliance on convention rather than on law arose out of the abdication crisis in 1936.[79] Each of the Dominions was consulted, and while each gave its consent, the differing legal position of each Dominion required a different legal approach. Canada passed legislation that invoked s 4 of the *Statute* and gave its consent under that provision,[80] while Australia and New Zealand merely gave their consent via parliamentary resolutions since they had not yet adopted the *Statute*.[81] In Australia's case, it was pointed out that since the *Statute* had not yet been adopted, s 4 was not available, nor was legislation under the Commonwealth *Constitution* possible because it was thought at the time that there was no head of Commonwealth legislative power that dealt with succession to the throne.[82]

However, a convention is a practice, and, unless embodied in the operative sections of a statute, is not a law.[83] It exists by being adhered to and the breach of a convention, or a reordering of its terms, does not break a law, although, of course, it may provoke a political crisis.[84] There were parliamentary observations in 1942 on the possibility that the British would go ahead and ignore the convention, but the likelihood of this was discounted.[85] Even the arch monarchist Robert Menzies warned in 1936 that, if it did

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[77] Dominions Office to Law Officers of the Crown, 3 September 1934 in D P O'Connell and Anne Riordan (eds), *Opinions on Imperial Constitutional Law* (Law Book Co, 1971) 409.
[78] Law Officers of the Crown to Dominions Office, 25 September 1934, ibid 416.
[79] Paul Weidenbaum, 'British Constitutional Law and the Recent Crisis' (1936–37) 14 *New York University Law Quarterly* 341–357; G G Phillips, 'Since the Statute of Westminster' (1938) 6 *Cambridge Law Journal* 182, 190–91.
[80] *Succession to the Throne Act,* SC 1937, c 16. See also R I Edward and F C Cronkite, 'Canada and the Abdication', (1938) 4 *Canadian Journal of Economics and Political Science* 177–191. South Africa also passed abdication legislation: *His Majesty King Edward the Eighth's Abdication Act 1937* (South Africa).
[81] For the Australian resolutions see Commonwealth, *Votes and Proceedings of the House of Representatives*, No 147, 11 December 1936, 805–06; Commonwealth, *Journal of the Senate*, No 95, 11 December 1936, 323–24.
[82] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 December 1936, 2908–2909.
[83] Geoffrey Marshall, *Constitutional Conventions* (Clarendon Press, 1986) 13. The conventions in the Balfour Declaration of 1926 were of course given statutory force by the Statute of Westminster 1931: *Al Sabah v Gruppo Torras SA* [2005] 2 AC 333, 342–43 [12] (PC).
[84] See *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645, 723A–D (Lord Reid), also cited in *Ukley v Ukley* [1977] VR 121, 127 (Young CJ, Barber & Nelson JJ); *Re Constitution of Canada* [1981] 1 SCR 753, 882–83 (Martland, Ritchie, Beetz, Chouinard & Lamer JJ). See also W Anstey and J J Bray, *Opinion on the Statute of Westminster*, 22 July 1937, 3 in South Australian State Library, PRG 1098/29/8.
[85] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1942, 1400 (Evatt). See also *Bistricic v Rokov* (1976) 135 CLR 552, 567 (Murphy J). A New Zealand writer thought that the Boston Tea Party was the best sanction against the repeal of the Statute. R O McGechan, 'Status and

happen, Australia would ignore any British law passed without Australia's assent and, by repealing the *Statute,* 'it [Britain] would create a state of revolution among the Dominions themselves.'[86] One Canadian commentator wrote in 1932 that it would lead to an immediate declaration of independence in that country.[87] The British also thought that it was unthinkable that 'Parliament could or would reverse that statute.'[88] It is worth noting that, while the adoption Bill introduced by Menzies in 1937 did not include the *Statute* as a schedule in that Bill, the 1942 legislation did. This means that the *Statute* is a statute embodied in a Commonwealth Act and that any unilateral British amendments to the British version would not affect the status of the *Statute* in the Commonwealth law.

Now, this body of constitutional practice on one view does support the effective independence thesis. But on another view it does not, for it is both evidence that conventions were necessary, because the Commonwealth lacked the legal capacity that adoption of the *Statute* would have secured, and testament to the continuing legal dependence on the British parliament.

V BRITISH LEGISLATION FOR AUSTRALIA 1931–1940

Evidence that the conventions of 1926, and those embodied in the preamble to the *Statute,* did not remove British legislative restrictions on the Commonwealth before 1942 may be found in the various statutes passed by the British Parliament that extended Commonwealth legislative powers between 1931 and 1942.[89] Although these statutes were passed with Australia's consent, they were necessary because the Commonwealth lacked the legal capacity to legislate for these matters itself. In some cases, changes were made to existing British acts that had applied to Australia before 1931, while others were new. Most of the legislation dealt with the extra-territorial reach of legislation. Since Australia had not adopted the *Statute*, this legislative limitation on the powers of the Commonwealth Parliament necessitated British legislation on the Commonwealth's behalf. In part, this arose out of the legal requirement to legislate for mandate territories and because of the acquisition of external territory such as the Antarctic Territory in 1933.

A *The Extra-Territorial Limitation*

British Acts were passed between 1931 and 1942 to give Australian legislation extra-territorial reach on the basis that the Commonwealth Parliament did not have this power itself without British legislative authority. This applied to legislation on the army via the *Army and Airforce (Annual) Acts 1931–41* (UK). Each of these covered the Dominions, although the *Army Act 1932* (UK) included references to the *Statute* and the Commonwealth of Australia (sch 2 amending s 187B). In 1940 the British Parliament

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Legislative Inability', in J C Beaglehole (ed) *New Zealand and the Statute of Westminster* (Victoria University College, 1944) 104.

[86] Robert Menzies speaking at a legal convention and commenting on Owen Dixon, above n 65, 108.

[87] W P M Kennedy, 'The Imperial Conferences, 1926–1930, The Statute of Westminster' (1932) 48 *Law Quarterly Review* 191, 206.

[88] *Blackburn v Attorney-General* [1971] 2 All ER 1380, 1382h (Lord Denning MR).

[89] These same acts also applied to New Zealand for it too had not adopted the Statute of Westminster and only did so in 1947: *Statute of Westminster Adoption Act 1947* (NZ). For a list see A E Currie, *New Zealand and the Statute of Westminster* (Butterworth, 1944) 38–39 or his paper A E Currie, 'New Zealand and the Statute of Westminster 1931' (1944) 20 *New Zealand Law Journal* 174–77.

included a provision in the *Army and Airforce (Annual) Act 1940* (UK) in order to give extra-territorial force to Australia's wartime legislation.[90] Another war-related statute passed by the British Parliament was the *Emergency Powers (Defence) Act 1939* (UK), which conferred on the Parliament of the Commonwealth of Australia extra-territorial application in respect of ships and aircraft registered in the Commonwealth.[91]

Similarly, the *Extradition Act 1932* (UK), legislation on extradition that extended the reach of Commonwealth powers, was passed in 1932. Not all British acts that applied to Australia between 1931 and 1942 specifically mentioned Australia, but the record shows that the Commonwealth and New Zealand were both consulted over the passage of this Act, which added drug offences to the list of extraditable offences. Australia had no objection to the Act, but New Zealand did. An opinion of the law officers made it clear that the third recital of the *Statute* was relied upon to consult the three Dominions that had not yet adopted the *Statute*. The reason for not mentioning the Dominions in the *Extradition Act 1932* (UK) was that the Act would not, by virtue of s 4 of the *Statute,* apply to those Dominions to which the *Statute* applied.[92] Strictly speaking, the British Parliament could have legislated without consulting the Dominions that had not yet adopted the *Statute,* but decided that constitutional practice required it. [93] The subsequent Commonwealth Act was necessary both to update the British extradition legislation that applied in Australia and to apply Australian extradition law to Papua and Norfolk Island.[94] After the Commonwealth passed the *Extradition Act 1933* (Cth), the British government procured an Order in Council stating that the Commonwealth act extended to Papua and Norfolk Island, and that it would have effect 'as if it were part of the *Extradition Act 1870* (UK).'[95].

The extra-territorial limitation arose in part because, although Australia administered mandates, it held them by virtue of Britain's accession to them. In the *Geneva Convention Act 1937* (UK), special provision was made in s 2 to allow the Commonwealth to pass a law to give effect to art 28 of the Convention and to extend that law to any mandate administered by the Commonwealth of Australia. The following year the Commonwealth Parliament, acting on that power, passed the *Geneva Convention Act 1938* (Cth) ('the 1938 Act'). This Act modified the *Geneva Convention Act 1911* (UK) ('1911 Act'), which had applied to all Dominions. One effect of the 1938 Act was that the 1911 Act no longer applied to the Commonwealth.[96] Had Australia adopted the *Statute* it could have accomplished this without special legislative assistance from the United Kingdom parliament.

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[90] *Army and Air Force (Annual) Act 1940* (UK) s 3(1) adding s 187C. See also Commonwealth, *Parliamentary Debates*, Senate, 16 May 1939, 340–41, where the continuing reliance on the British Army legislation was acknowledged and explained as a consequence of not having adopted the Statute of Westminster.

[91] *Emergency Powers (Defence) Act 1939* (UK) s 5(1).

[92] See Dominions Office to Law Officers, 18 August 1932; Law Officers to Dominions Office, 20 October 1932 in D P O'Connell and Anne Riordan above n 77, 404–07.

[93] Ibid 407.

[94] *Extradition Act 1933* (Cth).

[95] Order in Council, 14 August 1934; 1934 No 917 in Great Britain, *Statutory rules and orders and statutory instruments revised to December 31, 1948* (His Majesty's Stationary Office, vol ix, 1949–52) 485–86.

[96] Commonwealth, *Parliamentary Debates*, Senate, 4 May 1938, 743; Commonwealth, *Parliamentary Debates*, House of Representatives, 30 June 1938, 2987.

B *The Merchant Shipping Limitation*

The Commonwealth was not free of the restrictions in the *Merchant Shipping Act 1894* (UK) or the *Colonial Courts of Admiralty Act 1890* (UK) in 1931. One example was the *Merchant Shipping (Safety and Load Line Conventions) Act 1932* (UK), which implemented the load line convention. Provision was made in s 36(3)(b) for its extension to the Dominions, which was done in Australia's case by an Order in Council in 1936.[97] The *Whaling Industry (Regulation) Act 1934* (UK) dealt with both shipping and the extra-territorial limitation. This Act was extended to the Commonwealth of Australia[98] to give extra-territorial effect to laws governing ships registered in Australia. In the following year the Commonwealth took advantage of this extension of its legislative powers to pass the *Whaling Act 1935* (Cth). Section 4(1) gave extra-territorial effect to the Act. The background was that, with the assignment of the Antarctic territory to the Commonwealth in 1933 and the signing of an international agreement to regulate whaling, Australia needed the legal capacity to permit its legislation to regulate whaling to operate extra-territorially.[99] The power to issue any commission to constitute a Prize Court or to establish a Vice-Admiralty Court under such a commission was extended in 1939 to allow the Commonwealth of Australia to exercise such powers in a mandate territory.[100]

C *Succession to the Crown and Abdication*

Lastly, since s 4 of the *Statute* did not apply to the Commonwealth, legislation on the abdication of the King in 1936 was handled via the convention of not passing legislation for the Commonwealth, except at the request and consent of the Commonwealth. The main Act here was *His Majesty's Declaration of Abdication Act 1936* (UK), an Act to which Australia gave its consent, as did New Zealand, Ireland and South Africa. Each Dominion dealt with the abdication in a different manner. The Irish, for example, included the abdication proclamation in the schedule to the *Constitution (Amendment No 27) Act 1936* (Ireland) in which they took the opportunity to eliminate the role of the Crown in internal Irish affairs. In contrast, as the preamble says, Canada gave its consent under s 4 of the *Statute* and passed its own legislation to signify that consent.[101] But this power could not be invoked in respect of the Dominions that had not adopted the *Statute*. As the Commonwealth Parliament had not adopted the *Statute,* s 4 was not available to the Commonwealth in 1936. The Commonwealth Parliament expressed its consent to the abdication by resolution[102] because it was thought at the time that the Commonwealth Parliament did not have power under s 51 of the Constitution to pass a law on the succession of the Crown.[103] In short, both Britain and Australia relied upon the convention, enunciated in the second recital of the preamble to the *Statute,* that any

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[97] Order in Council, 1936 No 563, in Great Britain, *Statutory rules and orders and statutory instruments revised to December 31, 1948* (His Majesty's Stationary Office, vol xiv, 1949–52) 416.
[98] *Whaling Industry (Regulation) Act 1934* (UK) s 15(2).
[99] Commonwealth, *Parliamentary Debates*, Senate, 30 October 1935, 1104–1106.
[100] *Prize Act 1939* (UK) s 2(1)(b).
[101] *Succession to the Throne Act,* SC 1937, c 16.
[102] Commonwealth, *Votes and Proceedings of the House of Representatives*, Parl Paper No 147 (1936) 805–06; Commonwealth, *Journal of the Senate*, Parl Paper No 95 (1936) 323–24.
[103] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 December 1936, 2908–2909, where Attorney-General Menzies explained the legal position. It is now arguable that this was incorrect, see Anne Twomey, 'Changing the Rules of Succession to the Crown' [2011] *Public Law* 378, 393–94.

alteration in the succession to the Crown or royal style and titles would require the consent of the Parliaments of all the Dominions.[104] Now, while some of this legislation has been noticed previously,[105] most of it was not subject to analysis and its significance seems to have been overlooked.

VI WHY DID AUSTRALIA NOT ADOPT THE STATUTE BEFORE 1942?

There appear to be four reasons for the reluctance to adopt the *Statute*. First, in the years after 1931 there were no apparent or urgent practical reasons to do so.[106] Existing arrangements seemed to work well though, as Commonwealth Attorney-General Brennan warned in July 1931 '…in certain respects existing constitutional law does place definite limitations on the Dominion status which nothing but British legislation can remove.'[107] He went on to point out that several British Acts, including the *Merchant Shipping Act 1894* (UK), extended to Australia and that there was 'great uncertainty' as to how far they extended. The other example of legislative inability Mr Brennan gave was the continued extension of the doctrine of repugnancy, which, after citing from the case, had been applied to Commonwealth legislation in the *Union Steamship Co of Australia v King* case in 1925.[108] In opposition, Mr Brennan continued to campaign throughout the 1930s for the adoption of the *Statute*, charging the government in a debate in 1935 with a grave dereliction of duty for not adopting the *Statute*.[109] Despite the apparent contradiction between the promised autonomy and equality of the Balfour Declaration, and the practical legislative restrictions identified in 1929 and dealt with in the *Statute* in 1931, the view that there was no urgency prevailed in 1933, when Attorney-General Latham recommended to Cabinet that an adoption Bill be introduced. But Cabinet decided that there was no practical advantage to be obtained in adopting the *Statute*.[110]

Second, and of greatest importance, since it delayed the process by half a decade, several States were opposed to adoption fearing that the Commonwealth would use the powers given in the *Statute* to expand Commonwealth powers and to weaken the States.[111] Even before the *Statute* was passed, the Commonwealth gave an undertaking to consult the States and invited them to present their views.[112] Although the Commonwealth thought that State concerns were addressed in the *Statute*, as s 9(1) protected laws within the

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[104] Ibid 2908, where the recital is cited.
[105] Twomey, *Constitution of New South Wales*, n 11, 116 fn 277.
[106] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1935, 2055, where the Prime Minister, Mr Lyons, pointed out that: 'This is not an urgent matter, although it is, of course, an important one'.
[107] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3417 (Mr Brennan).
[108] Ibid 3417–3418, citing (1925) 36 CLR 130, 140.
[109] Commonwealth, *Parliamentary Debates*, House of Representatives, 8 April 1935, 993.
[110] Memorandum by the Attorney-General, John Latham, 2 October 1933, 6 [8] in NAA: A 432/85, 1930/181 pt 2. At page 8 he wrote that it was undesirable that different Dominions operate on a different legal basis. See also Memorandum by the Attorney-General, Robert Menzies, 21 January 1935, 1 [2], reviewing the events of 1933 in NAA: A 432/85, 1930/181 Part 2.
[111] See, eg, Western Australia, *Parliamentary Debates*, Assembly, 28 June 1931, 4060–4064. Twomey, *The Australia Acts* above n 11, 23–37 covers the concerns of the States during this period. The most thorough analysis at the time of the likely impact of the *Statute* on the States is in K H Bailey, *The Statute of Westminster, 1931* (Government Printer, 1935) an opinion of 49 pages with 10 pages of documents giving the opinions of a number of States.
[112] Commonwealth, *Record of the Conference of Commonwealth and State Ministers, Melbourne, 10–14 August and 1–12 September 1931*, Parl Paper No 269 (1931) 15.

exclusive authority of the States from being altered by the Commonwealth Parliament,[113] State objections continued well into the 1930s and were a major reason for the delay in the adoption of the *Statute* by the Commonwealth. Since members of the Commonwealth Parliament from the States concerned were not afraid to stand up for the interests of their States, this pressure prevented forward movement. Even as the *Statute* was being negotiated, the States made their concerns known and these were acknowledged at successive conferences between Ministers of all governments. At the conference of the Premiers and the Prime Minister in February 1934, the Prime Minister reiterated the undertaking given in 1931 that adoption would not occur until there had been full consultation with the States.[114] This drawn-out process finally ended when the States sent the Commonwealth their views in 1937. These show that New South Wales, Victoria and Queensland wanted both a recital and a declaratory clause that it would not be proper for the Commonwealth, without the concurrence of a State, to request and consent to any amendment of the *Statute* affecting the legislative powers of a State.[115] South Australia and Tasmania had no objections to adoption, while Western Australia opposed adoption altogether because it would create too many uncertainties concerning the effect of adoption on the States.

Third, many Australians were deeply attached to the Empire and saw the *Statute* as a weakening of the British connection,[116] and, although this was acknowledged by supporters of the *Statute*, it was contended that the *Statute* did not have this effect at all.[117] Nevertheless, the attachment was strong and this psychological element distinguishes attitudes in the 1930s from those in the 21st century. The overwhelming concerns during the period were after all not legal, but economic, given the Great Depression and later in the decade, the approach of war in Europe. Fourth, many senior legal luminaries were opposed to adoption, an attitude that emerged during discussions of the adoption question at several of the legal conferences in the 1930s.[118]

Despite the reluctance to adopt the *Statute*, even conservative figures recognised that the *Statute* should be adopted. Robert Menzies, the Commonwealth Attorney-General 1934–39, who was a strong proponent of the Imperial connection,[119] thought that the *Statute* should be adopted. He argued, in and out of Parliament, that it would be better to adopt the *Statute* in the absence of any urgent requirement to do so as to make for a calmer

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[113] Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1935, 2033. Mr Brennan thought that the trifling amendments to secure the rights of the States were unnecessary.
[114] Commonwealth, *Conference of Commonwealth and State Ministers on Constitutional Matters, 16th–28th February 1934*, Parl Paper No 134 (1934–35) 69.
[115] Commonwealth, *Parliamentary Debates*, House of Representatives, 15 September 1937, 1152–1153, where a summary of the position of each State is provided.
[116] See J G Latham, *Australia and the British Commonwealth* (MacMillan & Co, 1929) 92: '…there is no desire for this complete independence in Australia or New Zealand'. Robert Garran in a note 'The Statute and Australia' (1932) 13 *British Yearbook of International Law* 116–17 refers to the 'fear of endangering the organic unity of the British Commonwealth.
[117] Commonwealth, *Parliamentary Debates*, House of Representatives, 3 July 1931, 3421 (Mr Brennan).
[118] David Maugham, above n 73, 162, 164–5. Mr Hannan KC of South Australia at 162 thought that the statute was 'entirely mischievous'.
[119] See his comment 'Australia sees no future outside the British Empire or outside the British Commonwealth of Nations…' in R G Menzies, 'Australia's Place in the Empire' (1935) 14 *International Affairs* 480, 485, though he went on to criticise the British opinion that Australia's requests for access to the British market were 'mere parochial selfishness'.

and more mature debate on the matter.[120] At the beginning of 1935, he noted a shift in opinion in favor of adoption and argued that adoption would free Australia of the restrictions imposed by the *Merchant Shipping Act 1894* (UK).[121] He pressed the States, at the conference between Commonwealth and State Ministers in 1936, to agree to adoption so that Australia could take up its international responsibilities, as had the other Dominions. [122] He thought at the time that it was important that the Commonwealth have the power 'to pass a law having extra-territorial effect',[123] and that Australia should have the same capacity as the other Dominions.[124] After an adoption Bill[125] lapsed in November 1936 because the Parliament was prorogued,[126] another Bill was introduced in August 1937. [127] In his second reading speech on the Bill, Menzies stressed that in practice, after 1918, British interference was 'substantially unknown, and that in 'theory, complete independence of the self-governing [D]ominions should be assured".[128] He went on to add that the adoption of the *Statute* by the Commonwealth Parliament would deal with what he called the legal aspects of independence,[129] in contrast to political independence, of which he said: 'I know it is here'.[130] He later added that '[i]n point of practice the real and administrative legislative independence of Australia has never been challenged since the Commonwealth was created'. [131] This somewhat undermined the argument for adoption in the absence of any great emergency. Nevertheless, there remained practical limitations to Australia's independence, such as its inclusion in most favored nation clauses in trading agreements as a part of the British empire, which allowed Australia to keep out foreign goods and secure privileged access to the British market. There was also a doubt about whether Australia could be neutral in a war declared by the British. Despite these arguments, no adoption legislation was passed because the Parliament was dissolved a month later in September 1937 and the Bill therefore lapsed. [132] Further progress was blocked by Menzies' successor as Attorney-General. W H Hughes was opposed to adoption on the ground that he could not see 'any practical advantage' in adoption.[133]

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[120] Menzies, above n 1, 373.
[121] Robert Menzies, 'Memorandum', 21 January 1935, 2–3 [9] in NAA: A 432/85, 1936/296.
[122] Commonwealth, *Conference of Commonwealth and State Ministers*, *Adelaide, 26–28 August 1936*, Parl Paper No 268 (1934–35–36) 9.
[123] Ibid 77.
[124] Robert Menzies, 'Statute of Westminster', 5 February 1936, 4–5 [14]. in NAA: A 461, H327/1. A view shared by Evatt during the same period: Dixon, above n 65, 107. Evatt's views appear at the end of the Dixon paper.
[125] Commonwealth, *Votes and Proceedings of the House of Representatives*, No 138, 24 November 1936, 752.
[126] Commonwealth, *Gazette*, No 26, 27 May 1937, 915.
[127] For the text of the bill see NAA: A461, H327/1 or K C Wheare, *The Statute of Westminster and Dominion Status*, (Oxford University Press, 5th ed, 1953) 324–25.
[128] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 August 1937, 84.
[129] Ibid 92.
[130] Ibid 93.
[131] Ibid 94.
[132] Commonwealth, *Gazette*, No 53, 21 September 1937, 1605.
[133] Commonwealth, *Parliamentary Debates*, House of Representatives, 24 September 1941, 522.

VII THE ARGUMENTS FOR ADOPTION IN 1942

When World War Two broke out in 1939, the Commonwealth already had common law executive powers in relation to peace and war.[134] In his important speech on the Statute of Westminster Adoption Bill in October 1942, the Commonwealth Attorney-General Herbert Evatt made it clear that the executive power of the Crown to declare war, to conclude a peace and to enter into treaties, was exercised by the King in relation to Australia on the advice of his Australian Ministers.[135] In short, even before the passage of the adoption legislation, Australia enjoyed full sovereignty in such executive matters as evidenced by the declaration of war against the axis powers. Although Australia relied upon the British declaration of war in 1939 to indicate that a state of war existed, in order to invoke the powers given in the *Defence Act 1903-1939* (Cth),[136] Australia made its own declarations of war in 1941.[137] The declarations did not require British approval nor did they require any of the powers conferred by the *Statute*. In another indication of Australia's emerging international status before the adoption of the *Statute*, Australia separately signed the *Declaration by the United Nations and the Atlantic Charter* in 1941.[138] But none of this removed the Imperial fetters that restrained Commonwealth statutes.[139]

A decision was made in late 1941[140] to adopt the *Statute* and a Bill was drafted by May 1942.[141] During the parliamentary debate on the adoption of the *Statute* in October 1942, Attorney-General Evatt[142] explained that the existing restrictions of the *Colonial Laws Validity Act 1865* (UK) meant that important Commonwealth legislation on shipping and defence might be held invalid unless the Commonwealth Parliament passed an adoption Act. In the same debate he went on to say that the doubts about the validity of Commonwealth legislation in turn might impede the war effort, which was why the act was made retrospective to the beginning of World War Two.[143] He expanded his argument by issuing a 22 page monograph, which was circulated to members of

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[134] Commonwealth, *Imperial Conference 1937*, Parl Paper No 80 (1937) 29: 'One of the most conspicuous features of the period since the last Imperial Conference has been the increasing participation in international affairs by the Dominions as sovereign nations'.
[135] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1942, 1389–1390.
[136] Commonwealth, *Text of Documents exchanged between the United Kingdom and German Governments,* Parl Paper No 173 (1937–38–39) 19 for the British declaration of war. For the subsequent Australian announcement a few hours later that a state of war existed see the Commonwealth, *Gazette*, No 63, 3 September 1939, 1849.
[137] See Commonwealth, *Declaration of Existence of State of War with Finland, Hungary, Rumania and Japan, 8 December 1941,* Parl Paper No 66 (1940–41–42–43) 3. The formal proclamations appeared in Commonwealth, *Gazette*, No 251, 8 December 1941, 2725 and No 252, 9 December 1941, 2727.
[138] 14 August 1941, in force for Australia 3 September 1942, in *Australian Treaty Series 1942* No 4.
[139] See Commonwealth, *Parliamentary Debates*, House of Representatives, 1 October 1942, 1334–1336; Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1942, 1387–1400.
[140] Curtin to Scully, 26 November 1941 in NAA: A461, H327/1/1; Commonwealth, *Parliamentary Debates*, House of Representatives, 16 December 1941, 1127.
[141] Commonwealth, *Parliamentary Debates,* House of Representatives, 21 May 1942, 1500.
[142] Evatt was a member of the High Court from 1931 to 1940: Commonwealth, *Gazette*, No 2, 8 January 1931, 3, No 184, 31 August 1940, 1905. He was elected to Parliament a month later: Commonwealth, *Votes and Proceedings of the House of Representatives*, No 1, 20 November 1940, 3 and became the Attorney-General and Minister for External Affairs in October 1941: Commonwealth, *Gazette*, No 200, 7 October 1941, 2234.
[143] Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1942, 1399.

Parliament, setting out the case for adopting the *Statute* into Commonwealth law.[144] His argument was in effect a plea of urgency given wartime conditions and, as the long title to the *Statute of Westminster (Adoption) Act 1942* (Cth) indicates, the two main concerns were to allay doubts about the validity of certain Commonwealth legislation and to 'obviate delays occurring in its passage'. The monograph focused on the impediments of repugnancy, extra-territoriality, and the reservation requirements imposed on Commonwealth shipping legislation.

VIII THE REPUGNANCY DOCTRINE STILL OPERATED IN 1942

Once the war was under way, Australia found that British, rather than Australian, law applied in certain military situations. The Australian ships and sailors that were transferred to British fleets became subject to British, not Australian, naval legislation, as the High Court pointed out in a decision made on 8 July 1942.[145] Two sailors on HMAS Sydney, then part of a Royal Navy squadron, were convicted for the murder of a stoker named Riley, and sentenced to death following a court martial under British naval law. After their transfer to New South Wales to await their sentence of death by hanging, they sought a writ of habeas corpus to secure their release on the ground that they had been wrongly tried and convicted under British not Australian law. The application for the writ failed, as the High Court held that British legislation, not Commonwealth defence statutes, applied. While the applicable Commonwealth statute provided for the death penalty, the penalty could only be applied in such cases after the sentence was confirmed by the Governor-General,[146] who would, of course, act on the advice of his Australian Ministers. The applicable Commonwealth legislation permitted the sentence to be commuted. The central issue in the case was whether a Commonwealth Act applied or whether a British Act prevailed. The court held that s 45 of the *Naval Discipline Act 1866* (UK) applied notwithstanding s 98 of the *Defence Act 1903-1941* (Cth). As Starke J pointed out, the *Statute* was irrelevant because it had not yet been adopted.[147] It was clear that the doctrine that a British Act prevailed where a colonial Act was found to be repugnant to a British Act applied in this case.[148] The British then advised the Commonwealth government to directly approach the King to ask him to exercise the prerogative of mercy and, following Australian diplomatic intervention, the sentences were commuted to life imprisonment.[149]

IX COMMONWEALTH LEGISLATION AND EXTRA-TERRITORIALITY

As many of the British statutes mentioned above show, Commonwealth legislation did not have an extra-territorial reach without British legislative assistance. The extra-territorial limitation followed from the principle that legislation is primarily territorial, and as Isaacs J put it in 1913: '…the grant of powers of self-government to a component

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[144] H V Evatt, *Statute of Westminster Adoption Bill: A Monograph* (Government Printer, 1942). There are copies in the National Library, the Commonwealth Parliamentary Library, the Australian War Memorial, the Australian Archives, NAA: A.981, IMP 48 Pt 3 and at Flinders University in the Evatt Collection. Few Australian scholars have cited it but W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Sweet & Maxwell, 3rd ed, 1962) 93, fn 14 and Twomey, above n 2, 44 fn 179, 56 fn 243 do. It was also relied upon by McGechan, above n 85, 89 fn 27.
[145] *R v Bevan; ex parte Elias and Gordon* (1942) 66 CLR 452.
[146] Ibid 464.
[147] Ibid 471.
[148] Ibid 472 (Starke J), 479 (McTiernan J), 486 (Williams J).
[149] H V Evatt, above n 144, 8–9 [43]–[45].

portion of the Empire connotes, primarily, restriction on their exercise to the limits of the local territory and its adjacent sea limit as recognised universally and by statute.'[150]

In the early 1930s, this was not regarded as a serious problem for the Commonwealth, since it mainly affected criminal law and then principally the domain of State law, and the States were not included in the *Statute*. But after September 1939 the extra-territorial restriction became a serious problem for the Commonwealth. As islands were taken from the Japanese, Australia would have to install a temporary administration, and this raised the problem of whether Australian regulations had extra-territorial effect.[151] There were doubts about the exact nature of the limitation. The 1929 committee described the subject as full of obscurity and noted the conflict in the opinions of jurists,[152] while the judicial committee said that it was 'a doctrine of somewhat obscure extent.'[153] There were also doubts in Australia. Two barristers in 1937 described extra-territoriality as vague in nature in an opinion for a pro-Empire society.[154] Despite a decision by the judicial committee in 1933, on appeal from Canada, that, even before 1931, the doctrine did not apply to a Dominion,[155] concerns about the validity of Australian legislation were raised by the Solicitor-General of the Commonwealth George Knowles, and communicated to the Attorney-General.[156] This and other problems prompted the Government to move a Bill to adopt the *Statute* as Commonwealth law.[157] It is clear that the removal of the extra-territorial disability operated in Commonwealth law from the passage of the adoption Act in 1942, as Dixon J pointed out in 1959,[158] and as two justices of the High Court pointed out in 1991.[159]

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[150] *Merchant Services Guild of Australasia v Commonwealth Steamship Owners Association* (1913) 16 CLR 664, 690. See also *Merchant Services Guild of Australasia v Archibald Currie & Co Pty Ltd* (1908) 5 CLR 737, 744 (O'Connor J).

[151] For an account of the military takeover of the civilian administration in Papua see Brian Jinks, 'Blaming the Victim: Leonard Murray and the suspension of civil administration in Papua' (1982) 28 *Australian Journal of Politics and History* 44–55.

[152] *1929 Report,* above n 26, 12 [38]. Cited also in H V Evatt, above n 144, 11–12 [61].

[153] *British Coal Corporation v The King* [1935] AC 500, 520 (Lord Sankey LC), a remark also referred to in *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 12 but criticized in *Shaw v MIMIA* (2003) 218 CLR 28, 82–3 [170] (Callinan J dissenting).

[154] W Anstey and J J Bray, above n 84, 6.

[155] *Croft v Dunphy* [1933] AC 156. The case commenced in Nova Scotia in March 1930 some 21 months before the passage of the *Statute of Westminster*: [1930] 3 DLR 70. cf *Semple v O'Donavan* [1917] NZLR 273, 281 (Stout CJ), where New Zealand was held to be able to make laws beyond the three mile limit in order to defend the country. The court had in mind the war effort to take German Samoa. Similarly in *Trenholm v McCarthy* [1930] 1 DLR 674 a court in Nova Scotia held that customs regulations could operate beyond the 12 mile limit.

[156] H V Evatt, above n 144, 16 [94]. George Knowles was the Solicitor-General of the Commonwealth from 1932 to 1946.

[157] Curiously Evatt took the view when a member of the High Court in 1933 that the Commonwealth was not constrained by the extra-territorial limitation, even though it had not yet adopted the Statute of Westminster. See *Trustees, Executors & Agency Co Ltd v Federal Commissioner of Taxation* (1933) 49 CLR 220, 233.

[158] *R v Foster, ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256, 267. See also McTiernan J at 279 to the same effect. At 300 Menzies J described the doctrine as a misconception.

[159] *Polyukovich v Commonwealth* (1991) 172 CLR 501, 633 (Dawson J), 713 (McHugh J).

X THE SPECIAL PROBLEM OF SHIPPING LEGISLATION

Of special concern in the 1920s was the problem posed by Imperial shipping and admiralty laws. It was British policy to achieve uniformity in these matters,[160] something that they had insisted upon from an early date.[161] By the late 19th century consistency was accomplished through the *Merchant Shipping Act 1894* (UK) and the *Colonial Courts of Admiralty Act 1890* (UK). Both Acts applied to 'British Possessions' and the Commonwealth was held to be such a possession by the High Court in 1924 and in later cases.[162] These acts permitted the self-governing colonies to pass shipping and admiralty laws and, on their face, seemed to exempt the colonies from the repugnancy doctrine to the extent that they authorised departures from Imperial shipping legislation.[163] However, in a series of cases, it was established that any colonial shipping statutes could not exceed the bounds laid down in the *Merchant Shipping Act 1894* (UK).[164] In practice, this meant that Dominion lawyers had to hunt through the British statute book to ascertain the precise state of the law so that it could be applied in their own jurisdiction.[165] Doubts were expressed in 1924 whether the true foundation for navigation laws was to be found in the *Colonial Courts of Admiralty Act 1890* (UK), when Starke J pointed out that the admiralty jurisdiction of the High Court lay in s 76 of the *Constitution*, though he did not press the point, and agreed that the *Colonial Courts of Admiralty Act 1890* (UK) also sustained the powers given to the Court by ss 30 and 30A of the *Judiciary Act 1903* (Cth).[166]

The complaints about the merchant shipping laws were the subject of a special committee of experts in 1929. The committee recommended that uniformity be achieved through agreement, not legislation, and that given the complexity of the issue, further work was needed to achieve equality between the Dominions.[167] Despite claims by a

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[160] *ASN Co v Smith* (1886) 7 NSWR 207, 237 (Windeyer J); B J McGrath, 'Admiralty Jurisdiction and the Statute of Westminster' (1932) 6 *Australian Law Journal* 160.

[161] *The Australia* (1859) 15 ER 50, 60. A policy agreed to by the Dominions in Commonwealth, *Imperial Conference 1911*, Parl Paper No 68 (1911) 15.

[162] *John Sharp and Sons Ltd v The Katherine Mackall* (1924) 34 CLR 420, 424–5 (Knox CJ, Gavan Duffy J); *Hume v Palmer* (1926) 38 CLR 441, 449 (Knox CJ); *McArthur v Williams* (1936) 55 CLR 324, 337–38 (Latham CJ); *McIlwraith McEachern Ltd v Shell Co of Australia Ltd* (1945) 70 CLR 175, 189 (Latham CJ).

[163] See the Opinion by Robert Garran, 15 January 1906 in Commonwealth, *Report of the Royal Commission on the Navigation Bill*, Parl Paper No 30 (1906) lxxx, app E, [11]. But not wholly. The British objected to the Navigation Bill 1911 on these grounds: Commonwealth, *Navigation Bill*, Parl Paper No 11 (1911) 1045–1047.

[164] *The Camosun* [1909] AC 597, 608; *The Yuri Maru* [1927] AC 906, 915 affd in *Nagrint v The Ship "Regis"* (1939) 61 CLR 688, 692 (Dixon J); *F Kanamatsu & Co Ltd v The Ship 'Shamada"* (1956) 96 CLR 477, 483–484 (Taylor J); *Lewmarine Pty Ltd v The Ship 'Kaptayanni'* [1974] VR 465, 468 (Pape J); and referred to in *Empire Shipping v Shin Kobe Maru* (1991) 32 FCR 78, 87 (Gummow J).

[165] Herbert A Smith, 'Admiralty Jurisdiction in the Dominions' (1925) 41 *Law Quarterly Review* 423, 426–27.

[166] *John Sharp and Sons Ltd v The Katherine Mackall* (1924) 34 CLR 420, 433 (Starke J) ('*The Katherine Mackall*'). Isaacs J at 428–9 alludes to the same issues but along with the rest of the court decided the matter on the basis of the 1890 Act. References were made to ss 51(xxxix) and 76(iii) of the *Constitution* as supporting shipping and admiralty legislation by Dixon J in *Nagrint v The "Regis"* (1939) 61 CLR 688, 696 but after citing *The Katherine Mackall* case his honour concluded that the jurisdiction was founded on the *Colonial Court of Admiralty Act 1890* (UK).

[167] *1929 Report*, above n 26, 9 [13]. In fact, one day before the *Statute* became law an extensive agreement on Merchant Shipping matters was agreed to by the Dominions and Britain. For the agreement see Canada, *Statutes 1932*, Preface, ix–xv.

specialist in merchant shipping matters that Australia would benefit by adopting the *Statute*, and thereby free itself of the *Merchant Shipping Act 1894* (UK), the official position in the 1930s was that it would be a very large task to enact shipping laws for itself. The Solicitor-General warned that the task of drafting and enacting local shipping legislation looked like ten years of work.[168] In 1942, Attorney-General Evatt made it plain that since the *Colonial Laws Validity Act 1865* (UK) still applied to Commonwealth Acts, the government wanted to remove doubts about the validity of Australian shipping regulations in particular.[169] Despite the passage of the *Statute of Westminster (Adoption) Act 1942* (Cth), Australia continued to rely on British shipping legislation until the coming into force of the *Admiralty Act 1988* (Cth) on 1 January 1989. At that point s 76(iii) of the *Constitution*, which confers an admiralty jurisdiction on the High Court, was to be 'no longer…read against the background of concurrently applicable Imperial law'.[170]

XI RESERVATION OF THE ASSENT STILL OPERATED UP TO 1942

One of the British controls over Australian legislation was the doctrine that certain Bills had to be reserved for the assent in London. This was built into the instructions to the Governor-General in 1900[171] and was also imposed by particular Imperial statutes. There was a requirement that colonial legislation passed pursuant to the *Colonial Courts of Admiralty Act 1890* (UK), for example, had to be reserved for the assent in London.[172] This requirement was observed in 1913 but inexplicably ignored a year later.[173] In 1914 the Governor General assented[174] to an amendment to the *Judiciary Act 1920* (Cth) to constitute the High Court as a Colonial Court of Admiralty within the meaning of the *Colonial Courts of Admiralty Act 1890* (UK).[175] As the legislation was authorised by the *Colonial Courts of Admiralty Act 1890* (UK), and as s 4 of that Act required all such colonial legislation to be reserved for the assent in London, it was deemed invalid because it had not been reserved.[176] Once the mistake was discovered, the Act was then sent to London for the assent, which was only given in November 1916.[177] Aside from the delay, the real problem was that under s 60 of the Constitution, reserved legislation had to receive the assent within two years of being passed by the Parliament and in this case the assent was given 18 days after the expiry of the two-year limit. Despite the assent to the Act in London, there remained a question about the validity of the Act and in 1924 the High Court considered the matter. Isaacs J expressed doubts about the Act on the ground that since the Governor-General had given his assent he was *functus officio* and

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[168] Solicitor-General Knowles to East, 6 February 1935 in NAA: 432/85, 1936/296.
[169] Evatt, above n 144, 3–6. The problem had been raised in 1929 and was thought to be the only matter 'in which the Commonwealth had seriously encountered the supremacy of British legislation…' See *1929 Report*, above n 26, 33 [19].
[170] *Empire Shipping Co Ltd v Owners of the Ship Shin Kobe Maru* (1991) 32 FCR 78, 87 (Gummow J).
[171] Instructions to the Governor-General, 29 October 1900 in Australia, *Statutory Rules made under Commonwealth Acts from 1901–1956* (Butterworth & Company, vol v, 1960) 5311, cl vii.
[172] *Colonial Courts of Admiralty Act 1890* (UK) s 4. The reservation requirement also applied to colonial legislation authorized by the *Merchant Shipping Act 1894* (UK) s 735(1).
[173] See the detailed statement on the reservation of the Navigation Bill 1913 in Commonwealth, *Gazette*, No 70, 24 October 1913, 2896.
[174] Commonwealth, *Gazette*, No 91, 7 November 1914, 2472.
[175] *Judiciary Act 1914* (Cth) s 3, inserting s 30A.
[176] Colonial Office to Law Officers, 27 January 1915, in D P O'Connell and Anne Riordan, above n 77, 245–46.
[177] Commonwealth, *Gazette*, No 166, 16 November 1916, 3133.

could not reserve the Bill at all.[178] The other members of the Court did not agree, holding that the legislation was sustained by the *Colonial Courts of Admiralty Act 1890* (UK).[179] Dixon J followed the majority view in 1939,[180] and in any case the 1914 Act was repealed and replaced in the same year.[181] It was explained at the time that the 1939 Act was passed to allay any doubts about the validity of the 1914 Act and also to ensure that both State and Commonwealth courts could exercise an admiralty jurisdiction.[182]

Although it was accepted in 1929 that the requirement under certain legislation that the assent be reserved for the Queen or King was obsolete,[183] it nevertheless persisted in the absence of the adoption of s 6 of the *Statute* that removed the reservation requirement imposed by the *Colonial Courts of Admiralty Act 1890* (UK). In 1939, for example, an amendment to the *Judiciary Act 1903* (Cth) was reserved for His Majesty's pleasure on 9 September, but the Royal Assent was only given on 23 November.[184] As the war went on, the sense of urgency increased, while the British proved dilatory in giving their assent to reserved Commonwealth enactments. Attorney-General Evatt complained in October 1942 that although the Navigation Bill had been passed on 4 June 1942,[185] it was not yet in force four months later because it was awaiting the assent in London.[186] Indeed, it was only seven months after the Bill passed through the Commonwealth Parliament that it finally received the assent in London.[187]

Unsurprisingly, Evatt thought that the doctrine served no useful purpose for, in practice, the King would never refuse his assent. Therefore, he urged the Parliament to adopt the *Statute* to remove this obstacle to the efficient exercise of Commonwealth legislative power.[188] This, and earlier examples of the legal constraints on Commonwealth law making, demonstrates that there were significant legal and therefore practical limitations to the legislative independence of the Commonwealth before 1942. These limitations were real, not illusory, and given the Australian commitment to constitutional legality, they tell against the argument that the Commonwealth was practically or effectively independent in legislative matters between 1931 and 1942. In short, practical or effective legislative independence was not an adequate substitute for legal independence.

XII CONCLUSIONS

This paper has argued that in both law and in practice the Commonwealth lacked legislative independence from the United Kingdom before 1942. It showed not only the actual legislative limitations on the Commonwealth parliament in the 11 years between

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[178] *John Sharp Ltd v The Ship Katherine Mackall* (1924) 34 CLR 420, 429–31.
[179] Ibid 425 (Knox CJ and Gavan Duffy J), 433 (Starke J)
[180] *Nagrint v The Ship "Regis"* (1939) 61 CLR 688, 692.
[181] *Judiciary Act 1939* (Cth) s 3.
[182] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 September 1939, 162.
[183] *1929 Report,* above n 26, 11 [33].
[184] *Judiciary Act 1939* (Cth). For other acts between 1931 and 1942 that were reserved see the *Navigation (Maritime Conventions) Act 1934* (Cth) and the *Navigation Act 1935* (Cth).
[185] Commonwealth, *Votes and Proceedings of the House of Representatives*, Parl Paper No 86 (3 and 4 June 1942) 367.
[186] H V Evatt, above n 144, 14 [76]. See also at page 21 app F where he attaches a chart documenting the delay in securing the assent to reserved acts between 1912 and 1942.
[187] Commonwealth, *Gazette*, No 31, 10 February 1943, 431; *Navigation Act 1942* (Cth).
[188] H V Evatt, above n 144, 13 [69].

1931 and 1942, but also how the conventions established in the period 1926–1931, while useful, did not solve all of the legal problems faced by the Commonwealth, especially after 3 September 1939. A formidable array of Australian legal talent was brought to bear on the *Statute* from 1926 to 1942 and their arguments in the context in which they found themselves should not be lightly dismissed. No one at the time supposed that as a matter of law the Commonwealth enjoyed legislative independence between 1931 and 1942.

The errors of the advocates of 1931 as the date of Commonwealth legislative independence were legal, historical and conceptual. First, they may have not appreciated the state of the law between 1931 and 1942 and the significance of the problems that arose, in both a legal and practical sense, of not adopting the *Statute* before 1942. The noteworthy characteristic of the process of formulating and implementing the *Statute* was the steadfast, methodical and cautious adherence to legality and the rule of law. Even the Irish, who were anxious to reduce the legal connection with Britain, did so by legal means, as did the other Dominions. In short, the law mattered and as events showed, especially after 1939, the legal restrictions proved to be onerous and obstructive. Second, the proponents of 1931 supposed that constitutional conventions were an adequate substitute for the formal adoption of the *Statute*, when in fact learned opinion at the time and actual experience held otherwise. Third, their view embodies a rather odd paradox: that the retention of legislative fetters on a voluntary basis was somehow evidence of independence, when in law and in fact it denoted continuing dependence. This view was the result of confusing potential independence with actual legislative independence. In the light of the history and the law, the safest conclusion is that the adoption of the *Statute* in 1942, made operative from 3 September 1939, marked the true legislative independence of the Commonwealth. Thereafter, the Commonwealth did not need, with rare exceptions provided for in the *Statute* itself, British legislative help to pass legislation for the Commonwealth.

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HELPING STATES HELP THEMSELVES: RETHINKING THE DOCTRINE OF COUNTERMEASURES

Are countermeasures an effective means of resolving disputes between states?

ELIZA FITZGERALD*

The international law doctrine of countermeasures was formulated by international jurists to provide a lawful means by which states could respond to violations of their rights without provoking retribution or resorting to external means of enforcement. This paper critically analyses the theoretical value of countermeasures in safeguarding international peace and stability in light of the lukewarm responses to the doctrine by states. It examines the sparse precedent of states invoking the doctrine, as well as comments from various governments upon the International Law Commission's attempts to codify the doctrine, and subsequently identifies a number of key failings that problematise the use of countermeasures. This paper concludes that countermeasures, as presently formulated, suffer from being both overly restrictive and too uncertain in their application, leaving states unwilling to risk committing a prima facie wrongful act. Attempts to remedy this by either further codifying the doctrine's elements or giving their application greater flexibility seem unlikely without more discourse in the international legal community about the failings of the doctrine, which prevent it from effectively serving as a self-help tool of peaceful enforcement for states.

Perhaps the most common criticism lobbed at international law, and the rules and organisations that comprise it, is that its effects are felt primarily in the realms of academia and bureaucracy, and are divorced from the real actions and reactions of states. The state responsibility doctrine of countermeasures is a particularly good illustration of this criticism. This doctrine allows a state which has had its rights breached by another to temporarily derogate from its international obligations in order to compel the other state's compliance. Formulated by jurists and the International Law Commission ('*ILC*') in order to allow states to protect their international rights without escalating the conflict or resorting to external assistance, countermeasures appear on paper to have an immense potential to contribute to international peace and stability as a coercive force and a state self-help mechanism. Yet in reality, countermeasures appear to have failed to fulfil this potential. Despite existing in a relatively consistent form for at least fifty years, the instances in which the doctrine has been invoked by states are few, and only one of these invocations was successful: the *Air Service Agreement of 27 March 1946 (United States of America v France)*.[1] Since that arbitration, the elements of countermeasures have been defined by the ILC and applied by the International Court of

* BA (Macq), LLB (Hons) (Macq). This article was originally submitted as an Advanced Legal Research Project under the supervision of Professor Natalie Klein.

[1] *(Awards)* (1978) 18 R Int Arb Awards 417 (*´Air Service*').

Justice ('*ICJ*').[2] It is clear that countermeasures are a settled, authoritative legal doctrine. However, the increased certainty provided by codification has not resulted in a corresponding increase in use.[3] Clearly, there is a disjuncture between the theoretical purpose of countermeasures and the practical reality of interstate relations. This paper will critically examine the elements of countermeasures in an attempt to identify the factors which collectively account for the failure of the widespread use of the doctrine. It will posit that the utility of countermeasures is extremely limited, despite their theoretical value for the maintenance of rights and obligations of states in the decentralised international legal system. The elements of countermeasures must be reconceived if they are to have any ongoing relevance in international relations and live up to their promise of facilitating state self-help and avoiding conflict.

This paper is structured in four sections. Firstly, it will outline the historical emergence of the doctrine of countermeasures from the law of state responsibility, and explain how its elements were formulated with the primary rationale of creating a self-help mechanism for states to defend and enforce their international rights. Secondly, it will examine the most significant decisions by international courts and tribunals concerning invocations of the doctrine, as well as the separate World Trade Organization form of countermeasures, and subsequently identify why the United States in the *Air Service* arbitration succeeded in making out the elements of countermeasures where other states have failed. Thirdly, it will propose several key reasons that may explain why countermeasures have failed to effectively meet the needs of states, and analyse them to provide a picture of the flaws inherent in the doctrine. Finally, this paper will present a revised concept of how countermeasures can realistically contribute to international relations, which will include an explanation of what must be altered in order to address the doctrine's flaws and maintain its viability in international law.

This analysis has a positivist theoretical underpinning, adopting the conception of law as deriving its validity from accepted rules of recognition.[4] Specifically, this paper adopts a soft positivist conception which recognises that normative or policy factors may determine validity so long as those factors are prescribed by a rule of recognition.[5] Further, this paper accepts the positivist 'Separation Thesis': that the questions of what law is and what law ought to be are separate. That countermeasures as prescribed by the ILC are valid law is not at issue; the focus of this paper is rather to assess the effectiveness of the doctrine and hence make proposals for reform.[6] The effectiveness of countermeasures will be measured against the standard of Oppenheim's positivist goals of international law, as outlined by Kingsbury: specifically, how well the doctrine contributes to the peaceful settlement of international disputes.[7]

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[2] International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Agenda Item 162, Supp No 49, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex ('*RSIWA*'); *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 55–7 [82]–[87] ('*Gabčíkovo-Nagymaros*').
[3] Mary Ellen O'Connell, 'New International Legal Process' (1999) 93 *American Journal of International Law* 334, 349.
[4] Tai-Heng Cheng, 'Making International Law Without Agreeing What It Is' (2011) 10 *Washington University Global Studies Law Review* 1, 21–2.
[5] Ibid 23.
[6] Ibid.
[7] Benedict Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 *European Journal of International Law* 401, 430–31.

I HISTORY AND ELEMENTS OF COUNTERMEASURES

Countermeasures are defined as the non-performance of State A's international obligations towards State B, where State B is responsible for a prior internationally wrongful act, for the purpose of inducing State B to again comply with its international obligations.[8] Thus, they are one of several doctrines, including self-defence, necessity and consent, which may give lawful justification for what would otherwise be a breach of international law.[9] The current law on countermeasures derives from two recent and authoritative sources: the ILC's *Articles on Responsibility of States for Internationally Wrongful Acts* (*RSIWA*), adopted by the General Assembly in 2001, and the 1997 *Gabčíkovo-Nagymaros* case. Together, they present a consistent and definitive picture of the elements of the doctrine. Indeed, they have a reciprocal relationship — the ILC's commentary on the *RSIWA* cites the relevant section of *Gabčíkovo-Nagymaros*,[10] and the ICJ referred to an earlier version of the *RSIWA* that is substantively identical to the final provisions.[11] However, the doctrine is not a recent invention. It developed from other unilateral forms of coercion that gained traction after the use of force, as a means of redressing wrongs and enforcing laws in the international legal system, was banned in the UN Charter.[12] In particular, the concept of non-armed reprisals bears a degree of resemblance to countermeasures, as it is also a victim state's temporary non-performance of an international obligation towards an oppressor state.[13] The doctrine of countermeasures is distinguished from these previous remedies because of its purely coercive, rather than punitive, purpose and its strict, clearly-defined elements. As a preliminary to these elements, it should be noted that the ILC and ICJ conceptions of countermeasures are confined to interactions between states, and that countermeasures cannot operate to justify breaches of *jus cogens* norms, including the prohibition on the use of force. Thus, countermeasures in their current form are essentially unilateral and non-violent.

Because countermeasures are, by definition, an otherwise wrongful act rendered lawful, there were concerns that they would be open to abuse by states seeking to flaunt international law without consequence.[14] Hence, countermeasures were developed with strict procedural and substantive conditions which must be met. In drafting Chapter II of the *RSIWA*, the ILC was concerned with ensuring that countermeasures were clearly restricted so as to remain 'within generally acceptable bounds'.[15] Accordingly, in order for an act to constitute a lawful countermeasure, it must satisfy five conditions, both procedural and substantive. Firstly, it must be in response to an internationally wrongful act.[16] Therefore, the wrongful act must be attributable to a state. Secondly, before taking the countermeasure, a state must first have attempted to resolve the dispute through

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[8] See, eg, *RSIWA*, UN Doc A/RES/56/83, art 49.
[9] Omer Yousif Elagab, *The Legality of Non-Forcible Counter-Measures in International Law* (Oxford University Press, 1988) 3; *RSIWA*, UN Doc A/RES/56/83, arts [21], [25], [20].
[10] 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' [2001] II(2) *Yearbook of the International Law Commission* 31, 130–1, 134–6 ('*ILC commentaries*').
[11] *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 55 [83].
[12] Elizabeth Zoller, *Peacetime Unilateral Remedies: An Analysis of Countermeasures* (Transnational Publishers Inc, 1984) 4–5; *Charter of the United Nations* art 2(4).
[13] Zoller, above n 12, 35–46, citing *Naulilaa Arbitration (Portugal v Germany) (Judgement)* (1928) 2 UNRIAA 1011, 1026 ('*Naulilaa*').
[14] *ILC commentaries*, above n 10, 129.
[15] Ibid 128.
[16] *RSIWA*, UN Doc A/RES/56/83, art 49(1).

offering to negotiate in good faith.[17] As a part of this process, the invoking state must explicitly call upon the wrongful state to discontinue its wrongful conduct, or to make appropriate reparations.[18] Thirdly, the countermeasure must be proportionate to the harm suffered as a result of the wrongful act to which it is addressed.[19] An assessment of proportionality is a measure of both the quantitative and qualitative. It involves the weighing-up of the injury from the initial wrongful act with the injury from the countermeasures, as well as consideration of 'the rights in question' — a broad concept which encompasses the importance of the principle that is threatened by the wrongful act, and the effect of the wrong upon the rights of all affected states — a much more intangible form of harm.[20] Fourthly, the express purpose of the countermeasure must be to induce another state to comply with its international obligations.[21] Fifthly, the countermeasure must be reversible.[22] This requirement ensures that countermeasures do not have a lasting effect upon international obligations, because they do not operate to terminate them; rather they operate to temporarily suspend the obligation to perform.[23] Thus, the doctrine has been formulated in order to ensure that it promotes international peace and stability.

A *Purposes of Countermeasures*

The body of scholarship on countermeasures presents a relative consensus on the key function which the doctrine is intended to serve: the self-help of states.[24] Countermeasures are sometimes characterised as a form of reparation, but they are more accurately defined as an international law enforcement mechanism.[25] The need for effective coercion is pressing in a system where there is no compulsory judicial settlement of disputes and use of force except in self-defence is prohibited; discussions of this issue stem back to the dawn of the modern international law system itself.[26] Unlike municipal law systems, international society lacks an organised, systematic agent of enforcement.[27] It is incorrect to suggest that international law does not have any vertical mechanisms of enforcement, given that states can seek measures such as collective sanctions and security regimes facilitated by authoritative international bodies such as the UN Security Council. But these mechanisms are flawed in ways that horizontal enforcement mechanisms undertaken unilaterally by states are not. For one, initiating actions under, for example, Chapter VII of the UN Charter is usually subject to time-consuming, highly political, and restrictive procedures.[28] In contrast, unilateral actions by states are not subject to veto or potential modifications as a result of negotiations with other states whose interests or sympathies may be in conflict with

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[17] Ibid art 52(1).
[18] Ibid.
[19] Ibid art 51.
[20] *ILC commentaries*, above n 10, 135; *Air Service*, (1978) 18 R Int Arb Awards 417, 443–44 [83]; *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 56 [85]–[86].
[21] *RSIWA,* UN Doc A/RES/56/83, art 49.
[22] Ibid art 49(3).
[23] *ILC commentaries*, above n 10, 71.
[24] See, eg, Zoller, above n 12; David J Bederman, 'Counterintuiting Countermeasures' (2002) 96 *American Journal of International Law* 817, 818; David E Pozen, 'Self-Help and the Separation of Powers' (2014) 124 *Yale Law Journal* 2, 54.
[25] Zoller, above n 12, 95.
[26] Ibid xi–xiii.
[27] Ibid xii.
[28] Bederman, above n 24, 831.

those of the injured state.[29] Interventionism is not undertaken lightly; other states and intra-state organisations may well be unwilling to interfere in a dispute that directly concerns only a few states, risking repercussions for their own position. This is not to suggest that these enforcement mechanisms are ineffective and should be abandoned, but that they alone cannot compel respect for international law and the rights of states.[30] Countermeasures were developed in response to this need for horizontal enforcement mechanisms, especially where the dispute does not rise to the level of seriousness required to invoke violent reprisals. The ILC developed the articles on countermeasures with a view to their use in situations where a state has been injured but does not have guaranteed access to an impartial and just dispute settlement process. This can occur through the lack of an international court or tribunal with the necessary jurisdiction and authority to effectively protect the state's rights, or through the wrongful state's refusal to submit to the process in good faith.[31] Art 52 specifies that dispute resolution procedures displace the need for countermeasures, thereby illustrating this aim. Thus, countermeasures affirm state sovereignty, allowing a state to take unilateral action to protect and enforce its international rights through legitimate coercion.

It is clear that countermeasures have the potential to carry non-violent coercive power by restoring equality of position between the parties.[32] A state that derogates from its obligations towards another state is presumably acting in self-interest, as a result of considering the advantages and disadvantages of the wrongful act. Thus, it has a more pressing incentive to commit the wrong than to comply with international law. Because the injured state is the only one being significantly disadvantaged from the wrong, it may be the only one making real efforts to negotiate a solution or to submit the dispute to arbitration.[33] The wrongful state, having made a choice to commit the wrong in the first place, likely has insufficient incentive to resolve the dispute. Apart from a desire to maintain amicable relations, there is little to motivate a state to submit to dispute resolution processes if there is no real risk of injury.[34] International arbitration and other dispute resolution mechanisms cost money and time, and the risk of an adverse judgement could cost even more — both in terms of money and the state's pride or reputation.[35] Countermeasures allow the injured state to restore the balance so that the resumption of compliance with international obligations is in the best interests of both states. They constitute an explicit demonstration that, unless the wrongful state resumes compliance, it will not have its own rights respected and will suffer loss accordingly. Indeed, the mere existence of countermeasures as a potential consequence of derogation from international rules can be coercive, restraining the conduct of states that would otherwise breach international obligations with impunity.[36]

Yet to permit states to derogate from their international obligations whenever they judge that they have been wronged is to open the door to a chaotic and unstable international society. The goal of countermeasures is not merely to give states another weapon for

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[29] Laurence Boisson de Chazournes, 'Economic Countermeasures in an Interdependent World' (1995) 89 *Proceedings of the Annual Meeting, American Society of International Law* 337.
[30] Bederman, above n 24, 818.
[31] *ILC commentaries*, above n 10, 136 [2].
[32] Zoller, above n 12, 47.
[33] Lori Fisler Damrosch, 'Retaliation or Arbitration – or Both? The 1978 United States–France Aviation Dispute' (1980) 74 *American Journal of International Law* 785, 798.
[34] Ibid.
[35] Ibid.
[36] Bederman, above n 24, 824.

asserting their rights, but to contribute to international peace and stability — creating what Bederman calls a 'polite international society'.[37] The strict conditions attached to the use of countermeasures are to ensure that their use remains consistent with this overarching purpose. The obligations to notify and negotiate about the countermeasures with the wrongful state before taking them, and to ensure that the countermeasures are reversible and proportionate, ensure that any damage done to the relations between states through the exercise of countermeasures is limited. Countermeasures were not formulated to provide an excuse for any bad behaviour; they attempt to ensure as far as possible that, even where a state's wrongful acts are justified as a measure of enforcement of international rights, these acts do not themselves become sources of strife. The fact that the ILC does not permit the invocation of countermeasures to justify the suspension of performance of obligations pertaining to dispute resolution proceedings between the invoking and wrongful states underlines that countermeasures are intended to be inherently a dispute resolution tool.[38] If countermeasures could be used to subvert other international dispute resolution processes, they would destabilise established modes of negotiation and arbitration, causing less regulation and compliance overall. However, this requirement appears to be based upon the treaty law rule that dispute settlement provisions within a treaty remain in force even if the treaty's validity or effectiveness itself is in dispute.[39] It could therefore be argued that this requirement speaks only of the ILC's concern in maintaining consistency between the *RSIWA* and other relevant international law rules. Nonetheless, it evidences that, in the development of the *RSIWA*, a high regard was placed upon the principle of the peaceful and effective resolution of disputes. Thus, it is apparent that countermeasures have both a specific and a broad purpose. First and foremost, countermeasures are understood as a horizontal law enforcement mechanism that can be used by individual states to protect their international rights; in brief, they have a self-help purpose.[40] As a result of this primary purpose, they contribute — on paper — to the effective resolution of international disputes, and therefore to a peaceful international society in which states generally afford respect to each other's rights. However, this secondary purpose has caused several restraints to be placed upon their use in order to prevent interference with other international dispute resolution mechanisms.

II PRECEDENT OF INVOCATIONS OF COUNTERMEASURES

A *The* Air Service *Arbitration*

An examination of the sole case where countermeasures have been successfully invoked reveals their potential effectiveness in facilitating the quick resolution of disputes, and that the concept of proportionality cannot realistically be applied inflexibly. The *Air Service* arbitration concerned a reciprocal agreement between the United States and France that granted each state the right to conduct certain air services in the other state's air space.[41] The dispute arose when Pan Am, a US carrier, decided to schedule a switch in

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[37] Bederman, above n 24, 819.
[38] *ILC commentaries*, above n 10, 133[11]; *RSIWA,* UN Doc A/RES/56/83, art 50(2)(a).
[39] *ILC commentaries*, above n 10, 133[13], citing *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan) (Judgment)* [1972] ICJ Rep 46, 53.
[40] Enzo Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 *European Journal of International Law* 889, 893.
[41] Christopher Greenwood, 'The US–French Air Services Arbitration' (1979) 38 *Cambridge Law Journal* 233, 233–234.

the model of aircraft used — known as a 'change of gauge' — at the London stopover on the West Coast–Paris route. Whilst the 1946 agreement permitted changes of gauge to be done in either the US or France, it was silent on changes in third party states. France objected to Pan Am's proposed change of gauge, alleging that it was unlawful because it was not permitted by the Agreement. When Pan Am proceeded to conduct the change of gauge regardless, French *gendarmes* surrounded a Pan Am plane on the runway and refused to allow its passengers or freight to be disembarked.[42] Pan Am's flights under the Agreement were subsequently suspended.[43] This action taken by France in blocking Pan Am from flying the agreed routes constitutes the initial wrongful act. In response, amid negotiations about having recourse to arbitration, the US Civil Aeronautics Board ordered that Air France was to be prevented from operating its thrice-weekly flights along the Los Angeles–Montreal–Paris route for the period during which Pan Am was barred from operating its West Coast–London–Paris flights.[44] It is this order that forms the substance of the US's countermeasures. However, the order was never carried out, as a *Compromis* of arbitration was written and signed by the parties on 11 July 1978 — one day before the order was to take effect.[45] It was a term of the *Compromis* that Pan Am be permitted to operate the West Coast–London–Paris flights with the change of gauge until such time as the Tribunal issued alternative orders.[46]

The Tribunal, constituted by a representative from each party and a third, impartial president — Dutch scholar Willem Riphagen — was convened to determine two questions: whether the London change of gauge was permitted under the 1946 agreement, and whether the US had a right to issue the order.[47] The first question was answered in the affirmative, although the French arbitrator, Paul Reuter, dissented.[48] However, the question of the lawfulness of the US's response was answered unanimously.[49] In Question B, the Tribunal considered arguments made by France and the US pertaining to issues which are now recognisable as codified elements of lawful countermeasures under *Gabčíkovo-Nagymaros* and the *RSIWA*. One major point of dispute between the parties was whether the US's suspension was proportionate to France's alleged breach. Facts which France claimed pointed to disproportionality were that the denial of a right to commence a new service is different in value to the interruption of an existing undisputed service, and that each act would have had different economic consequences.[50] However, the Tribunal's reasoning makes it clear that proportionality does not mean equivalence. Instead, they stated that any calculation of proportionality of countermeasures must not merely account for the injuries suffered by each party, but 'also the importance of the questions of principle arising from the alleged breach.'[51] Given that the change of gauge issue was a significant part of the United States' air transport policy, and accordingly of a large number of international agreements with other countries, any disruption or challenge to the status quo of one such agreement could have ramifications far beyond the 1946 Agreement.[52] This

[42] *Air Service*, (1978) 18 R Int Arb Awards 417, 420 [4].
[43] Ibid.
[44] Ibid 421 [8].
[45] Ibid 421–2 [9].
[46] Ibid 422.
[47] Ibid.
[48] Ibid 447–8.
[49] Ibid.
[50] Ibid 427–8 [17].
[51] *Air Service*, (1978) 18 R Int Arb Awards 417, 443–4 [83].
[52] Ibid; Damrosch, above n 33, 792.

consideration overrode the disproportionate factors to which France pointed. The Tribunal's decision makes it clear that all the circumstances of the case must be taken into account when assessing proportionality, and that states invoking countermeasures do not have to establish perfect proportionality, where the effects of the measures correspond directly and precisely to those of the breach. It also situates the taking of unilateral countermeasures in a wider context of state relations, by establishing that considerations of principle are given further weight when the actions of non-party states could be affected.[53] Thus, in *Air Service*, countermeasures were characterised as having the ability to safeguard the observance of legal principles among all states that subscribe to them — not merely between the two states directly concerned. The case provides an example of the invocation of countermeasures in a bilateral dispute being used to promote international stability more broadly.

The Tribunal also considered France's arguments that the US did not have the right to take countermeasures whilst negotiations about arbitral procedures were ongoing — an argument that evokes the duty to negotiate before taking countermeasures in art 52(1) of the ILC *RSIWA*. It found that the presence of an arbitration clause in the agreement did not preclude the taking of countermeasures before the Tribunal was constituted and in a position to give measures of protection.[54] It reasoned that countermeasures may facilitate resolution of disputes through arbitral or judicial settlement procedures by 'balancing the scales' of damage suffered, giving the wrongdoing state a real interest in the quick resolution of the dispute, and hence in cooperating in dispute resolution procedures.[55] However, the Tribunal made a distinction between potential arbitral or judicial proceedings, and proceedings that will remove the justification for countermeasures by giving states recourse to alternative modes of international enforcement.[56] The Tribunal must be in a position to act on the dispute, in the form of prescribing appropriate interim protective measures, before the state's right to take countermeasures is excluded.[57] This finding is now codified in art 52(3)(b), which provides that countermeasures must be abandoned once judicial proceedings are pending in a forum that has binding authority over the parties. Thus, so long as a state is not in a position where an external mechanism can take action to protect the state's threatened rights, it is still entitled to protect itself through countermeasures. In this respect, the Tribunal demonstrated a clear understanding of the value of countermeasures in encouraging the resolution of disputes, and elucidated the relationship between them and other international dispute resolution proceedings. The picture painted of the doctrine by the *Air Service* arbitration is of a useful means of encouraging cooperative, quick and effective negotiation and arbitration.

B *The* Gabčíkovo-Nagymaros *Dams Case and Other Unsuccessful Invocations*

Analysing the unsuccessful invocations of the countermeasures doctrine reveals which elements have been the most difficult to make out, as well as further subtleties in how states view the doctrine. Arguably the most significant invocation, given that it gave the ICJ its best opportunity to date to examine and apply the doctrine, is the *Gabčíkovo-*

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[53] Damrosch, above n 33, 792.
[54] *Air Service*, (1978) 18 R Int Arb Awards 417, 443 [80], 444 [84]–[99].
[55] Ibid 444 [95]; Damrosch, above n 33, 800.
[56] *Air Service*, (1978) 18 R Int Arb Awards 417, 444 [94].
[57] Ibid 444 [95]-[96].

Nagymaros Dams case in 1998. Hungary and Slovakia were engaged in a dispute over Hungary's breach of a treaty (originally concluded with Czechoslovakia and succeeded to by Slovakia upon the dissolution of that state) that governed the construction of a joint hydroelectric project on a part of the river Danube shared by both nations. That Hungary had *prima facie* breached the treaty in suspending and later abandoning work on the project was not in dispute. Slovakia claimed that Czechoslovakia's acts of diverting the Danube and constructing alternative works — known as 'Variant C' — were valid countermeasures in response to Hungary's breach. Whilst Slovakia originally tried to argue that Variant C was lawful, when the Court concluded that these actions were *prima facie* unlawful, countermeasures were raised as an alternative argument.[58] Thus, Variant C does not appear to have been deliberately taken as a countermeasure; rather, the alternative argument structure suggests that the invocation of countermeasures was a result of Slovakia searching for some legal justification for the conduct after the fact.

The countermeasures passed the first two elements easily; it was 'clear' that Variant C was in response to Hungary's internationally wrongful act of violating the treaty, [59] and Czechoslovakia had requested Hungary's resumption of its treaty obligations 'on many occasions', to no effect, before Variant C was implemented. [60] The point on which Slovakia failed was proportionality.[61] The Court defined the proportionality assessment as a comparison between the effects of the countermeasure and the initial injury, 'taking account of the rights in question'.[62] Unlike the *Air Service* Tribunal, the Court did not specifically mention the relevance of the principle at stake. The Court found that the Danube was a natural resource to which Hungary had a right to have an equitable and reasonable share. Czechoslovakia's unilateral diversion of the Danube deprived Hungary of this rightful share. Furthermore, the diversion had ongoing effects upon the ecology of Hungarian land.[63] By the Court's calculus, these effects outweighed Czechoslovakia's losses from Hungary's failure to complete construction of the project. However, Judge Vereschetin dissented on this point, criticising the Court for not 'compar[ing] like with like'.[64] By this, he meant that the Court should have weighed equivalent consequences of the breach and the countermeasure against each other, considering the financial consequences, environmental consequences, and the effects upon each state's right to equitable use of the shared watercourse seperately.[65] It has been argued that the Court failed to give the proportionality analysis the depth of reasoning it required by conflating these different consequences.[66]

The Court did not consider the reversibility requirement, having already found that the proportionality element was not met. However, the Court's mention of the 'continuing' ecological effects of the Danube's diversion, as well as the separate opinion of Judge Bedjaoui that the measure was 'neither provisional nor deterrent', [67] indicates that Slovakia would have struggled to succeed on this point. The measure had tangible effects

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[58] *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 54 [78].
[59] Ibid 55–56 [83].
[60] Ibid 56 [84].
[61] Ibid 56–57 [87].
[62] Ibid 56 [85].
[63] Ibid.
[64] Ibid 244 (Judge Vereschetin).
[65] René Lefeber, 'Case Analysis: The Gabčíkovo-Nagymaros Project and the Law of State Responsibility' (1998) 11 *Leiden Journal of International Law* 609, 618.
[66] Ibid.
[67] *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 131 [52] (Judge Bedjaoui).

upon a natural environment, the value of which is not easily measured in monetary terms or easily repaired once damaged. This illustrates the difficulty involved in taking countermeasures; if they have any effect beyond economic loss or the rights of the state that directly correspond to the rights infringed by the initial wrong, then both proportionality and reversibility are difficult to meet.

The other primary international cases that are usually cited as relevant precedent for countermeasures actually concerned belligerent reprisals. In the 1930 *Portuguese Colonies* Award,[68] known as the *Cysne* case, Germany used armed force to attack a Portuguese ship in retaliation against Great Britain's breach.[69] *Cysne* is cited by the ILC as evidence for the requirement that countermeasures must be directed against the responsible state, although injury to the rights of nationals of third states may be unavoidable. Germany failed to defend its actions as lawful because it impermissibly directed its reprisal against a third state, and not against Great Britain.[70] Similarly, the *Naulilaa* arbitration between Germany and Portugal concerned armed reprisals, but nonetheless established several essential requirements of lawful reprisals that were later applied to countermeasures: that they must be directed against a prior internationally wrongful act, that they must be preceded by a demand for compliance and/or reparation, and that they must be proportionate to the wrong.[71] Germany failed to establish all three of these elements. Finally, the United States unsuccessfully attempted to raise countermeasures as a defence to its actions in supporting insurgents within Nicaragua in the *Military and Paramilitary Activities in and against Nicaragua* case.[72] Again, these actions clearly did not constitute countermeasures because they involved the use of force and were in response to Nicaragua's unlawful conduct against El Salvador, not against the United States.[73]

Additionally, there have been several unsuccessful invocations in the context of international investment law.[74] Notably, the case of *Corn Products International Inc v The United Mexican States* concerned a tax imposed by Mexico on High Fructose Corn Syrup products that were flooding the market and affecting the Mexican sugar industry.[75] When Corn Products International sued Mexico, Mexico claimed that the tax constituted a countermeasure. This argument failed because it was found that the countermeasure was directed against an investor, and not against a state, thus violating art 49 of the *RSIWA*.[76] This case further restricted the scope of countermeasures, because the Tribunal interpreted the ILC's commentary that countermeasures do not

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[68] *Execution of German-Portuguese Arbitral Award of June 30th, 1930 (Germany v Portugal) (Award)* (1933) 3 UNRIAA 1371.
[69] Junianto James Losari and Michael Ewing-Chow, 'A Clash of Treaties: The Legality of Countermeasures in International Trade Law and International Investment Law' (Paper presented at the Fourth Biennial Global Conference of the Society of International Economic Law, World Trade Institute, University of Bern, 10–12 July 2014) 4.
[70] *ILC commentaries*, above n 10, 76.
[71] *Naulilaa,* (1928) 2 UNRIAA 1011.
[72] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 ('*Nicaragua*').
[73] Ibid 127 [248]-[249].
[74] *Cargill Inc. v Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/05/2, 18 September 2009); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico (Award)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/5, 21 November 2007).
[75] *(Decision on Responsibility)* (ICSID Arbitral Tribunal, Case No ARB(AF)/04/1, 15 January 2008) ('*Corn Products* Case'); Losari and Ewing-Chow, above n 69, 12-13.
[76] *Corn Products* Case, ICSID Arbitral Tribunal, Case No ARB(AF)/04/1.

justify the violation of a third state's rights as applying to the rights of all third parties.[77] Clearly, the unsuccessful invocations of countermeasures outnumber the single successful *Air Service* arbitration.

C *Why Are WTO Countermeasures Relatively Successful?*

It must be noted that there is one area of international law where countermeasures are successfully used with some regularity, namely, disputes that arise under World Trade Organization ('*WTO*') agreements.[78] However, these countermeasures are a specialised form that operates under a distinct legal regime, and examining their characteristics elucidates why they are more appealing to states than the broader 'ILC Countermeasures' that are the main focus of this paper. There are numerous examples of countermeasures being employed under the *lex specialis* of the WTO Dispute Settlement Understanding.[79] For example, in *US – Upland Cotton*,[80] the United States breached a trade agreement with Brazil by placing subsidies on cotton. In response, Brazil was authorised to impose additional customs duties upon medical products, food and arms.[81] In another case, *US – Gambling*,[82] the US imposed limitations on market access to gambling and betting services that were not specified in its General Agreement on Trade in Services (GATS) Schedule. As a result, the WTO Dispute Settlement Board ('*DSB*') authorized Antigua to impose a countermeasure in the form of suspending its protection of intellectual property rights towards US nationals.[83] In both cases, the parties subsequently arrived at an agreement that resolved the dispute; in *US – Upland Cotton,* it included the paying of reparations by the US. There are several other cases where WTO countermeasures have been used, many of which have been decided after 2000.[84] They exemplify the creative and effective ways in which countermeasures can facilitate cooperation and resolve disputes; but they cannot be used as demonstrative of the success of the broad ILC doctrine.

The most striking difference is that WTO countermeasures must be first authorised by the WTO DSB, and are subject to review from that body.[85] Thus, they are not purely horizontal measures of self-help, as they require the state to submit to vertical authority. Further, the WTO panel's 2000 report on the *United States — Import Measures on Certain Products from the European Communities* dispute, it was stated that

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[77] Ibid 76–77 [163]–[164].
[78] *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).
[79] *Marrakesh Agreement Establishing the World Trade Organization,* opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*DSU*').
[80] Recourse to Article 22.6 Arbitration Report, *United States – Subsidies on Upland Cotton*, WTO Doc WT/DS267/ARB/2 (31 August 2009) ('*US – Upland Cotton*').
[81] Ibid.
[82] Decision of the Arbitrators, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/ARB (21 December 2007) ('*US – Gambling*').
[83] Ibid.
[84] See, eg, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, WTO Doc WT/DS308/R (7 October 2005) (Report of the Panel); *European Communities — Measures Affecting Trade in Commercial Vessels*, WTO Doc WT/DS301/R (22 April 2005) (Report of the Panel); Decision of the Arbitrator, *United States — Tax Treatment for 'Foreign Sales Corporations'*, WTO Doc WT/DS108/ARB (20 August 2002).
[85] *DSU* arts 3.7, 22.2.

countermeasures authorised by the DSB were 'essentially retaliatory in nature'.[86] This is in stark contrast to the ILC's emphasis on the essentially *coercive* nature of countermeasures.[87] Indeed, the Disputes Settlement Understanding (DSU) specifies elements of WTO countermeasures that override the *RSIWA* as *lex specialis*. For example, under the DSU the injured state must first seek to suspend performance of its obligations within the same sectors as the initial wrong.[88] If this is not practicable, then obligations under different sectors or agreements can be considered.[89] The *RSIWA*, by contrast, do not give any specifications about which obligations ought to make up the substance of countermeasures. The more specific nature of these elements, combined with the aforementioned vertical authorisation of the measures, gives WTO countermeasures a significant degree of certainty that cannot be achieved by ILC countermeasures. The state taking countermeasures is assured, before they breach their legal obligations, that they are acting within their rights and will not subsequently be found responsible for an internationally wrongful act.[90] Further, they are not solely responsible for determining the type and extent of the countermeasures, but are co-authors with the DSB.[91] States have enthusiastically adopted WTO countermeasures because they have little to lose in seeking authorisation from the DSB, and much to gain. Because the highly regulated status of trade disputes transforms them into vertical measures with a high degree of certainty, WTO countermeasures are a different beast to the general doctrine. Their overwhelming success relative to the ILC form is suggestive of the aspects of ILC countermeasures that are unattractive to states — namely, the uncertainty of whether their application will expose the state to responsibility for an international wrong.

III FAILINGS OF COUNTERMEASURES

As the cases discussed above illustrate, it cannot be said that countermeasures are currently contributing to the peaceful settlement of international disputes by facilitating state self-help, for the simple reason that states are not invoking them. This ineffectiveness can be explained by the identification of several consistent factors that separate the successful *Air Service* arbitration and WTO regime from the *RSIWA* and unsuccessful invocations. In brief, the dominant flaws in the doctrine are its strict procedural requirements, the uncertainty of proportionality assessments, its lack of clear applicability to multilateral or non-state actor disputes, its a priori wrongfulness, and the inherent risk it carries of escalating disputes. As will be discussed in this section, there is evidence that each of these flaws has to some extent affected how states perceive the doctrine.

A *Strict Procedural Requirements*

The strict formalism of the *RSIWA* is an antithesis to the reality of how states act in international relations. Whilst each condition imposed upon the invocation of countermeasures has a clear justification that is in line with the goals of international

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[86] *United States — Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/R (17 July 2000) (Report of the Panel) 6.106.
[87] *ILC commentaries*, above n 10, 130.
[88] *DSU* art 22.3(a).
[89] Ibid art 22.3(b), (c).
[90] *DSU* art 22.3; Losari and Ewing-Chow, above n 69, 6.
[91] Ranieri Lima Resende, 'Normative Heterogeneity and International Responsibility: Another View on the World Trade Organization and its System of Countermeasures' (2011) 3 *Goettingen Journal of International Law* 643, 672.

peace and stability, together they present a restrictive, complicated regime that is unattractive to states, as compared with the flexibility of diplomatic negotiation. The ILC, along with numerous states and the UN General Assembly, was concerned with the doctrine's potential for abuse, particularly by strong states.[92] In the past, reprisals — an unrestricted predecessor to countermeasures — were frequently used to compel obedience to a strong state's will, rather than to international obligations.[93] Even with the limitations imposed upon countermeasures, there remained concerns that their unilateral character permitted exploitation by stronger states that were less susceptible to damage.[94] However, these legitimate concerns may have hamstrung the doctrine's usefulness by imposing the conditions of prior notification, negotiation, and reversibility, which are either impractical or interfere with the coercive function of the measures.

The requirement that has been subject to particularly vehement criticism from some states is that states must attempt to engage in negotiation prior to taking countermeasures.[95] Japan raised the point that responsible states are likely to accept an offer to negotiate, which would stymie the countermeasures before they are taken.[96] In some cases, such as *Air Service*, this may well be a positive result; but it is also possible that this could cause two states of unequal bargaining power to negotiate with an unjust outcome, where if countermeasures had been taken the states would have been on a more balanced footing. On that note, the United States made the point that allowing countermeasures whilst negotiations were taking place had the advantage of preventing the wrongful state from controlling the duration of the negotiations.[97] Whilst these points may be countered by art 52's specification that the negotiations must be in good faith, which would prevent the wrongful state from exerting undue control over the process, the United Kingdom argued that this is 'wholly inadequate' because bad faith may not be definitively established for a significant amount of time, during which countermeasures could not be used.[98] Nonetheless, it has been pointed out that negotiations between disputant states are hardly so uncommon as to render this requirement inconvenient or burdensome;[99] indeed, several members of the ILC did not consider that the negotiation requirement was necessary to include because it was so inconceivable that an injured state would ever resort to countermeasures without prior negotiations except in the most extreme circumstances.[100] It is striking that the three states that are so strenuously opposed to the restrictiveness of the *RSIWA* — with the UK even going so far as to call the countermeasures provisions 'wholly unacceptable'[101] — are all 'strong' states that have more financial and political power than the vast majority of

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[92] See, eg, International Law Commission, 48th sess, 2454th mtg, UN Doc A/CN.4/SER.A/1996 (5 July 1996) 155–160 ('*ILC 2454th mtg*'); International Law Commission, 48th sess, 2455th mtg, UN Doc A/CN.4/SER.A/1996 (9 July 1996) 160–166 ('*ILC 2455th mtg*'); *Comments and Observations Received from Governments,* 53rd sess, UN Doc A/CN.4/515 and Add.1–3 (28 June 2001) 84 (Denmark, on behalf of Norway, Sweden, Iceland and Finland), 86 (Japan), 82 (Argentina) ('*2001 Comments and Observations from Governments*'); Pozen, above n 24, 58.
[93] *ILC 2455th mtg*, UN Doc A/CN.4/SER.A/1996, 160 [6]–[8].
[94] International Law Commission, 46th sess, 2366th mtg, UN Doc A/CN.4/SER.A/1994 (13 July 1994) 265[46] ('*ILC 2366th mtg*'); Bederman, above n 24, 831.
[95] *RSIWA,* UN Doc A/RES/56/83, art 52.
[96] *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3 88.
[97] Ibid 89.
[98] Ibid 88-89.
[99] *ILC commentaries*, above n 10, 136 [4].
[100] *ILC 2455th mtg*, UN Doc A/CN.4/SER.A/1996, 161 [14].
[101] *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 88.

other states. This suggests that the negotiation requirement is having the precise intended effect of limiting the ability of powerful states to abuse the doctrine. Nonetheless, these points are legitimate: countermeasures could better ensure compliance with dispute resolution procedures if they were allowed to remain in force during negotiations.

The reversability requirement of art 49(3) is flawed because it suffers from uncertainty. It is difficult to discern how states can ensure that countermeasures do not have irreversible effects; because whilst the measures themselves may be reversible, they are likely to have, at the very least, ongoing economic effects. It is unclear whether Slovakia would have successfully argued that the diversion of the Danube was reversible in *Gabčíkovo-Nagymaros,* because the court did not consider that element upon finding that they had failed on the proportionality element. It may well be possible that the Danube could be re-diverted to its original course — but it seems unlikely that this could be accomplished without ongoing effects upon the environment, and therefore on Hungary's rights. It is unclear to what extent reversibility requires the state taking countermeasures to address the effects of the countermeasures prior to invoking them.

Furthermore, the responsibility to notify the wrongdoing state of the decision to take countermeasures in art 52(1)(b) does not appear to line up with state practice, because states may not explicitly recognise their actions as specific legal remedies until after the fact. Slovakia's failed invocation in the *Gabčíkovo-Nagymaros* case demonstrates that states will only turn to such legalistic doctrines once they have already submitted to international judicial authority. Czechoslovakia — whose conduct in diverting the Danube was succeeded to by Slovakia after the country split — did not explicitly identify the diversion of the Danube and the alternate works as countermeasures before they took them, although it is apparent from the facts that it was motivated by Hungary's failure to participate in the joint construction of works. Instead, the doctrine was raised in their submissions to the ICJ as a defence to Hungary's accusations of breach of their obligations under the treaty. It seems that Slovakia only sought to claim that the diversion of the river was a countermeasure retrospectively. This presents a picture, not of a state knowingly utilising the doctrine to coerce another state into resuming performance of its international obligations, but of a state committing a wrongful act with some notion of lawful reprisals and reciprocity, and only later seeking to apply a definitive rule that would allow it to escape legal consequences for its wrongfulness. Clearly, Slovakia's invocation does not fit the intended scenario whereby an injured state consciously uses the doctrine to push the wrongful state towards compliance with legal norms.

Thus, the restrictive elements of countermeasures go too far because of the fear of abuse, when surely an abusive use of the doctrine — ie countermeasures taken with no prior requests for compliance, or with irreversible effects upon the wrongful state's interests — would not align with the coercive self-help purpose of countermeasures, and thus would be ruled invalid by a court or tribunal. Prior negotiation, reversibility, and notification as formulated by the *RSIWA* all carry pragmatic difficulties which interfere with effective state action and, in the case of negotiation, may actually impair coercion.

B *Proportionality*

Whilst the ILC's codification has somewhat increased certainty in the doctrine of countermeasures, there remains uncertainty in their application as a result of the

requirement of proportionality. Proportionality requires analysis that involves a not insignificant degree of approximation.[102] A state seeking to deploy countermeasures must first determine whether the impact of the potential measures would be excessive when considered in light of the wrong to which they are addressed. The ILC's commentary does recognise that it would be 'virtually impossible' to take countermeasures that precisely match the qualitative and quantitative effects of the initial wrong.[103] Thus, the articles allow some flexibility; there is no need for states to definitively determine proportionality. However, the vagueness with which art 51 explains how proportionality is to be determined leaves much to be desired. Art 51 explains that both the 'gravity of the internationally wrongful act' and 'the rights in question' must be taken into account — but the weight they are to be given is left completely undefined. Furthermore, the 'gravity' of a wrongful act is a highly subjective factor. Whilst the injured state may believe that the wrong poses a grave threat to its rights and to international peace and stability, there is no guarantee that the international community, or an international court or tribunal, will share this view. Such was the predicament of Slovakia in the *Gabčíkovo-Nagymaros* case; in Slovakia's view, the redirection of the Danube in order to complete the works unilaterally was clearly proportionate to the aim of recouping the losses it no doubt suffered as a result of Hungary's failure to carry out construction on the project.[104] However, the ICJ found that Hungary's natural resources rights had been damaged in a way that exceeded Slovakia's injuries, invoking the law governing non-navigational uses of international watercourses. This reveals a further issue: the term 'the rights in question' is so broad as to render it extremely difficult for the state seeking to use countermeasures to consider every relevant right. Clearly, Slovakia had failed to consider the principle that states are entitled to 'perfect equality' in the use of such waterways; or if they had, then they had failed to afford Hungary's rights relevant weight.[105] Spain and the Republic of Korea registered concerns about the clarity of art 51 in their 2001 comments on the *RSIWA*.[106] Spain suggested the addition of more criteria to be used for judging proportionality, and South Korea pointed out that the term 'the rights in question' does not clearly identify to which rights it refers — whether it be those of the injured state, of the wrongful state, of third party states, or of all three.[107] Regarding South Korea's point, the ILC commentary on art 51 does state that all three such rights may be relevant. Nonetheless, the reservations of these states reveals that art 51 is perceived as giving insufficient guidance for states to ensure their compliance with this element.

Furthermore, some states have argued that the ILC's formulation of the proportionality requirement is so restrictive as to remove the coercive value of countermeasures. They adopt the perspective that the proportionality should be assessed with reference to what is necessary to induce performance of the wrongful state's obligations. Japan noted that, where a smaller and less powerful state seeks countermeasures against a relatively strong state, it is likely that the injury suffered by the small state would be relatively insignificant to the stronger state, so that countermeasures proportionate to the injury could have little coercive effect.[108] Indeed, the ILC seemed to note the need to consider inequality of power in proportionality calculations in 1993, but this concern was not

[102] *Air Service*, (1978) 18 R Int Arb Awards 417, 443 [83].
[103] *ILC commentaries*, above n 10, 135[6].
[104] Cannizzaro, above n 40, 898.
[105] *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 56 [85].
[106] *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 86.
[107] Ibid.
[108] Ibid.

reflected in the *RSIWA* or their commentaries.[109] The United States registered its concern that art 51's use of the phrase 'the rights in question' was not sufficient to reflect the *Air Service* finding that a response may outweigh the seriousness of the wrong if it is necessary to induce compliance with a significant principle.[110] Thus, the ILC's codification of proportionality is problematic for states in two respects: it requires them to risk responsibility for a wrongful act on the basis of a subjective, uncertain calculation; and it limits the potential effectiveness of countermeasures. It seems quite possible that the proportionality element is a prominent disincentive to states considering taking countermeasures.

C *The Bilateral Nature of Countermeasures*

The *RSIWA* and precedent depict countermeasures as a mechanism that is essentially bilateral, being taken by one state and directed at one other state; yet international disputes rarely involve just two state actors. In a globalised world, with increasingly complex ties between states and a greater understanding of cross-border issues such as climate change and cybercrime,[111] it is becoming less probable that a state's wrongful acts will only affect the rights of one other state. Some states are concerned with this lacuna: Spain, in its 2001 comments on the *RSIWA*, criticised them on the grounds that they lacked a provision on the permissibility of consequences for third states.[112] Whilst there are provisions elsewhere in the *RSIWA* that address situations where state responsibility involves multiple injured or responsible states, these only clarify that each injured state is entitled to a claim against each responsible state.[113] The use of countermeasures by third states that have not been directly injured by the wrongful state is, in fact, countenanced by the *RSIWA* in art 54. Yet this does not amount to anything more than recognition that the doctrine could be developed further in this respect in the future. The statement that existing articles 'do not prejudice' the lawfulness, or lack thereof, of third party countermeasures, is hardly a solid basis for a state to confidently become involved in a conflict by which they have not yet been directly affected. The *RSIWA* leaves open too many questions for third states. For example, is the proportionality of third party countermeasures to be assessed by comparing the effects of the measures with the injury suffered by the injured state, or by the indirect injury caused to the third state as a result of the general threat to international peace and stability? If the former, how are third states in a position to fully assess the effects of the initial wrong and take appropriate countermeasures? If the latter, how can such an abstract injury be weighed against concrete injuries? Multilateral disputes are simply not adequately provided for by the countermeasures provisions. Interestingly, Crawford notes that art 54 was more substantive, but comments from states caused it to be significantly reduced to a mere saving clause.[114] This suggests that states are concerned with the clause being used to justify interventionism – a valid misgiving, but one which could have been better addressed by placing tighter restrictions upon third party countermeasures, rather than leaving them an open-ended possibility. Furthermore, non-state actors have become

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[109] International Law Commission, 45th sess, 2318th mtg, UN Doc A/CN.4/SER.A/1993 (13 July 1993) 143 [23].
[110] *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 87.
[111] Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-first Century' (2002) 96 *American Journal of International Law* 798, 800.
[112] *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 84.
[113] *RSIWA,* UN Doc A/RES/56/83, arts 46, 47.
[114] James Crawford, 'The ILC's Articles on State Responsibility: A Retrospect' (2002) 96 *American Journal of International Law* 874, 875.

exponentially more numerous and powerful over the latter half of the 20th century and the beginning of the 21st. Yet the *RSIWA* articles are – as the name makes clear – exclusively about state responsibility, and do not countenance how this might interact with the rights and obligations of non-state actors.[115] This statist focus of the *RSIWA* has been criticised as being outdated.[116] Bederman notes that it is an irony that, over the fifty years of the *RSIWA*'s drafting process, states have become much less significant in the international sphere compared to other actors.[117] Whilst it is understandable that the ILC limited the scope of the articles, given the complexity of the area without other complications, it is undeniable that the lack of guidance as to how countermeasures may and may not affect the rights of third parties is a flaw that may dissuade states from employing the doctrine.

D *The A Priori Wrongfulness of Countermeasures*

It is surely uncontroversial to assert that states are reluctant to admit that they have perpetrated an internationally wrongful act – and countermeasures are, by definition, internationally wrongful acts only rendered lawful by a successful invocation of the doctrine. Given the potential for purported countermeasures to be later ruled invalid, as demonstrated in the *Gabčíkovo-Nagymaros* and *Corn Products* cases, states may be unwilling to openly declare that they are committing what is a priori a wrongful act. This notion is supported by the fact that previous invocations of countermeasures have not tended to constitute a primary argument, but rather an alternative to an allegation that their action was lawful in the first place. In *Gabčíkovo-Nagymaros,* Slovakia did not raise countermeasures as a primary argument because it argued that its actions in diverting the Danube and unilaterally constructing new hydroelectric facilities were lawful.[118] It was only after the court had determined that Slovakia's actions were not condoned by the treaty that countermeasures became an issue for consideration. Similarly, the United States in *Nicaragua* raised countermeasures as an alternative to the argument that the actions constituted lawful self-defence.[119] Further, the a priori wrongfulness of countermeasures is emphasised by the ILC's framing of the doctrine as possessing an exceptional character. [120] The *RSIWA* drafts initially framed countermeasures as lawful with several exceptions to that lawfulness, rather than as the specific exception to wrongfulness as they appear today.[121] This approach was changed after members of the ILC expressed reservations about this positive framing. [122] References to states having an entitlement to take countermeasures were removed to ensure that they were not perceived as permitted acts, but as wrongful acts rendered permissible.[123] Several members of the ILC regarded countermeasures as 'an unfortunate fact of international law',[124] and understood the purpose of codifying them as a limitation of future use of the doctrine, rather than approval. These reservations are shared by numerous states that supported the limitations placed upon the exercise of lawful

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[115] *ILC commentaries*, above n 10, 31.
[116] Weiss, above n 110, 809.
[117] Bederman, above n 24, 829.
[118] *Gabčíkovo-Nagymaros*, [1997] ICJ Rep 7, 55 [82].
[119] *Nicaragua*, [1986] ICJ Rep 14, 127 [248].
[120] *ILC commentaries*, above n 10, 128 [2], 129 [6].
[121] *ILC 2366th mtg*, UN Doc A/CN.4/SER.A/1994, 263 [27]-[28].
[122] Ibid.
[123] International Law Commission, 48th sess, 2456th mtg, UN Doc A/CN.4/SER.A/1996 (10 July 1996) 166–169.
[124] *ILC 2455th mtg*, UN Doc A/CN.4/SER.A/1996, 161 [27].

countermeasures in the *RSIWA*.[125] Thus, any state purporting to take countermeasures must be aware that their actions will be subject to significant scrutiny from the international community, and that they are risking liability and censure if they fail to meet the strict requirements of the doctrine. At the very least, states may be concerned about the reputational damage that they will incur from committing an international wrong, regardless of whether that wrong has a lawful justification. Once again, the *RSIWA* impose a significant disincentive to the use of the doctrine.

E *The Risk of Escalation*

Finally, the view of advocates of countermeasures that they effectively resolve disputes whilst avoiding escalation does not appear to be shared by many states. On the contrary, countermeasures are generally regarded as an escalating step. Indeed, it is difficult to understand how countermeasures could have any coercive force if they did not escalate matters in some way, thus motivating the wrongful state to change its behaviour. However, they also risk provoking further action from the wrongful state, which in turn leads to a stronger response from the invoking state and an escalating dispute.[126] Even in *Air Service,* where the Tribunal evinced a favourable view of countermeasures and their role in dispute resolution, they were regarded as the final step in a series of measures by which the parties escalated the dispute.[127] It was also acknowledged that 'it goes without saying' that countermeasures risk further action from the wrongful state that could worsen the existing conflict;[128] essentially, it was regarded by the Tribunal as self-evident that countermeasures can lead to escalation. This view is explicitly shared by several states. Notably, in its preliminary arguments in a 2000 dispute with EU members about the authority of the Council of the International Civil Aviation Organisation, the United States argued that without this authority states would exercise their rights through countermeasures – a situation that was framed as undesirable as it would escalate, rather than resolve, disputes.[129] Furthermore, Mexico, in its comments on the final version of the *RSIWA* in 2001, expressed its general opposition to the codification of the law on countermeasures on the grounds that it essentially gave international approval for the doctrine's use, which 'could aggravate an existing conflict'.[130] Whilst the other commenting states did not share Mexico's objections to any codification at all, the majority's support for the restrictive framing of the *RSIWA* suggests that countermeasures are perceived as a risky enterprise and should be discouraged.[131] It is quite likely that the potential for escalation is a significant factor behind this general caution towards the doctrine. However, it may be said that any escalation sparked by countermeasures would be relatively slow, occurring only after the requisite negotiations, and their non-violent nature means that they are unlikely to provoke forceful responses. Further, the reversibility requirement and art 53's specification that countermeasures be terminated once the initial wrongful act has ceased provide for de-

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[125] See, eg, *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 82 (Argentina), 83 (the Netherlands).
[126] Crawford, above n 113, 883.
[127] *Air Service*, (1978) 18 R Int Arb Awards 417, 442 [75].
[128] Ibid 444–45 [90].
[129] 'Response of the United States of America to the Preliminary Objections Presented by the Member States of the European Union', *In Re the Application and Memorial of the United States of America Relating to the Disagreement Arising under the Convention on International Civil Aviation done at Chicago on December 7, 1944 (United States v Members of the European Union*) [2000] 21–22.
[130] *2001 Comments and Observations from Governments*, UN Doc A/CN.4/515 and Add.1–3, 83.
[131] Ibid 82-86.

escalation.[132] Regardless, cautious states may prefer to continue negotiations, even if they lead to stasis, rather than risk provoking the other state to reciprocate in ways that prove more damaging than the initial wrong.

IV RECONCEIVING THE DOCTRINE IN LIGHT OF ITS FAILINGS

In considering the five failings together, it appears that there are three primary disincentives for states to take countermeasures: they do not believe that countermeasures will be effective as a dispute resolution mechanism, either through lacking coercive power or causing undesirable escalation; they may not be sure whether countermeasures are appropriate if their dispute involves multiple other states or non-state actors; or they are unwilling to risk committing a wrongful act because they are unsure whether they will be able to fulfil the doctrine's strict elements. Clearly, countermeasures are not regarded as a viable option, unless a state has already committed a wrongful act and is seeking to defend its actions, as in *Gabčíkovo-Nagymaros*. The majority of these restrictions pertain to the perceptions held by states, rather than the doctrine's ability to achieve its self-help purpose. It appears that countermeasures have been primarily hamstrung by an ideological conflict between the majority of states and jurists who, whilst acknowledging that countermeasures exist, wish to heavily limit their deployment for fear of their abuse, particularly by large states over weaker states; and a minority of powerful states, notably the US, UK and Japan, who strongly advocate the doctrine's use to induce compliance and who believe that its restrictions go too far and hamper its coercive power. Thus, states either subscribe to the view that countermeasures are anathema to peaceful international relations because they are used to escape obligations and exert control over weaker states, or that they have been effectively neutered by the ILC and can no longer be used to achieve their self-help purpose.

These two viewpoints give rise to two possible solutions to the doctrine's lack of use. First, further codification to more fully elucidate elements of the doctrine would address concerns about the difficulty of meeting them and about their potential for abuse. Alternatively, a significant simplification of the existing test for countermeasures to lift the burden of invoking the doctrine and draw it back to its self-help purpose would refute the perception that the doctrine has lost its coercive power. Both solutions should encourage the more frequent use of the doctrine, although each comes with its own challenges.

A *Further Codification*

Expanding and clarifying the *RSIWA* could give more certainty for states about the likely outcome of an invocation of countermeasures, whilst remaining consistent with the general preference of the international legal community to restrict the doctrine's use to exceptional circumstances. In particular, further regulations to more clearly define the requirements of reversibility and proportionality, and to expand the application of the doctrine to multilateral disputes and those involving non-state actors, would remove some ambiguity from the law. Ambiguity can cause the dual ills of restraining states with legitimate purposes for fear of failure whilst permitting opportunistic states to unscrupulously exploit the system.[133] As is apparent from the success of WTO

[132] Crawford, above n 113, 883.
[133] Bederman, above n 24, 832.

countermeasures, if states are more certain that their countermeasures are legal, they are more likely to embrace them. Regarding multilateral countermeasures and those deployed by and against non-state actors, this simply requires more codification to explain when countermeasures can be used outside the context of bilateral disputes. Ideally, the doctrine's application would be expanded to situations where states can assert them against non-state actors. Given that they are an exemption from state responsibility, a concept that is inherently based upon state sovereignty, it would be inappropriate at this time to extend their availability as a remedy to non-state actors before a complete regime of international responsibility exists. However, there appears to be no reason why states should not be entitled to assert their rights against non-state actors that have breached their international obligations.

Further, this codification ought to make it clear that there are some exceptional circumstances where a third state may be justified in taking countermeasures on behalf of an injured state. As discussed above, the recognition in art 54 that the *RSIWA* do not prejudice the rights of third party states to take countermeasures is inadequate to give these states sufficient certainty as to the extent of their responsibility. However, giving states an unfettered ability to defend the rights of others could risk seriously destabilising the principle of non-intervention. Additional requirements that the injured state must be unable to take effective countermeasures itself, and must have explicitly called upon the third state for assistance with the relevant dispute, would ensure that countermeasures could not be used to engage in bullying, unjustified intervention, or unwarranted displays of power. However, it would be more difficult to further define the proportionality and reversibility requirements, because they are by definition relatively open-ended concepts that require some determination on the behalf of states seeking to apply them. Furthermore, if the already significant codification represented by the *RSIWA* had little effect on encouraging states to regard countermeasures as a more viable doctrine, it is unrealistic to suggest that further codification would have any more of an effect. This may be a feasible solution to the problem of countermeasures being confined to bilateral disputes, but it does not have practical value beyond this issue.

B *Simplifying the Existing Test for Countermeasures*

Alternately, a solution to the onerous nature of the doctrine is to abolish several formalistic elements and replace them with a general requirement that the state clearly demonstrates its intent to use countermeasures for a coercive purpose. The concepts of prior negotiation, notification, strict proportionality, and reversibility could be the relevant considerations when determining the true purpose of purported countermeasures, rather than strict requirements that must be met. Prior attempts to negotiate indicate that the state's first priority was to resolve the situation, rather than take punitive action. As was evidenced in *Air Service*, the act of notifying the wrongful state of the decision to take countermeasures can suffice to induce compliance or submission to dispute resolution procedures, and thus again demonstrates that the state's goal was coercion. Measures which are proportionate to what is reasonably necessary to coerce compliance with the rights in question are a further indication of true countermeasures, rather than vindictive retaliation. However, none of these are definitive; if a state failed to establish an element, but could explain why this failure was reasonable and not inconsistent with coercion, the doctrine could be applied more flexibly. This would remove some of the burden on states that are dissuaded from taking legitimate countermeasures for fear of failing to meet an element. This approach could also incorporate a good faith partial defence to liability, where if a state can show that

they genuinely believed that their actions were lawful countermeasures at the time, they are not given as strict a punishment than if they had wilfully perpetrated the same wrongful act.[134] For example, if the countermeasures were disproportionate, the state could be ordered to pay reparations to cover the amount of damage that exceeded proportionality, rather than holding the state wholly responsible for its breach. However, it must be acknowledged that the difficulty of determining motivations of states renders this defence problematic.[135]

This solution would undoubtedly be the more controversial of the two proposals, given the predominant view among states and jurists that countermeasures are exceptional and should generally be discouraged. It is difficult to imagine the ILC deleting several provisions of the *RSIWA* over which it laboured for half a century, especially when so many states have expressed their satisfaction with the restrictions they impose. To do so would be seen as promoting, in the words of one ILC representative, the 'law of the jungle rather than international law'.[136]

V CONCLUSION

The ideological conflict over whether countermeasures should be used readily in disputes or should be reserved for exceptional situations means that it is especially important that the failings of the doctrine become more widely recognised and understood. The state comments and ILC debates on the *RSIWA* acknowledge that taking coercive action against other states is a reality of international relations – indeed, that it is unavoidable. This suggests that it is the explicit invocation of countermeasures that is absent from state practice, and that states have been unwilling to adjust their practice to fit the requirements by which the ILC intended to limit their use, either from fear of the negative stigma attached to the doctrine, reluctance to meet the strict elements, or a belief that countermeasures no longer have sufficient coercive power. Thus, it appears that the international legal definition of countermeasures is divorced from reality. Work must be done to render the standard more flexible and in line with its self-help function in order to encourage states to regard countermeasures in a more positive way and to explicitly cite them as justification for their behaviour in disputes. Unfortunately, this change could only come about through a significant shift in attitudes towards the doctrine, from the perception that it is a necessary evil to the perception that it is a useful tool to maintain stability and sovereign equality in the decentralised system of international law. However, it is not beyond the realm of possibility that the doctrine be subject to further development. Professor James Crawford, the final Special Rapporteur of the *RSIWA*, commented that they would 'have to prove themselves in practice'.[137] Fourteen years after the *RSIWA* were recognised by the General Assembly, there is little indication that the provisions on countermeasures will prove themselves. Recognition in the international legal community of the flaws of the doctrine that were the result of the ILC's over-cautious approach would be an important development that could spark further attempts to strike a more appropriate balance between the doctrine's coercive power and its necessary limitations.

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[134] Damrosch, above n 33, 795–796.
[135] Crawford, above n 113, 883.
[136] *ILC 2455th mtg*, UN Doc A/CN.4/SER.A/1996, 163 [34] (Mr Villagrán Kramer).
[137] Crawford, above n 113, 889.

CLASS ACTION SETTLEMENT DISTRIBUTION IN AUSTRALIA: COMPENSATION ON THE MERITS OR ROUGH JUSTICE?

MICHAEL LEGG*

Class actions by nature involve litigation on behalf of numerous group members. When class actions settle, the settlement must be distributed amongst the group members who have suffered loss. The settlement distribution process must be approved by the court and is guided by two requirements: compensation on the merits and efficiency. Compensation on the merits focuses on the substantive law and the underlying compensation principle. Efficiency, or rough justice, involves simplifying the distribution process to make it less costly and quicker by ignoring some group member circumstances relevant to the quantum of the recovery they should make. This article explains those requirements and the manner in which they compete. The article argues that a settled class action can only ever use the compensation principle and substantive law as a guide and strict adherence may give rise to harmful cost and delay. However, too ready an acceptance of rough justice in the name of efficiency can harm both group members and the reputation of the class action procedure.

I INTRODUCTION

Settlement of class actions (also referred to as representative proceedings or group proceedings) is the most common way in which this form of litigation is resolved. A key step in the settlement process is the distribution of the settlement funds to the group members. Distribution of the settlement requires that the headline quantum, which attracts most attention, is broken up and divided amongst the group members who have suffered loss.

The settlement distribution process is guided by two competing objectives. First, individual compensation should reflect the merits of the individual claim so that the group member receives compensation commensurate with the amount to which they are entitled. This is usually compensation as determined by law through the courts. Second, the distribution process is completed in a manner that minimises cost and delay. The objectives compete, or conflict, in that a distribution scheme that seeks to take account of more individual factors, which are relevant to the quantum of recovery so as to reflect the merits of the claim, will be more costly and time consuming, especially when the class action includes both strong and weak claims.

This article explains the requirements for compensation on the merits and efficiency and the difficulties of complying with both requirements in class action settlement distribution schemes. The article then concludes that while a settled class action can only ever use the compensation principle and substantive law as a guide, and strict adherence may give rise to harmful cost and delay, too ready an acceptance of rough justice in the name of efficiency can harm both group members and the reputation of the class action procedure.

II BACKGROUND

On 1 February 1977 the Federal Attorney-General instructed the Australian Law Reform Commission (ALRC) to examine the adequacy of the existing law in relation to class actions.[1] The ALRC set about determining whether it was appropriate or desirable to introduce a new form of procedure that would allow for class actions. The ALRC determined:

> An effective grouping procedure is needed as a way of reducing the cost of enforcing legal remedies in cases of multiple wrongdoing. Such a procedure could enable people who suffer loss or damage in common with others as a result of a wrongful act or omission by the same respondent to enforce their legal rights in the courts in a cost effective manner. It could overcome the cost and other barriers which impede people from pursuing a legal remedy. People who may be ignorant of their rights or fearful of embarking on proceedings could be assisted to a remedy if one member of a group, all similarly affected, could commence proceedings on behalf of all members. The grouping of claims could also promote efficiency in the use of resources by enabling common issues to be dealt with together. Appropriate grouping procedures are an essential part of the legal system's response to wrongdoing in an increasingly complex world.[2]

While the ALRC reported that a class action procedure was necessary to promote access to justice through reducing cost, the ALRC was also adamant that the primary goal of the procedural innovation that it was recommending was 'to enable identified persons who establish their loss to secure the legal remedy the law provides'.[3] The class action was not meant to alter the substantive law. Rather the substantive law determined the legal remedy that could be obtained.

Class actions were introduced into Australia through the enactment of the *Federal Court of Australia Amendment Act 1991* (Cth) which provided for 'representative proceedings' through inserting Part IVA into the *Federal Court of Australia Act 1976* (Cth) ('FCA Act'). Part IVA commenced on 4 March 1992. The objectives of class action litigation, according to the Minister's Second Reading Speech, were expressed as follows:

> The new procedure will enhance access to justice, reduce the costs of proceedings and promote efficiency in the use of court resources. ... [4]

In Victoria, a procedure for 'group proceedings' was inserted in Part 4A of the *Supreme Court Act 1986* (Vic) with effect from 1 January 2000 by the *Courts and Tribunals Legislation (Miscellanous Amendments) Act 2000* (Vic).[5] The Victorian procedure

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* Associate Professor, UNSW Australia Law. The author would like to thank participants at the Civil Justice Academic Conference, Monash University, Melbourne, 18 February 2016 for comments on an earlier draft of this article.

[1] Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No 46 (1988), [1].

[2] Ibid [69].

[3] Ibid [323].

[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 14 November 1991, 3176-7 (Michael Duffy, Attorney-General).

[5] Class action procedures also exist in New South Wales where Part 10 was inserted into the *Civil Procedure Act 2005* (NSW) by the *Courts and Crimes Legislation Further Amendment Act 2010* (NSW) so as to make 'representative proceedings' available in NSW courts from 4 March 2011.

effectively mirrors the Federal regime. The class action procedure sought to facilitate the pursuit of remedies for contravention of legal 'rights' as recognised by the substantive law but also to do so in a manner that promoted efficiency and reduced costs.

III SETTLEMENT

Most class actions settle.[6] However, a class action may not be settled or discontinued without the approval of the Court.[7] The criteria for approving settlements in the Federal Court has been discussed on a number of occasions[8] and are now consolidated in Federal Court of Australia, Practice Note CM17, *Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 9 October 2013.[9] Practice Note CM17 at paragraph 11.1 and 11.2 states:

> When applying for Court approval of a settlement, the parties will usually need to persuade the Court that:
> (a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the group members who will be bound by the settlement; and
> (b) the proposed settlement has been undertaken in the interests of group members, as well as those of the applicant, and not just in the interests of the applicant and the respondent/s.
>
> When applying for Court approval of a settlement the parties will usually be required to address at least the following factors:
> (a) the complexity and likely duration of the litigation;
> (b) the reaction of the group to the settlement;
> (c) the stage of the proceedings;
> (d) the risks of establishing liability;
> (e) the risks of establishing loss or damage;
> (f) the risks of maintaining a representative proceeding;
> (g) the ability of the respondent to withstand a greater judgment;
> (h) the range of reasonableness of the settlement in light of the best recovery;
> (i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and
> (j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

It has been recognised in Australian class actions that fairness and reasonableness of a settlement requires consideration of not just the overall settlement sum 'but also the

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[6] See Vince Morabito, *An Empirical Study of Australia's Class Action Regimes – First Report* (December 2009) 30-36.
[7] *Federal Court of Australia Act 1976* (Cth) s 33V. See also *Supreme Court Act 1986* (Vic) s 33V and *Civil Procedure Act 2005* (NSW) s 173.
[8] See eg *Taylor v Telstra Corporation Ltd* [2007] FCA 2008; *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia [No 6]* [2011] FCA 277; *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89, [6]-[8]; *De Brett Seafood Pty Limited v Qantas Airways Limited [No 7]*[2015] FCA 979; *City of Swan v McGraw-Hill Companies Inc* [2016] FCA 343, [32]-[35].
[9] The Federal Court is currently seeking comment on a revised practice note. However, in relation to settlement and settlement distribution the draft revised practice note is substantially the same as the existing practice note.

structure and workings of the scheme by which that sum is proposed to be distributed among group members.'[10]

The Practice Note makes specific reference to the distribution process. Paragraph 11.3 states:

> An application for the Court's approval of a proposed settlement must be made by interlocutory application. The orders which are commonly made on such an application include orders:
>
> ...
>
> (c) approving any scheme for distribution [of] any settlement payment

Further, Practice Note CM 17 raises for consideration by the court, and requires information from the parties, as to how a settlement will be distributed. Paragraph 11.4 states:

> To the extent relevant, the affidavit or affidavits in support [of the settlement] should state:
>
> ...
>
> (c) the effect of [the terms of settlement] on group members (ie the quantum of damages they are to receive in exchange for ceasing to pursue their claims and whether group members are treated the same or differently and why);
>
> (d) the means of distributing settlement funds;

From quite early in the development of class action jurisprudence around the settlement approval requirement it was accepted that the Court would take into account 'the amount offered to each group member, the prospects of success in the proceeding [and] the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer'.[11] However, these factors focused on an overall settlement sum rather than the distribution of that sum amongst group members.[12]

In *Camilleri v The Trust Company (Nominees) Limited*, Moshinsky J explained that settlement approval required consideration of the settlement *inter partes* and *inter se*.[13] The latter focused on the sharing of compensation among claimants and the need to 'achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible'.[14] His Honour then set out a number of factors relevant to the assessment of whether a proposed distribution scheme is fair and reasonable, including 'whether the assessment methodology ... is consistent with the case that was to be advanced at trial and supportable as a matter of legal principle'.[15] The distribution scheme under consideration was found to have been 'constructed to "proxy" the kinds of

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[10] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, [41]. See generally Michael Legg, 'Class Action Settlements in Australia — The Need for Greater Scrutiny' (2014) 38(2) *Melbourne University Law Review* 590, 605-608.

[11] *Williams v FAI Home Security Pty Ltd [No 4]* (2000) 180 ALR 459, [19].

[12] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, [38].

[13] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [5]. See also *Foley v Gay* [2016] FCA 273, [7] endorsing the approach.

[14] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [5]. See also *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204, [37]-[39].

[15] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [43].

damages-assessment principles which the applicants' representatives expect would in substance be adopted at trial'.[16]

Similarly, the Supreme Court of Victoria has stated that in assessing the fairness of a settlement

> it is necessary to form a view as to the correlation between the amount individual group members will recover under the settlement distribution scheme and the amount they might recover after a trial, necessarily any such comparison can only be performed in a broad manner.17

The consideration of the settlement *inter se*, or between group members, becomes more problematic where the strength of the claims of the group members is not a constant but, rather, involves claims that are stronger or weaker than other claims. In the Vitamins cartel class action, Jessup J observed that the initial approach taken by the applicant in devising a settlement based on a broad assessment of the prospects of success of the case as a whole, taking into account the strength of the case for each type of vitamin, could not be criticised if undertaken by a single litigant. Such a litigant would be entitled to make trade-offs between claims that were expected to have varying degrees of success.[18] However, in the context of the Vitamins cartel class action settlement, in which some of the vitamins claims had lower prospects of success than others, those claims were held by different group members. Jessup J continued:

> However, different considerations apply in the case of a representative proceeding under Pt IVA of the *Federal Court Act*. In the present case, it must be assumed that, unbeknown to themselves, group members with stronger cases would, by participating in the overall settlement, share the advantages of their stronger cases with their fellows who had weaker cases. Under s 33V(1) of the *Federal Court Act*, the role of the court is to protect the interests of those who have no voice at the bar table, and it must be said that there is no obvious reason why the court should not assume that those unheard group members whose cases are strong would regard it as unfair and unreasonable to make compromises in the interests of other group members whose cases are weak.[19]

Where the claims that are combined in a class action have different prospects of success, then the settlement distribution should reflect those prospects. Equally, if there is an internal differentiation in the settlement scheme, then that differentiation must reflect substantive differences in the claims, such as the strength of the claim, and not be arbitrary.[20] This approach may be put another way: the distribution of settlements should seek to achieve 'vertical equity' (that more deserving claimants receive more than less deserving claimants) and 'horizontal equity' (that similarly situated claimants receive similar awards).[21]

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[16] Ibid [47].
[17] *A v Schulberg [No 2]* [2014] VSC 258, [12]. See also *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [40] endorsing this approach.
[18] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, [66].
[19] Ibid.
[20] *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [53].
[21] William Rubenstein, Alba Conte and Herbert B Newberg, *Newberg on Class Actions* (Westlaw, 5th ed 2015) § 13:59 ('Put simply, a court is striving to ensure that similarly situated class members are treated similarly and that dissimilarly situated class members are not arbitrarily treated as if they were similarly situated.'); American Law Institute, *Principles of the Law of Aggregate Litigation*

An example of the failure to achieve vertical equity in a class action settlement distribution is provided by the Vioxx product liability class action which was brought by Graeme Peterson in 2006. Mr Peterson was successful at first instance in relation to his personal claim and achieved favourable answers to a number of common questions.[22] On appeal, the Full Federal Court found against Mr Peterson but did not disturb the answers to the common questions.[23] However, those answers were said to illustrate an 'absence of commonality in relation to many of [the common] questions'.[24]

The proceedings brought by Mr Peterson and related proceedings by Joan Reeves were subsequently settled and approval was sought from the Federal Court. The terms of the settlement[25] were, in summary, if a group member had (1) suffered a myocardial infarction (heart attack) or sudden cardiac death and (2) Vioxx was a current medication when they were injured and they have documentary evidence of having received a specified number of Vioxx tablets within specified timeframes, they would receive the following compensation:

- For living group members, $2000, provided the total of all payments to living group members does not exceed $497 500. In the event that the total of all payments to living group members does exceed this amount, each approved eligible living group member will receive one equal share of $497 500;

- For deceased group members (and approved eligible group members in the Reeves proceeding), $1500, provided the total of all payments to deceased group members in both the Peterson and Reeves proceedings does not exceed $45 000. In the event that the total of all payments to deceased group members in both proceedings does exceed this amount, each approved eligible living group member will receive one equal share of $45 000.

The reasons for the Full Federal Court finding against Mr Peterson became of central relevance to the decision whether to approve the settlement. The Full Federal Court found that Mr Peterson's personal circumstances — his age, gender, hypertension, hyperlipidaemia, obesity, left ventricular hypertrophy and history of smoking — afforded a ready explanation for the occurrence of his injury independent of the possible effects of Vioxx. Further, because of the causative potential of these circumstances for a heart attack, the court held that it was a matter of conjecture rather than reasonable inference on the balance of probabilities that Vioxx was a cause of Mr Peterson's heart attack.[26] The Full Federal Court also dismissed Mr Peterson's claims that Vioxx was unfit for purpose or was not of merchantable quality.[27]

(2010) § 1.04 cmt. f; Carrie Menkel-Meadow, 'Ethics and the Settlements of Mass Torts: When the Rules Meet the Road' (1995) 80 *Cornell Law Review* 1159, 1211.

[22] *Peterson v Merck Sharp & Dohme (Australia) Pty Ltd* (2010) 184 FCR 1; [2010] FCA 180.

[23] *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145; [2011] FCAFC 128.

[24] *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [No 2]* [2011] FCAFC 146, [9].

[25] *Peterson v Merck Sharp and Dohme (Australia) Pty Ltd [No 6]* [2013] FCA 447, [13]-[15].

[26] *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* (2011) 196 FCR 145; [2011] FCAFC 128, [120], [124].

[27] Ibid [173]-[175], [179]-[182].

However, Jessup J observed that the reasons of the Full Federal Court did not find that other group members could never recover. Rather, Mr Peterson's case was not representative. Other group members who were prescribed Vioxx may have been able to prove that Vioxx contributed to the occurrence of a heart attack.[28] Further, the trial and appeal had determined a number of 'criteria by reference to which the relative strengths and weaknesses of the cases of the various group members would stand to be assessed.'[29]

The difficulty faced by Jessup J was that the settlement agreement did not take account of the learning produced by the trial and appeal. Consequently, Jessup J observed:

> [the settlement] makes no discrimination between group members who have other risk factors which were decisive in the rejection of the applicant's case by the Full Court and group members who have no other risk factors.[30]

The settlement agreement creates two pre-requisites to recovery — namely, the group member had (1) a heart attack or sudden cardiac death and (2) been prescribed Vioxx — and then group members are treated the same. The settlement ignores the strength of group members' claims and treats strong and weak claims alike. As a result:

> Under the proposed settlement, for group members whose circumstances are similar to those of the applicant, the payment of the monetary sum proposed would constitute a windfall. … On the other hand, for a group member who might, consistently with the reasons of the Full Court, anticipate a favourable judgment, the settlement would represent an obvious injustice.[31]

Jessup J refused to grant approval of the settlement on the basis that it was unfair and unreasonable for the representative party, Mr Peterson, to compromise the claims of those group members who had no other risk factors, on the basis that it enabled the claims of the 'less-deserving group members' to be settled.[32] In short, the settlement failed to achieve vertical equity — more deserving claimants did not recover more than less deserving claimants.

The lack of vertical equity was addressed in an amended settlement agreement, which provided for the distribution of the total settlement sum according to a points system. This system recognised the differential impacts of existing personal circumstances presumptively predisposing a person to the occurrence of a heart attack.[33]

The above discussion demonstrates that the approach of Australian courts to the design of settlement distribution schemes is to utilise the substantive law and what might be recovered at trial to assess a settlement, but with consideration of the risks of litigation,

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[28] *Peterson v Merck Sharp and Dohme (Australia) Pty Ltd [No 6]* [2013] FCA 447, [9]-[10], [12].
[29] Ibid [16].
[30] Ibid [17].
[31] Ibid [20].
[32] Ibid [20].
[33] *Peterson v Merck Sharp and Dohme (Australia) Pty Ltd [No 7]* [2015] FCA 123, [2]. In the US, the Vioxx settlement that was negotiated outside of the class actions regime (as a class action was unable to be certified pursuant to Federal Rules of Civil Procedure r 23) employed a points system 'based on a combination of factors seeking to approximate the strength and value of the plaintiff's case': Noah Smith-Drelich, 'Curing the Mass Tort Settlement Malaise' (2014) 48 *Loyola of Los Angeles Law Review* 1, 33.

including failing to establish liability or failing to establish loss or damage. This is to be expected as the class action is meant to be facilitating access to the remedies provided by the substantive law. However, in damages class actions the substantive law is underwritten by the compensation principle. Although the Australian courts have not referred to the compensation principle by name, it is the lodestar for redressing loss or damage, and grounds the substantive law's approach to compensation, which in turn guides the assessment of fairness in class action settlements.

IV SUBSTANTIVE FAIRNESS AND THE COMPENSATION PRINCIPLE

The meaning of compensation in the common law may be traced back to the 19th century and the seminal decisions of *Robinson v Harman* (1848) 1 Exch 850 and *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25. In *Robinson v Harman*, Parke B explained:

> Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract was performed.[34]

In *Livingstone v Rawyards Coal Co*, Lord Blackburn in the House of Lords stated:

> I do not think that there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is getting his compensation or reparation.[35]

The High Court of Australia has endorsed both statements as follows:

> The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed.[36]

The High Court went on to state that the rule that damages are compensatory in nature is 'a cardinal concept' and 'one principle that is absolutely firm, and must control all else'.[37] Cognate with the compensatory principle is the rule that a plaintiff may not recover more than he or she has lost.[38] In *Commonwealth v Amann Aviation Pty Ltd*, Mason CJ and Dawson J observed that the corollary of the principle in *Robinson* 'is that a plaintiff is not entitled, by the award of damages upon breach, to be placed in a

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[34] *Robinson v Harman* (1848) 1 Exch 850, 855.
[35] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39.
[36] *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ) (footnotes omitted). See also *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 98 (Brennan J), 116 (Deane J), 161(McHugh J dissenting); *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191; *Clark v Macourt* (2013) 253 CLR 1, 11 [26] (Crennan and Bell JJ), 18-19 [59] (Gageler J).
[37] *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ) citing *Skelton v Collins* (1966) 115 CLR 94, 128 (Windeyer J).
[38] *Haines v Bendall* (1991) 172 CLR 60, 63 (Mason CJ, Dawson, Toohey and Gaudron JJ). See also *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 323 ALR 1; [2015] HCA 28, [47] (French CJ, Bell, Gageler and Keane JJ) referring to the rule against double recovery.

superior position to that in which he or she would have been in had the contract been performed.'[39]

In the context of statutory causes of action, such as those applicable to contravention of the prohibition on misleading or deceptive conduct, it is clear that compensation is not limited to measures of damages provided by the common law.[40] Moreover, principles for assessing damages may have to give way in particular cases to solutions best adapted to give the injured claimant an amount which will most fairly compensate for the wrong suffered.[41] However, while different claims may give rise to different measures of damages, the underlying goal is the same — complete compensation.[42] The compensatory principle has also been applied in a range of diverse areas such as conversion of chattels, carriage of goods, sale of land and infringement of patent.[43]

The ramification of the compensation principle is that the aim of compensation is to 'restore and redress the balance of fairness or justice' that has been upset by a wrongdoer's contravention of the law.[44] To compensate someone for something is to provide that person with 'a full and perfect equivalent' for that thing. If they are given more than that, they have been over-compensated, and if given less, under-compensated. The idea of over- or under-compensation implies that the notion of compensation is to provide an exact equivalent — neither more nor less.[45] Consequently, an important criterion for measuring fairness is that all of those persons 'who are entitled to compensation … actually receive compensation and in the amount to which they are entitled'.[46]

V AVERAGING AND ROUGH JUSTICE

The American Law Institute in its *Principles of the Law of Aggregate Litigation* explains that:

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[39] *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 28.
[40] *Henville v Walker* (2001) 206 CLR 459, 470 (Gleeson CJ); *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 525 (both cases discuss s 82 of the *Trade Practices Act 1974* (Cth) which is analogous to *Corporations Act 2001* (Cth) s 1041I, *Australian Securities and Investments Commission Act 2001* (Cth) s 12DA, *Australian Consumer Law* s 236 (Schedule 2 to *Competition and Consumer Act 2010* (Cth)).
[41] *Johnson v Perez* (1988) 166 CLR 351, 355-356 (Mason CJ); *Henville v Walker* (2001) 206 CLR 459, 502 (McHugh J).
[42] *Marks v GIO Australia Holdings* (1998) 196 CLR 494, 503-504 [17], per Gaudron J ('the task is simply to identify the loss or damage suffered or likely to be suffered and, then, to make orders for recovery of that amount under s 82'), 510 [38], per McHugh, Hayne and Callinan JJ; *Henville v Walker* (2001) 206 CLR 459, 482 per Gaudron J, 509 per Hayne J ('the section [82] permits recovery of the whole of the loss sustained by a person who demonstrates that a contravention of Pt V of the Act was a cause of that loss. Neither the words of s 82(1) nor anything in the intended scope and context of the Act suggest some narrower conclusion.'); Colin Lockhart, *The Law of Misleading or Deceptive Conduct* (LexisNexis, 4th ed 2015) 445.
[43] Harold Luntz, *Assessment of Damages for Personal Injury and Death: General Principles* (LexisNexis 2006) 5.
[44] Peter Cane, *Atiyah's Accidents, Compensation and the Law* (Cambridge University Press, 8th ed, 2013) 403, 416–417.
[45] Robert Goodin, 'Theories of Compensation' (1989) 9 *Oxford Journal of Legal Studies* 56, 59; Benjamin Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 *Georgetown Law Journal* 695, 701 ('The defendant must pay not just any amount, but the amount of the plaintiff's injury, because the payment is not a penalty per se, but the rectification of an injury that the defendant inflicted').
[46] Goodin, above n 44 , 409.

> Ideally, the amount of compensation a claimant receives should reflect the merits of the claim itself, including the likelihood that the claimant would prevail at trial and the amount the claimant would win.[47]

Such a statement reflects the Australian position. However, the American Law Institute goes on to state:

> In practice, the ideal is rarely achieved. Rough justice is normal in aggregate proceedings. In these cases settlements usually involve an element of 'damages averaging,' which occurs when an allocation plan ignores some features of claims that might reasonably be expected to influence claimants' expected recoveries at trial.[48]

Rough justice typically means 'unfair treatment of a person or cause'.[49] Here that implication arises because differences between claims are ignored or minimised with the effect that the distribution of settlement funds between group members is not equitable because it does not reflect those differences.[50] This has led to the concern that the terms negotiated to settle class actions may not resemble a result consistent with the merits of the dispute at issue.[51]

The statements about 'rough justice' and 'damages averaging' are in the context of US damages class actions where the class action must be certified by a court, which includes the court finding 'that the questions of law or fact common to class members predominate over any questions affecting only individual members'.[52] This mandates much greater cohesion in the claims of group members than is required in Australia.[53] The Australian class action regime allows for groups with less cohesion or, put another way, a greater degree of difference in their claims, to band together in a single class action proceeding.[54] The greater the differences in the claims, the greater the prospect of 'rough justice' and 'damages averaging'.

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[47] The American Law Institute, *Principles of the Law of Aggregate Litigation* (2010) § 1.04 comment f.

[48] Ibid. See also John Coffee Jr, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action' (1987) 54 *University of Chicago Law Review* 877, 917; Charles Silver and Lynn Baker, 'I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds' (1998) 84 *Virginia Law Review* 1465, 1481-1482; Jack Weinstein, 'Compensating Large Numbers of People for Inflicted Harms' (2001) 11 *Duke Journal of Comparative and International Law* 165, 174.

[49] Bryan Garner (ed), *Black's Law Dictionary* (Thomson Reuters, 10th ed, 2014). The American Law Institute recognises that the expression can sometimes be a pejorative term: The American Law Institute, *Principles of the Law of Aggregate Litigation* (2010) 53.

[50] Charles Silver and Lynn Baker, 'I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds' (1998) 84 *Virginia Law Review* 1465, 1481.

[51] Ralph Winter, 'Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America' (1993) 42 *Duke Law Journal* 945, 951; Edward Brunet, 'Class Action Objectors: Extortionist Free Riders or Fairness Guarantors' (2003) *The University of Chicago Legal Forum* 403, 407.

[52] Federal Rules of Civil Procedure r 23(b)(3) (2016).

[53] S Stuart Clark and Christina Harris, 'Multi-Plaintiff Litigation in Australia: A Comparative Perspective' (2001) 11 *Duke Journal of Comparative & International Law* 289, 297.

[54] *Timbercorp Finance Pty Ltd (in liquidation) v Collins and Tomes* [2015] VSC 461, [316], [462] ('A group proceeding can encompass issues which have both common and idiosyncratic dimensions.'); *Kelly v Willmott Forests Ltd (in liquidation) [No 4]* [2016] FCA 323, [213].

'Rough justice' has been justified on the basis that a representative may need to adjust or average settlement amounts in light of the practical limitations of compensating many people through a settlement scheme.[55] Class actions have been said to have foregone perfection in relation to compensation so as to achieve that compensation more quickly and at less cost.[56] Greater precision may only be possible through increased transaction costs.[57]

The accuracy of a settlement distribution scheme can be reduced or expanded depending on the way in which settlement payments are calculated. The calculation can seek to take account of a number of variables within the group that relate to the strength of a claim so as to provide compensation that reflects the strength of the claim. For example, in the Vioxx class action settlement, the first settlement scheme only considered two factors, namely the group member had (1) a heart attack or sudden cardiac death and (2) had been prescribed Vioxx. After that scheme was rejected by the Federal Court, a new scheme was negotiated that employed a points system which considered a range of personal circumstances that made the person more or less predisposed to a heart attack.[58]

However, the greater the fine-tuning of settlement allocations compared to calculating compensation based on the average group member, the greater the costs that may be incurred.[59] In *Camilleri v The Trust Company (Nominees) Limited*, Moshinsky J listed as a relevant factor in determining if a settlement should be approved, 'whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution'.[60] Similarly, in the Kilmore East bushfire class action settlement, Osborn JA commented:

> The potential claims are so heterogeneous that unless some simplified scheme of assessment is provided, the process of assessment of damages will be impractically costly, contentious and delayed.[61]

Costs associated with customising the settlement allocation arise as part of designing the settlement distribution scheme and in administering the scheme after the settlement is approved. The costs incurred by the solicitors (and possibly experts)[62] to design the distribution scheme may reduce the settlement funds available for group members or increase the legal costs and disbursements that are incurred and usually paid by the respondent as part of a settlement. In the Corrugated Cardboard Cartel class action, an expert designed an econometric model to take account of such factors as the size and

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[55] The American Law Institute, above n 47; Michael Sant Ambrogio and Adam Zimmerman. 'The Agency Class Action' (2012) 112 *Columbia Law Review* 1992, 2061.
[56] Rachael Mulheron, *The Class Action in Common Law Legal Systems* (Hart Publishing, 2004) 51-52.
[57] John Coffee Jr, 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action' (1987) 54 *University of Chicago Law Review* 877, 919 n 104.
[58] *Peterson v Merck Sharp and Dohme (Australia) Pty Ltd [No 6]* [2013] FCA 447, [13]; *Peterson v Merck Sharp and Dohme (Australia) Pty Ltd [No 7]* [2015] FCA 123, [2].
[59] Coffee, above n 57, 918.
[60] *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468, [43].
[61] *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [420].
[62] See *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 671, [10], [19], [32]-[35], [40]-[52].

type of cardboard product, the state and end-use category of the customer, and whether or not the customer was classified as a contract customer so as to customise the compensation to the measurable characteristics of each group member.[63]

Further costs will be incurred to administer the distribution scheme. The applicant's solicitor, now administrator,[64] must co-ordinate the implementation of the scheme, carry out the necessary assessment of claims and calculation of payments.[65] This will often require the assistance of experts such as accountants and other lawyers. The greater the focus on the individual merits, the higher the costs. For example, the Bonsoy soy milk product liability class action settlement employed a distribution scheme which required an administrator to determine 'whether, on balance of probabilities, consumption of Bonsoy within the Relevant Period caused the injuries claimed', as opposed to other schemes where causation was assumed.[66] As a result, a person would need to undergo a medico-legal review, provide information, documents and authorities, and attend meetings.[67] These costs will reduce the settlement funds available for group members, even though they may frequently be paid out of the interest earned on the settlement fund, rather than from the principal.[68]

Similarly, the more intricate the calculation, the greater the delay in having a settlement distributed to group members. For example, in the Kilmore East bushfire class action, delays in the distribution of the funds from the settlement arose due to 'the unprecedented size and complexity of the settlement'.[69] The delay resulted in the court allowing for a broader pool of lawyers to act as assessors of the personal injury and dependency claims under the distribution scheme.[70] There is a trade-off between accurately allocating settlement payments based on the relative strength of group members' claims and reducing delay in concluding the settlement.

It also needs to be borne in mind that the need for greater information to be provided by group members, to allow for the settlement distribution to be customised, may complicate or make more onerous the forms group members need to complete to be able to participate in the settlement. This can have the effect of fewer group members being able to establish their claim or taking the time to participate in the settlement. Consequently, seeking precision in compensation equivalent to the individual

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[63] *Jarra Creek Central Packing Shed Pty Ltd v Amcor Limited* [2011] FCA 671, [42].
[64] See eg *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [400]; *Foley v Gay* [2016] FCA 273, [17]; *City of Swan v McGraw-Hill Companies Inc* [2016] FCA 343, [48] where the lawyer for the applicant is appointed by the court to administer the settlement fund.
[65] See eg *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd [No 2]* [2011] FCA 1506; *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [400].
[66] *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [156]. Compare to *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [289]-[291], [294].
[67] *Downie v Spiral Foods Pty Ltd* [2015] VSC 190, [73]-[74].
[68] See eg *Pharm-a-Care Laboratories Pty Ltd v Commonwealth of Australia [No 9]* [2011] FCA 1111, [4] (clause in settlement distribution scheme providing for payment of administration fees); *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663, [403]-[404].
[69] Australian Broadcasting Corporation, 'Black Saturday fire victims upset at payout delay and lack of communication from lawyers', *AM*, 6 February 2016 (Simon Lauder) <http://www.abc.net.au/am/content/2015/s4401573.htm >. See also Hedley Thomas, 'Black Saturday bonanza for law firm as victims forced to wait', *The Australian*, 9 April 2016 < http://www.theaustralian.com.au/in-depth/bushfires/black-saturday-bonanza-for-law-firm-as-victims-forced-to-wait/news-story/e568cd7bdb1f5d2d7146187a012910fc>.
[70] Matthews v Ausnet (Ruling No. 41) [2016] VSC 171.

assessment of each claim may increase costs and undermine the efficiencies that the class action is designed to achieve. Averaging and rough justice may be argued to be a necessary evil in compensating the victims of mass harm.

VI CONCLUSION

While the compensation principle and the court's settlement approval jurisprudence equate fairness with evaluating the distribution of a settlement to group members by reference to the substantive law, it is also clear that a distribution regime cannot precisely replicate the substantive law. The settlement distribution process does not involve a trial before an independent judicial officer who hears competing evidence that is tested through cross-examination, receives argument on the application of the law and resolves the dispute through weighing the evidence, applying that law and giving reasons.[71] Rather, it is an approximation of the litigation process, with that process providing more or less guidance on the specific case depending on the stage at which the proceedings are settled. Precision or accuracy is unlikely to be attainable. The compensation principle and the substantive law are guides for the assessment of fairness in class action settlements, rather than the providers of single, distinct outcomes. Equally, the equation of 'rough justice' with class actions may be detrimental to the victims of mass harm and to the class action procedure.

Rough justice is of greatest concern where the class action combines claims with varying prospects of success. The combination of strong and weak claims in a class action may work to increase the amount the defendant pays to holders of weak claims.[72] Consequently, if there is 'damages averaging' the class action settlement would also reduce the payments to group members with strong claims. In short, those with weak claims receive a windfall or overpayment, while those with strong claims are underpaid giving rise to an 'obvious injustice'.[73]

The problem with overcompensating weak claims is not just the injustice it perpetrates on the holders of strong claims, but that it also undermines the reputation of the class action procedure and adds to the arguments that class actions are 'legalized blackmail'.[74] Professor John Coffee, in his book *Entrepreneurial Litigation,* discusses a range of class action critiques. In relation to the 'extortion critique' he states:

> The most plausible theory of extortion is that the inevitable aggregation of strong individual cases with weak individual cases in a class action may give enhanced (and unjustified) settlement value to the weak claims. In effect, the weak cases

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[71] Michael Legg and Sera Mirzabegian, 'Appropriate Dispute Resolution and the Role of Litigation' (2013) 38 Australian Bar Review 55, 57–61.

[72] *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Ltd [No 2]* (2006) 236 ALR 322, [66]; Joseph Grundfest and Michael Perino, "The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation" (1996) 38 *Arizona Law Review* 559, 571-572; Scott Dodson, 'Subclassing' (2006) 27 *Cardozo Law Review* 2351, 2360.

[73] *Peterson v Merck Sharp and Dohme (Australia) Pty Ltd [No 6]* [2013] FCA 447, [20].

[74] Bruce Hay and David Rosenberg, '"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy' (2000) 75 *Notre Dame Law Review* 1377; Anne Bloom, 'From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis' (2006) 39 *Loyola of Los Angeles Law Review* 719, 720.

> hide behind the strong. From this perspective, the class action camouflages the weak cases and so arguably extracts overpayments.[75]

The extraction of overpayments only follows if the settlement distribution scheme does not seek to give effect to the compensation principle and pay claims an amount consistent with their merits. In other words, a settlement distribution scheme that considers each claim based on the main factors relevant to prospects of success should offer protection against overpayment and criticisms of the class action procedure. Group members with weak claims may be able to be part of the class action and to shelter behind a representative party whose stronger claim is 'used as the vehicle for determining the common questions in the action',[76] but the weak claims recover based on their own merits.

Group members with strong claims who do not receive an allocation of compensation commensurate with the strength of the claim may feel unjustly treated. The experience with US shareholder class actions is that institutional investors have chosen to opt out where they 'believe that, in a class action, their stronger claims will be combined with weaker claims to dilute their ultimate share of the settlement value'.[77] The benefit of choosing not to participate in the class action and instead to bring an individual claim has been examined by comparing the recoveries achieved by the class action with the recovery achieved by institutional investors.[78] For example, the AOL class action obtained a settlement of $2.5 billion which translated into a per share recovery of 60 cents. Institutions that opted-out did significantly better than if they had stayed in the class, as shown by Table 1.[79]

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[75] John Coffee, *Entrepreneurial Litigation* (Harvard University Press, 2015) 135.
[76] Federal Court of Australia, *Practice Note CM17 — Representative Proceedings Commenced under Part IVA of the Federal Court of Australia Act 1976*, 9 October 2013, [2.2].
[77] James Cox and Randall Thomas, 'Does the Plaintiff Matter?: An Empirical Analysis of Lead Plaintiffs in Securities Class Actions' (2006) 106 *Columbia Law Review* 1587, 1605. See also Kendra Langlois, 'Note, Putting the Plaintiff Class' Needs in the Lead: Reforming Class Action Litigation by Extending the Lead Plaintiff Provision of the Private Securities Litigation Reform Act' (2002) 44 *William & Mary Law Review* 855, 876; Joseph Grundfest and Michael Perino, 'The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation' (1996) 38 *Arizona Law Review* 559, 571-72 (describing strategic benefits of class actions for weaker claimants and disadvantages for stronger claimants).
[78] John Coffee, 'Litigation Governance: Taking Accountability Seriously' (2010) 110 *Columbia Law Review* 288, 312. A similar phenomenon has been observed in relation to cartel and mass tort class actions in the US where there are group members with large individual losses: 317-318.
[79] Ibid 312.

Table 1 *The AOL Time Warner Differential*

Institutional Investor	Opt-Out Settlement	Estimated Improvement over Share of Class Recovery
University of California	$246 million	16-24 times better than class
Ohio Pension Funds	$175 million	$9 million (over 19 times better than class)
CalPERS	$117.7 million	17 times better than class
CalSTRS	$105 million	7 times better than class
State of Alaska Funds	$50 million (on $60 million claim)	80%+ recovery was '50 times better than class recovery'

While choosing to opt out has been linked to maximising recovery, institutional investors have also listed as reasons for suing alone as: pursuing additional claims, controlling litigation strategy and settlement, suing in a preferred (often state-court) forum, leveraging their position to demand corporate-governance changes, and receiving settlement funds quickly.[80] As a consequence, it cannot be said that claimants with strong claims always choose to leave the class action because of the strength of their claims. However, it does make intuitive sense that if class action settlement distributions that provide for averaging are approved, then an entity with a strong claim may prefer to pursue that claim alone.

The ability of those with the most valuable claims to opt out and litigate on their own behalf has been argued to operate as a type of protection against strong claims being undercompensated.[81] However, in Australian class actions, the settlement distribution regime may only be decided after the time to opt out has passed.[82] As a result, group members may only learn that they are being unfairly treated once their right to exit has expired.[83] This may mean that group members will make their decision to opt out based on the reputation of the class action, rather than the actual settlement distribution regime that is employed.

While allowing for strong claims to opt out might be seen as providing some protection to the holders of those strong claims, it also affects those holding weak claims. The ramification for the group members with weaker claims is that it may reduce the value of the class settlement in total, because the settling defendant must retain sufficient funds

[80] Elizabeth Chamblee Burch, 'Optimal Lead Plaintiffs' (2011) 64 *Vanderbilt Law Review* 1109, 1132.
[81] Jack Weinstein, 'Compensating Large Numbers of People for Inflicted Harms' (2001) 11 *Duke Journal of Comparative and International Law* 165, 174.
[82] In some class actions that settle early the opt out and settlement notices may occur at the same time: *Inabu Pty Ltd v Leighton Holdings Limited* [2014] FCA 622.
[83] See *Kelly v Willmott Forests Ltd (in liquidation) [No 4]* [2016] FCA 323, [6] where the detrimental effect of a settlement term was not known at the time of the right to opt out. Murphy J raised for consideration the need to allow for a second right to opt out for group members where the first opt out opportunity occurred prior to the terms of a proposed settlement being made available to group members: [136][140].

to cover the high-value opt-outs whose claims it must resolve separately through the ordinary civil litigation process.[84] If the class action proceeds, then the harm to those with weaker claims may be minimal as any settlement would presumably reflect the strength of their claims. Indeed the combination of numerous weak claims may result in their having a greater value than if they were to be litigated individually due to the risk to the defendant of losing the litigation, even if the probability of such a loss was low.[85] However, to be weighed against this is that numerous weak claims may find it difficult to attract the support of a lawyer and/or litigation funder with the result that no class action is commenced.[86] While it may be argued that the weak claims hide behind the strong claims, it also follows that the strong claims may enable the weaker claims to be brought.

The courts and legal practitioners need to balance compensation on the merits and efficiency. 'Rough justice' or averaging of damages must occur to some degree in a class action settlement so as to minimise cost and delay. However, it remains necessary to strive for a settlement distribution scheme that is consistent with the compensation principle and the substantive law. Otherwise class actions may be detrimental to some victims of mass harm and undermine the class action procedure.

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[84] Richard Nagareda, 'The Pre-Existence Principle and the Structure of the Class Action' (2003) 103 *Columbia Law Review* 149, 200. In an Australian context, see eg *Inabu Pty Ltd v Leighton Holdings Ltd* [2014] FCA 622, [6] (The settlement agreement allowed for a large shareholder opting out of the settlement to be dealt with by Leighton being able to require an amount in respect of such a group member to be held in escrow for a period of two years.).

[85] Charles Silver, '"We're Scared to Death": Class Certification and Blackmail' (2003) 78 *New York University Law Review* 1357, 1373–1375; Michael Legg, 'Shareholder Class Actions in Australia - The Perfect Storm?' (2008) 31 *UNSW Law Journal* 669, 699-701.

[86] John Walker, Susanna Khouri and Wayne Attrill, 'Funding Criteria for Class Actions' (2009) 32 *UNSW Law Journal* 1036.

LAW, POLITICS, AND THE ATTORNEY-GENERAL: THE CONTEXT AND IMPACT OF *GOURIET V UNION OF POST OFFICE WORKERS*

PETER RADAN*

The role of the Attorney-General as the guardian of the public interest, in considering granting his or her fiat to relator proceedings in relation to the enforcement of public rights, often attracts political controversy. This is vividly illustrated in the circumstances surrounding the decision of the House of Lords in Gouriet v Union of Post Office Workers, which confirmed the traditional rule that the Attorney-General's decision to refuse to grant his or her fiat is not justiciable (the fiat rule). This article details the rationale for the fiat rule, explores the political context and impact of the Gouriet case, and briefly details the impact of the decision on the rights of a private individual to enforce public rights.

I INTRODUCTION

It is well established that the Attorney-General, on behalf of the Crown and as the guardian of the public interest, has the principal role in the enforcement of public rights. The traditional rules relating to the standing of a private individual to enforce public rights are encapsulated in the two limbs in *Boyce v Paddington Borough Council* (*Boyce*).[1] Under the first limb, a private individual can enforce a public right if the infringement of that right also amounts to an infringement of his or her private right.[2] Under the second limb, a private individual can enforce a public right if, as a result of an infringement of the public right, he or she would suffer 'special damage peculiar to himself [or herself]'.[3] However, a private individual can also approach the Attorney-General to seek the latter's fiat or consent to bring relator proceedings. The plaintiff in relator proceedings is the Attorney-General, although the private individual (the relator) conducts the case and is liable for any costs.[4] The most controversial aspect of relator proceedings is the issue of whether an Attorney-General's decision to refuse to grant his or her fiat is justiciable. However, on this matter the law is clear: the Attorney-General's decision cannot be challenged before the courts. For the sake of convenience, hereinafter this will be referred to as 'the fiat rule'.

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* BA, LLB, PhD (Syd), Dip Ed (SCAE), FAAL, Professor, Macquarie Law School. With the usual caveats, I would like to thank Professors Denise Meyerson, Brian Opeskin and Cheryl Saunders, Dr Frank Carrigan, Andrew Tink, and the two anonymous reviewers of this article for their very helpful comments and suggestions on earlier drafts of this article.

[1] [1903] 1 Ch 109.

[2] *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114.

[3] Ibid.

[4] *Wentworth v Attorney-General for the State of New South Wales* (1984) 154 CLR 518, 527; *A-G (Qld) ex rel Duncan v Andrews* (1979 145 CLR 573, 582; *Andrew v A-G* [2013] SGCA 56, [35]; Harold Edward Renfree, *The Executive Power of the Commonwealth of Australia* (Legal Books, 1984) 208; Mark Robinson, *Judicial Review in Australia* (Thomson Reuters, 2014) 522.

Although relator proceedings do not arise with any great frequency,[5] they bring into sharp focus the dual functions of an Attorney-General. On the one hand, the Attorney-General, as a member of parliament, has a political role to play. On the other hand, he or she has a crucial role to play in the enforcement of the law. Diana Woodhouse aptly observes that the position of the Attorney-General is 'at best awkward and at times barely sustainable' because he or she 'is required to serve two masters, the government and the law, and thus to combine the role of a politician with that of a lawyer'.[6] This awkwardness really comes to the fore with fiat applications.

The 'high-water mark'[7] authority on the fiat rule is the unanimous decision of the House of Lords in *Gouriet v Union of Post Office Workers* (*Gouriet*).[8] *Gouriet* is also an excellent illustration of the political controversy in which Samuel Silkin, as Attorney-General for the United Kingdom, found himself in January 1977. The occasion was the announcement of plans, by the Union of Post Office Workers (UPOW), to place a ban on the delivery of mail to and from South Africa. Silkin refused to grant his fiat to John Gouriet who, as the representative of the National Association for Freedom (NAFF), sought an injunction to prevent the illegal strike taking place. Silkin's decision was the trigger that ultimately led to the unanimous decision of the House of Lords in *Gouriet* which upheld the long-standing fiat rule.[9]

The merits or otherwise of the decision in *Gouriet* have been extensively analysed,[10] and it is not the purpose of this article to add to this body of literature. Rather, its purpose is to paint a picture of *Gouriet's* political context and impact. *Gouriet* was a case in which NAFF sought to overturn the fiat rule in pursuit of its objective of preventing an illegal strike taking place in the context of its broader political campaign against the power of trade unions. This objective was shared by the Conservative Party in the United Kingdom, which quietly supported the litigation initiated by NAFF. Attorney-General Silkin's defence of the fiat rule was upheld by the House of Lords, but not before NAFF, and indeed the Conservative Party, achieved a significant political victory, when the Court of Appeal granted an interlocutory injunction preventing UPOW's strike going ahead. This political victory contributed, to some degree, to the victory of the Conservative Party in the general election of 1979. On the other hand, *Gouriet* also led to considerable debate about the extent to which a private individual should have the right to bring legal proceedings to enforce the public law. This article will, albeit briefly, examine the impact of *Gouriet* in both the United Kingdom and Australia in this respect.

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[5] In Australia, the Commonwealth Attorney-General received 31 applications between 1937 and 2002, most of which were refused: Daryl Williams, 'The Role of the Attorney-General' (2002) 13 *Public Law Review* 252, 253. In the states and territories during the 1990s, 32 applications were made, of which only 7 were granted: Cheryl Saunders and Paul Rabbat, 'Relator Actions: Practice in Australia and New Zealand' (2002) 13 *Public Law Review* 292, 296.

[6] Diana Woodhouse, 'The Attorney General' (1977) 50 *Parliamentary Affairs* 97, 97.

[7] Olumide Babalola, *The Attorney-General: Chronicles and Perspectives* (LAWpavilion, 2013) 56.

[8] [1978] AC 435.

[9] Ibid 482 (Lord Wilberforce), 494 (Viscount Dilhorne), 500 (Lord Diplock agreeing with the views of Lord Wilberforce and Viscount Dilhorne on this matter), 505-6 (Lord Edmund-Davies), 518 (Lord Fraser of Tullybelton).

[10] See for example, John Griffiths, 'Some Recent Developments in Judicial Review of Executive Power' (1977-1978) 11 *Melbourne University Law Review* 316, 331-40; J J Waldron, 'Gouriet's Case in the House of Lords' (1977-1980) 4 *Otago Law Review* 87; Geoffrey A Flick, 'Relator Actions: Injunctions and the Enforcement of Public Rights' (1978) 5 *Monash University Law Review* 133; David Feldman, 'Injunction and the Criminal Law' (1979) 42 *Modern Law Review* 369.

It will also outline the extent of changes in the law that have lessened the need for private individuals to seek an Attorney-General's fiat, although not affecting the authority of the fiat rule itself. However, before examining these matters, the operation and rationale of the fiat rule will be briefly detailed.

II OPERATION AND RATIONALE OF THE FIAT RULE

Although a government minister, the decision of the Attorney-General in relation to relator applications is one to be made by the Attorney-General free of political pressure from his or her colleagues. However, this does not mean that he or she cannot consult colleagues.

The classic pronouncement on the proper role of the Attorney-General making his or her decision was stated by Sir Hartley Shawcross in 1951. In a statement as Labour Attorney-General, that was approved by both sides of the House of Commons[11] and subsequently cited with approval in *Gouriet*[12] by Viscount Dilhorne, himself a former Attorney-General, Shawcross said the following:

> This is a very wide subject indeed, but there is only one consideration which is altogether excluded and that is the repercussion of a given decision upon my personal or my party's or the Government's political fortunes; that is a consideration which never enters into account. Apart from that the Attorney-General may have regard to a variety of considerations, all of them leading to the final question: would a prosecution be in the public interest, including in that phrase, of course, the interests of justice?[13]

In weighing up the public interest, Shawcross went on to say that the Attorney-General should, after being acquainted with the relevant facts, take into account factors such as 'the effect which the prosecution, successful or unsuccessful as the case may be, would have on public morale and order and with any other considerations affecting public policy'.[14] These clearly political calculations inevitably mean that the fiat rule is likely to attract political controversy.

The rationale underpinning the fiat rule is that the Attorney-General is accountable to Parliament and not to the courts. In *Gouriet*, Lord Fraser of Tulleybelton put it as follows:

> If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the

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[11] John L J Edwards, *The Attorney-General, Politics and the Public Interest* (Sweet & Maxwell, 1984) 322.
[12] [1978] AC 435, 489.
[13] Geoffrey Wilson, *Cases and Materials on Constitutional and Administrative Law* (Cambridge University Press, 2nd ed, 1976) 516.
[14] Ibid 517. See also Sir Hartley Shawcross, 'The Office of the Attorney-General' (1953) 7 *Parliamentary Affairs* 380, 385-6.

> sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts.[15]

However, the capacity of Parliament to hold an Attorney-General accountable is somewhat limited. The Attorney-General cannot be questioned on a case that is before the courts and is not bound to give reasons for making a particular decision.[16]

III POLITICAL CONTEXT AND IMPACT OF *GOURIET*

The political context in which so many fiat applications are located is well illustrated by the background to the *Gouriet* case. Although the entirety of the *Gouriet* litigation took place during the British Labour Party administration of the mid-1970s,[17] the broad political background to this case needs to be traced back to the 1950s. It was at this time that, following Britain's post-World War II boom, Conservative Party Prime Minister Harold Macmillan famously declared that most British people in the late 1950s had 'never had it so good'.[18] However, circumstances had dramatically changed by the early 1970s. The post-World War II consensus, built around high public spending and a mixed economy was breaking down. The priority in the early post-war years in terms of economic policy was focused on keeping unemployment as low as possible rather than controlling inflation. However, by the early 1970s, persistent inflation, combined with stagnant growth ('stagflation'), and the world oil-price shocks, saw 'ever more powerful political and corporate forces … question[ing] protectionism and state ownership, as well as welfare state policies and the value of strong unions and secure job status'. This led to calls for 'deregulation, liberalisation of trade and investment, and privatization of industry'.[19]

As a response to this changed environment, in the mid-1970s, a new set of policies began to emerge within the opposition Conservative Party. They were largely inspired by Sir Keith Joseph[20] and were gradually championed by his major supporter, Margaret Thatcher, after she became Leader of the party on 11 February 1975.[21] The 4 major planks

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[15] *Gouriet v Union of Post Office Workers* [1978] AC 435, 524. See also Lord Wilberforce's speech at 482.

[16] Woodhouse, above n 6, 103.

[17] The Labour Party, led by Harold Wilson, came to power, by defeating the Conservative Party, led by Prime Minister Edward Heath, in the general election held on 28 February 1974. It was re-elected to power in the general election held on 10 October 1974. Prime Minister Harold Wilson retired on 5 April 1975 and was replaced by James Callaghan. In February 1979, Margaret Thatcher became Prime Minister following the Conservative Party's victory at the general election held on 3 May 1979.

[18] Dominic Sandbrook, *Never Had It So Good: A History of Britain from Suez to the Beatles* (Little, Brown, 2005) 75.

[19] Peter Dauvergne and Genevieve Lebaron, *Protest Inc: The Corporatization of Activism* (Polity, 2014). 91.

[20] William Keegan, *Mrs Thatcher's Economic Experiment* (Allen Lane, 1984) 33-65; Andrew Denham and Mark Garnett, 'From "Guru" to "Godfather": Keith Joseph, "New" Labour and the British Conservative Tradition' (2001) 72 *Political Quarterly* 97, 100-104.

[21] Thatcher replaced Edward Heath, who had led the party to two election defeats in 1974, the first as Prime Minister and the second as Leader of the Opposition. These defeats led to moves to replace Heath as the leader of the party with Sir Keith Joseph who led the party's right wing faction. However, Joseph's prospects of assuming the party's leadership were shattered on 19 October 1974 when, in delivering a major speech in Birmingham, he claimed that many of Britain's problems were the consequence of too many children being born to women in Britain's lower classes and that as a result he felt that '[Britain's] human stock [was] threatened':

of this policy approach were: (i) reduction of the money supply as a means of controlling inflation, which was seen as the main way to fix the economy; (ii) reduction of the public sector in favour of an expanded market economy to be achieved through privatisation of state-owned industries and services; (iii) reform of the labour market through restricting the powers of trade unions; and (iv) restoration of government authority through an increase in resources for the armed forces and police so as to strengthen the nations' military defence, strengthen the forces of law and order, and resist the claims of special interest groups.[22]

Significant intellectual support for these neo-liberal policies came from outside the Conservative Party through the work of think-tanks such as the Institute of Economic Affairs (established in 1955), the Centre for Policy Studies (established in 1974, and whose Deputy Chairman was Margaret Thatcher[23]), and the Adam Smith Institute (established in 1977). The policies propounded by these pro-free market think-tanks were largely inspired by the economic theories of Milton Friedman and Friedrich von Hayek.[24] The impact of these policies was, as William Keegan observes, 'nothing less than the abandonment of the post-war consensus between Conservative and Labour over the centre ground and common aspirations of politics'.[25]

One of the key targets of this nascent neo-liberalism was an attack on the power of trade unions. The trade union movement had emerged from World War II with enhanced power. Its pride of place in the affairs of state was recognised in the post-war consensus, which accepted organised labour as an integral part of the system and whose power was enhanced by the fact that there were generally very low levels of unemployment. Unions,

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<http://www.margaretthatcher.org/document/101830>. Public outrage at these comments, which saw Joseph labeled as a 'saloon-bar Malthus', saw him withdraw from the leadership contest with Heath. It was then that Thatcher, who was a close associate of Joseph and who saw him as her intellectual guru, came forward to contest the party's leadership, a contest that she won, much to the surprise of nearly everybody, including Thatcher herself. The speech that triggered Joseph's fall from grace was crafted by Jonathan Sumption, a former Oxford history don and freshly minted barrister who was then working as an assistant to Joseph: Dominic Sandbrook, *Season in the Sun, The Battle for Britain, 1974-1979* (Allen Lane, 2012) 233-4. According to Vernon Bogdanor, Sumption can be credited with creating Thatcher: Vernon Bogdanor, 'Review: Seasons in the Sun by Dominic Sandbrook', *New Statesman*, 26 April 2012. Sumption subsequently went on to a stellar career at the bar and, in 2012, became only the sixth person to be appointed to Great Britain's highest court without having previously served as a full-time judge in her lower courts – the others were Lord Macnaughten (1887), Lord Carson (1921), Lord Macmillan (1930), Lord Reid (1948), and Lord Radcliffe (1949).

[22] Dennis Kavanagh, *Thatcherism and British Politics, The End of Consensus?* (Oxford University Press, 2nd ed, 1990) 12-13; Camilla Schofield, '"A nation or no nation?" Enoch Powell and Thatcherism' in Ben Jackson and Robert Saunders (eds), *Making Thatcher's Britain* (Cambridge University Press, 2012) 95, 97-107.

[23] Keegan, above n 20, 46.

[24] Kavanagh, above n 22, 76-91; Ben Jackson, 'The think-tank archipelago: Thatcherism and neo-liberalism' in Ben Jackson and Robert Saunders (eds), *Making Thatcher's Britain* (Cambridge University Press, 2012) 43; Andy Beckett, *When the Lights Went Out, What Really Happened to Britain in the Seventies* (Faber & Faber, 2010) 260-88; Sandbrook, above n 21, 222-8; Keegan, above n 20, 59-60. For a detailed analysis of the emergence of neoliberalism see Daniel Stedman Jones, *Masters of the Universe, Hayek, Friedman, and the Birth of Neoliberal Politics* (Princeton University Press, 2012).

[25] Keegan, above n 20, 81.

and by extension the governing Labour Party, in turn favoured the welfare state, a commitment to full employment, and the public ownership of assets.[26]

This was also a time when union membership had, since World War II, been on the increase and reached its peak in 1979. This peaking coincided with the breakdown of the post-war consensus that, in turn, led to a substantial increase in the number of strikes.[27] A particular feature of strike activity at this time was the return of large national strikes, especially involving miners, which had not been common since before World War II.[28]

Union activity at this time was very successful in achieving significant improvements in wages and working conditions for its working-class members. As a result, the 1970s represented 'the high tide of redistribution' policies that were aimed at reducing inequality of incomes and wealth.[29] However, in the 1970s, significant improvements to the standard of living for the working class triggered the emergence of what is widely referred to as a 'middle-class revolt', as various conservative, activist, and militant groups, drawn largely from Britain's middle class, began to emerge on the political landscape.[30]

An early example of such a group was the Middle Class Association (MCA), founded by Conservative MP John Gorst. In the words of Roger King:

> [The MCA sought to unite] 'professional, managerial, self-employed and small business occupations' against 'spiteful' tax increases at a time when the middle classes were 'suffering disproportionately from inflation and massive erosions of savings and investment'. Its members resented the militancy of trade unionism which tilted at the 'measure of comfort' worked for in socially and economically valuable lifetimes.[31]

In effect, MCA members and sympathisers felt that their relative superiority over the working class in terms of wealth, prosperity, and social standing was being threatened by the increased prosperity of blue-collar workers, who had benefited from the successes of their unions.[32] In this fear of being overtaken by the increasingly better off working class, MCA members felt, in the words of King, that, 'the gadarene rush to equality of reward threatened the source of vitality, independence and creativity provided by middle class

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[26] Kavanagh, above n 22, 34-5.
[27] Duncan Gallie, 'Employment and the Labour Market' in Jonathan Hollowell (ed), *Britain Since 1945* (Blackwell Publishing, 2003) 404, 417. In the period 1954-1964 there were 2,472 disputes that resulted in the loss of 3,760,000 working days due to strikes, whereas in the period 1970-1979 there were 5,195 disputes that resulted in 25,740,000 working days being lost: Chris Wrigley, 'Industrial Relations and Labour' in Jonathan Hollowell (ed), *Britain Since 1945* (Blackwell Publishing, 2003), 425, 436 (citing Department of Employment statistics).
[28] Wrigley, above n 27, 435.
[29] Robert Skidelsky, *Britain Since 1900, A Success Story?* (Vintage Books, 2014) 30.
[30] Nick Tiratsoo, '"You Never Had It So Bad": Britain in the 1970s' in Nick Tiratsoo (ed), *From Blitz to Blair, A New History of Britain Since 1939* (Phoenix, 1997) 163, 187-9; Sandbrook, above n 21, 365-6.
[31] Roger King, 'The Middle Class in Revolt?' in Roger King and Neil Nugent (eds) *Respectable Rebels: Middle Class Campaigns in Britain in the 1970s* (Hodder and Stoughton, 1979) 1, 3; Sandbrook, above n 21, 382.
[32] Sandbrook, above n 21, 127.

man'.[33] However, the MCA was short-lived, with its membership absorbed by NAFF in the mid-1970s.[34]

A *National Association for Freedom (NAFF)*

The most visible, militant, and long lasting group in this middle class revolt was NAFF. Officially launched on 2 December 1975, its founding members included a host of prominent individuals[35] and a handful of Conservative Party MPs.[36] However, the critical personnel in its formation and early years were Viscount De L'Isle, Ross and Norris McWhirter, Robert Moss, and John Gouriet. Viscount De L'Isle, NAFF's founding Chairman, was a Victoria Cross winner from World War II, a former Conservative Party MP and Secretary of State for Air in the government of Sir Winston Churchill, and Australia's Governor General from 1961-1965. Ross and Norris McWhirter, who were both well known to Margaret Thatcher,[37] were best known as co-editors of the *Guinness Book of Records* and its television spin-off, *Record Breakers*. The McWhirters had a long track record of campaigning against what they saw as the advance of socialism in Britain. In pursuit of their political objectives, the McWhirters, with some degree of success, regularly resorted to the courts.[38] The assassination of Ross McWhirter by IRA gunmen six days before NAFF's official launch, attracted significant publicity and support for NAFF.[39] Robert Moss was an Australian-born and educated former academic at the Australian National University, who worked as a journalist and commentator for the *Economist* in the 1970s. He was the first editor of NAFF's newspaper, *Free Nation*.[40] As an occasional speechwriter for Margaret Thatcher, Moss drafted the speech given by

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[33] King, above n 31, 3.

[34] Phillip Whitehead, *The Writing on the Wall, Britain in the Seventies* (Michael Joseph, 1986) 213. NAFF also absorbed the remnants of the Civil Assistance organization (a group formed to break any general strike) formed by Sir Walter Walker, who had served as Commander in Chief of NATO forces in Northern Europe from 1969 to 1972. Walker, whose *Who's Who* entry described his recreations as 'normal', had achieved considerable notoriety in the early 1970s as a supposed candidate to become a British version of Chile's General Pinochet: Andy Beckett, *Pinochet in Piccadilly, Britain and Chile's Hidden History* (Faber and Faber, 2002) 198-201; Sandbrook, above n 21, 135-40.

[35] These included Douglas Bader (famed World War II pilot), Alec Bedser (former test cricketer and then Chairman of Selectors), John Braine (novelist), Brian Crozier (anti-communist activist, founder of the Institute for the Study of Conflict, and later an adviser to Thatcher on foreign policy), Ralph Harris (Director of the Institute of Economic Affairs), Michael Ivens (Director of Aims in Industry, an anti-union pressure group, who was described by *The Morning Star* as 'one of the three most dangerous men in Britain'), Lady Morrison of Lambeth (widow of Labour icon Herbert Morrison), and Peregrine Worsthorne (prominent columnist with *The Daily Telepgraph*): Beckett, above n 34, 191; Crozier, above n 40, 140; 'Michael Ivens – Obituary', *The Daily Telegraph* (7 November 2001) <http://www.telegraph.co.uk/news/obituaries/1361693/Michael-Ivens.html>; Neill Nugent, 'The National Association for Freedom' in Roger King & Neil Nugent (eds) *Respectable Rebels: Middle Class Campaigns in Britain in the 1970s* (Hodder and Stoughton, 1979) 76, 87; Sandbrook, above n 21, 383; Rob Steen, 'The D'Oliveira Affair' in Stephen Wagg (ed), *Myths and Milestones in the History of Sport* (Palgrave Macmillan, 2011) 185, 190; Richard Vinen, *Thatcher's Britain: The Politics and Social Upheaval of the 1980s* (Simon & Schuster UK, 2009) 83.

[36] Jill Knight, Sir Frederic Bennett, Rhodes Boyson, Winston Churchill (the grandson of former Prime Minister Winston Churchill), Stephen Hastings, and Nicholas Ridley: Nugent, above n 35, 88.

[37] Thatcher was quite open in her grief and shock at the assassination of Ross McWhirter by IRA gunmen six days before the NAFF's official launch: Margaret Thatcher, *The Path to Power* (HarperCollins Publishers, 1995) 398; Sandbrook, above n 21, 363.

[38] Beckett, above n 24, 377-8.

[39] Sandbrook, above n 21, 383.

[40] Brian Crozier, *Free Agent, The Unseen War 1941-1991* (HarperCollins, 1994) 118.

Thatcher in January 1976, warning about the Soviet military build-up that led to the Soviets labelling Thatcher as the 'Iron Lady', a moniker that Thatcher willingly accepted.[41] John Gouriet was a former intelligence officer who had served in places such as Malaya, Borneo, and Northern Ireland. After his retirement from the army, he became a merchant banker in London.[42] It was in his capacity as NAFF's Campaign Director that he initiated the proceedings in *Gouriet*.

Like the MCA, NAFF was formed, following the Conservative Party's two election losses in 1974, in response to the party's abandonment of individualistic and free enterprise policies. These policies had been part of the Conservative Party's platform that swept Edward Heath to power as Prime Minister in 1970.[43] NAFF's members and supporters were, by and large, middle class conservatives who had previously been reluctant to engage in organised political activity, but who were now more militant and less prepared to work through, and accept the wisdom of, conventional party politics.

NAFF represented parts of the middle class that felt they were being ignored by the Conservative Party. Angered by Heath's alleged 'accommodation of the trade unions and apparent helplessness in the face of collectivism', NAFF wanted the Conservative Party to be committed to 'more individualistic economic policies, … firmer commitments on defence against the communist threat', as well as 'to [reduce] trade union influence, especially through legal prohibition of the closed shop'.[44] In his speech on the occasion of NAFF's launch, Viscount De L'Isle said that freedom in Britain faced four major threats, namely, the drift towards collectivism, inflation, the continued expansion of government, and the power of trade unions.[45]

In Margaret Thatcher, NAFF saw the Conservative Party being led by one of their own, and welcomed her defeat of Heath for leadership of the Conservative Party in February 1975. At the time of her challenge for the leadership of the Conservative Party, Thatcher had explicitly identified herself with conservative middle class values when she said:

> [I]f 'middle class values' include the encouragement of variety and individual choice, the provision of fair incentives and rewards for skill and hard work, the maintenance of effective barriers against the excessive power of the State and a belief in the wide distribution of individual *private* property, then they are certainly what I am trying to defend.[46]

As leader of the opposition in the lead-up to the 1979 general election, Thatcher's priority was to reassure the middle class that she had its interests at heart.[47]

It was thus not surprising that Thatcher embraced NAFF and offered, despite reservations from some of her colleagues, discreet, but firm support for its activities.[48] In

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[41] Charles Moore, *Margaret Thatcher, The Authorized Biography, Volume One: Not for Turning* (Allen Lane, 2013) 331-3; Thatcher, above n 37, 361.
[42] Sandbrook, above n 21, 384; Beckett, above n 24, 380-2.
[43] King, above n 31, 2-4.
[44] Ibid 7; Nugent, above n 35, 88.
[45] Nugent, above n 35, 83-4.
[46] Daniel Anthony Cowdrill, The Conservative Party and Thatcherism, 1970-1979: A Grass-Roots Perspective (M Phil Dissertation, University of Birmingham, 2009) 30-3 <http://etheses.bham.ac.uk/725/1/CowdrillMPhil10.pdf>.
[47] Sandbrook, above n 21, 672.

January 1977, she attended, as guest of honour, NAFF's first subscription dinner where over 500 guests gave her a standing ovation.[49] Unsurprisingly, Heathites within the Conservative Party, with considerable justification, regarded NAFF 'as a stalking horse for Thatcher's brand of Toryism'.[50] Similarly, and also with considerable justification, the UPOW saw NAFF as 'the stalking horse for a legal attack on trade union rights that were later implemented by the post-1979 Thatcher Government'.[51]

NAFF certainly agreed with this assessment of its activities. At the time, John Gouriet saw NAFF as Thatcher's 'liege men',[52] and would, many years later, claim that NAFF was 'in the vanguard and at the cutting edge of Thatcherism'[53] and could 'justly claim to have paved the way for her first victory in 1979 by exposing the unacceptable face of trade unionism and its links with the Labour Government of the day'.[54]

B *Political Activities of NAFF*

NAFF's broad political objective was to transform British society, which it saw as being controlled by an ever-encroaching government that had succumbed to increasingly powerful and irresponsible trade unions, into one in which the forces of government were minimal, 'except, significantly, in the areas of law enforcement, defence and alleged abuse of trade union power'.[55] NAFF's anti-union attitudes paralleled those of Margaret Thatcher, who, as far back as 1966, expressed the view that it is 'the individual who needs protection against the power of unions and the public who need protecting against unofficial strikes'.[56] In the campaign leading up to the 1979 general election, the Conservative Party policy was expressed in terms of a campaign against 'the dictatorship of unsackable union leaders'.[57]

In its early years, the central focus of all NAFF's activities was its campaign against the power of the union movement. This was made clear in the following headlined front page demand of the first issue of *Free Nation*: 'Mrs Thatcher, Please don't sell out to the Union left'.[58] According to Gouriet, NAFF's focus in the late 1970s was 'the abuse of power by unelected, overmighty trade union extremists who were holding the Labour Government and the country to ransom'.[59]

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[48] Thatcher, above n 37, 399.
[49] Nugent, above n 35, 88.
[50] King, above n 31, 3.
[51] Alan Clinton, *Post Office Workers, A Trade Union and Social History* (George Allen & Unwin, 1984) 585.
[52] Crozier, above n 40, 127.
[53] John Gouriet, *'Hear Hear!', Collected Articles and Letters, 1999-2009* (Author House UK Ltd, 2010) 402.
[54] Ibid 294. NAFF's devotion to Thatcher continues to this day. Following her death in 2013, NAFF (now known as the Freedom Association) established the Margaret Thatcher Birthday Weekend to be held annually in Thatcher's birthplace of Grantham with the aim of celebrating Thatcher's legacy and the values that she held dear: The Freedom Association (2014) <http://www.tfa.net/margaret-thatcher-birthday-weekend>.
[55] Nugent, above n 35, 76.
[56] Sandbrook, above n 21, 678.
[57] Ibid 679.
[58] *The Free Nation*, 1, no 1, 19 March 1976, quoted in Jack McGowan,' "Dispute", "Battle", "Siege", "Farce"? – Grunwick 30 Years On' (2008) 22 *Contemporary British History* 383, 396.
[59] Gouriet, above n 53, 298.

NAFF's focus on anti-union activism was not a surprise. The eighth freedom set out in its *Charter of Rights and Liberties* was the '[f]reedom to choose whether or not to be a member of a trade union or employer's association'. Its anti-union stance was further demonstrated in the thirteenth freedom which was the '[f]reedom to engage in private enterprise, and to pursue the trade, business or profession of one's choice, without harassment'.[60] A more assertive statement of its anti-union stance is to be found in its Certificate of Incorporation under the *Companies Act 1948-1967* (UK) which stated that NAFF 'shall not support with its funds any object, or endeavour to impose on or procure to be observed by its members or others any regulation, restriction or condition which if an object of [NAFF] would make it a Trade Union'.[61]

According to Robert Moss, Britain was, at that time, in danger of becoming a Trades Union Congress one-party state.[62] His, and NAFF's, view on trade unions was as follows:

> [I]n Britain … trade unions today are no longer fighting for the same cause as the Tolpuddle Martyrs. Far from defending down-trodden workers who are forbidden to combine, they are seen to be championing the sectional selfishness of an aristocracy of better-paid workers – who are able to be paid more than the market allows, by diverting resources from other areas and so contributing to unemployment – and to be operating as press-gangs that oblige unwilling employees to send an annual subscription to maintain the lifestyles and strike funds of the union leadership.[63]

According to NAFF, the time was 'ripe … to reconcile the claims of trade unions with those of the community as a whole'. To achieve this goal the following was required:

> [T]he repeal of closed-shop legislation; adequate constraints on the right to picket to prevent intimidation; new legislation to restrict disruption of services vital to public health and safety, like water, gas and electricity; and provision for the democratic (and regular) election of union officials through secret ballot, which should be made compulsory.[64]

When NAFF sought political influence, this was not done on an institutional basis, but rather through the networks of social contacts that were generated by the members of its National Council which, as already noted, included a number of Conservative Party MPs. This reflected a continuation of the political application of social resources that had been typical of the nineteenth century middle and upper classes that was described by Eric Hobsbawm as follows:

> The classical recourse of the bourgeois in trouble or with cause for complaint was to exercise or to ask for personal influence, to have a word with the mayor, the deputy, the minister, the old school or college comrade, the kinsman or business contact.[65]

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[60] NAFF's Charter of Rights and Liberties is reprinted in Robert Moss, *The Collapse of Freedom* (Abacus, 1977) 218.
[61] Certificate of Incorporation No 1303670, Clause 3(ii), 18 March 1977 (copy with the author).
[62] Robert Moss, 'The Defence of Freedom' in K W Watkins (ed), *In Defence of Freedom* (Cassell, 1978) 145.
[63] Ibid 146.
[64] Ibid 147.
[65] Eric Hobsbawm, *The Age of Capital, 1848-1897* (Weidenfeld & Nicolson, 1975) 244.

However, the focus of NAFF's activism was not in lobbying politicians or influencing civil servants.[66] Rather, it was on taking legal action.[67] In this, NAFF was inspired by, and followed, the example of the McWhirter brothers' earlier efforts to achieve their political objectives through the courts,[68] the most significant such case being *A-G ex rel McWhirter v Independent Broadcasting Authority* (*McWhirter*).[69]

C *NAFF and the Union of Post Office Workers (UPOW)*

Gouriet's case was not the first time that NAFF had been involved with legal proceedings against the UPOW. This occurred during the union's dispute with Grunwick Processing Laboratories (Grunwick), owned by George Ward. This dispute ran at the same time that the dispute in *Gouriet* arose. Grunwick was a photograph developing business, reliant upon the postal system for the operation of its mail order business. The Grunwick dispute, which attracted extensive media publicity, began in August 1976. The central issue in the dispute concerned the right of an employer to engage only non-union labour and arose in the wake of closed-shop legislation that was introduced by Britain's Labour government in 1974.[70] For NAFF, this legislation constituted 'an affront to individual liberty', without parallel in Western Europe.[71]

For NAFF, the Grunwick dispute was a crucial test of principle and from its earliest stages NAFF campaigned vigorously on behalf of Ward and his business. According to Gouriet, Grunwick was 'one little company that was being bullied' and NAFF pledged to do whatever it could to save it.[72]

During the course of the Grunwick dispute, on 1 November 1976, the UPOW placed a local area ban on the handling of Grunwick's mail. This posed a serious threat to the viability of Grunwick's business. On 4 November 1976, NAFF, keen to challenge the assumed right of unions to strike, sponsored Grunwick's application for an injunction against the UPOW. The UPOW retracted its boycott and the legal proceedings were withdrawn on 9 November 1976, on the basis that fruitful negotiations were to be

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[66] Brian Elliott, Frank Bechhofer, David McCone and Stewart Black, 'Bourgeois Social Movement in Britain: Repertoires and Responses' (1982) 30 *Sociological Review* 71, 85.
[67] For example, NAFF took several cases to the European Court in Strasbourg involving staff dismissed by British Rail as a result of the closed shop. It also provided financial support to the Tameside Parents Education Group in its successful claim in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 to prevent the introduction of comprehensive education within the Tameside Municipal Bourough: Nugent, above n 35, 89
[68] Sandbrook, above n 21, 364. Cases brought before the courts by the McWhirter brothers included *McWhirter v Manning*, *The Times*, 30 October 1954; *McWhirter & McWhirter v Chapple* (1954) 104 SJ 204; *McWhirter v Platten* [1970] 1 QB 508; *McWhirter v Attorney-General* [1972] CMLR 882; *McWhirter v Callaghan*, Unreported decision in 1970; and *A-G ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629. Some of these cases are recalled in Norris McWhirter's affectionate biography of his brother: Norris McWhirter, *Ross, The Story of a Shared Life* (Churchill Press Ltd, 1976).
[69] [1973] QB 629.
[70] For accounts of the Grunwick dispute see Joe Rogaly, *Grunwick* (Penguin Books, 1977); Beckett, above n 24, 358-403; Sandbrook, above n 21, 599-618. On NAFF's role in the Grunwick dispute see Jack McGowan, '"Dispute", "Battle", "Siege", "Farce"? – Grunwick 30 Years On' (2008) 22 *Contemporary British History* 383. On the UPOW's role in the dispute see Clinton, above n 51, 585-93.
[71] Moss, above n 62, 145.
[72] Sandbrook, above n 21, 606.

entered into to resolve the dispute.[73] When these negotiations did not eventuate, a second local ban was initiated by the UPOW in June 1977. In response to this ban, NAFF launched Operation Pony Express on 10 July 1977. This action consisted of Gouriet, Moss and a handful of supporters loading sacks of Grunwick's outgoing mail into vans that they mailed from post-boxes across England, some as far north as Preston and Manchester and south as far as Plymouth and Truro. Following this out-manoeuvring of the UPOW, the UPOW ended the black ban.[74] NAFF's actions during the Grunwick dispute resulted in much favourable publicity for it, a doubling of its membership, and a significant level of monetary donations for its coffers.[75]

Margaret Thatcher approved of NAFF's role in the Grunwick dispute and expressed the view that '[w]ithout NAFF, Grunwick would almost certainly have gone under'.[76] According to NAFF, Thatcher privately described Operation Pony Express as the 'best thing since Entebbe'.[77] At the time she wrote to Gouriet as follows:

> [W]e feel that the scenes of wild violence portrayed on television plus the wild charges and allegations being thrown about in certain quarters, are enough in themselves to put most of the public on the side of right and are doing more than hours of argument.[78]

For Thatcher, the Grunwick dispute was more than about the closed shop. Like NAFF, she saw the dispute as part of a broader issue, namely, 'the sheer power of the unions'.[79] In the words of George Ward, in an article in *The Times* in September 1977 that was probably written for him by NAFF, victory in the Grunwick dispute represented, 'an exceptional nuisance to those who see Britain's future as that of a collectivist, corporate state, in which business can be obliged to surrender to coercion and brute force'.[80]

The significance of the Grunwick dispute was that popular opinion agreed with Thatcher. In 1975, opinion polls showed that three out of four people thought unions were too powerful. By September 1978, and notwithstanding that the UPOW suffered a defeat in the Grunwick dispute, 82 per cent of the people, including an overwhelming majority of union members, thought unions exerted too much power.[81] As the Labour-supporting historian Kenneth Morgan observed, 'Grunwick became not a fight for workers' rights but a symbol of mob rule and uncontrolled threats from trade union power'.[82]

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[73] *Gouriet v Union of Post Office Workers* [1977] QB 729, 760-1; Jamie Ritchie, 'Grunwick' (1978-1979) 4 *Policy Law Review* 3, 4; Clinton, above n 51, 586-7; Peter Hain, *Political Trials in Britain* (Allen Lane, 1984) 199.

[74] Clinton, above n 51, 590-1; Beckett, above n 24, 395-401; Sandbrook, above n 21, 614-5; Nugent, above n 35, 90. For Gouriet's later reflections upon the Grunwick dispute and an account of Operation Pony Express see Gouriet, above n 53, 275-9. The name of this operation is likely to have been inspired by Operation Pony Express, a covert operation run American military forces South East Asia during the Vietnam War that transported indigenous forces into Laos to cross into North Vietnam to gather intelligence on North Vietnamese troop movements, which was then used by the Americans to select targets for air strikes.

[75] Sandbrook, above n 21, 617.

[76] Thatcher, above n 37, 399.

[77] Gouriet, above n 53, 278.

[78] Thatcher, above n 37, 399.

[79] Ibid 401.

[80] Sandbrook, above n 21, 617.

[81] Ibid 617-8.

[82] Kenneth O Morgan, *Callaghan: A Life* (Oxford University Press, 1997) 583.

The critical events in the *Gouriet* case, which, as already noted, took place during the protracted Grunwick dispute, had their origins in an appeal to the UPOW from the International Confederation of Free Trade Unions to support a one week boycott on postal and telecommunications services to South Africa. The call for support was made as part of a coordinated international protest against apartheid in the wake of the shooting of school children in Soweto in September 1976, the banning of trade union activity, and the death of a number of trade union leaders whilst in captivity.[83]

The UPOW supported the ban. Its recently appointed research officer, Peter Hain, a leading figure in the anti-apartheid campaign and later in his career a Labour MP and Minister in the Blair Labour government, drafted the press release announcing the UPOW's planned week-long boycott.[84] On the evening of 13 January 1977, the ban, which was scheduled to commence at midnight on 16 January 1977, was publicly announced by the union's General Secretary, Tom Jackson.

The UPOW's call for a ban provided a golden opportunity for NAFF to initiate legal action for an injunction, similar in nature to the discontinued proceedings against the UPOW that it had sponsored less than two months earlier in the context of the Grunwick dispute.[85]

On 14 January 1977, Gouriet sought the Attorney-General's fiat for relator proceedings for an injunction to stop the union from going ahead with the ban. In a decision that Gouriet claimed was based upon political expediency, the Attorney-General refused to grant his fiat.[86] Later that day, Gouriet made an application before Stocker J in chambers for an injunction against the UPOW.

Gouriet had some legal basis for launching his proceedings without the Attorney-General's fiat. In *McWhirter*, Ross McWhirter, whom Lord Denning later described as a 'remarkable person' who 'took a stand against evil' and 'was always courageous in support of the rule of law',[87] sought an injunction to restrain the broadcasting of a film about Andy Warhol on the grounds that it breached provisions in the *Television Act 1974* (UK). McWhirter had previously asked the Attorney-General to take these proceedings, but the Attorney-General declined to do so. The Court of Appeal, in a majority decision, granted an interim injunction to McWhirter. However, it subsequently declined to continue the injunction on the basis that there was no breach of the legislation. In the course of his judgment in this case, Lord Denning ruled that 'if the Attorney-General

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[83] Clinton, above n 51, 587.
[84] Peter Hain, *Outside In* (Biteback Publishing Ltd, 2012) 126-7. Hain would have had no sympathies for NAFF, not only because of a clash of opinions over the apartheid regime in South Africa, but also on a more personal level, as Ross McWhirter had previously chaired a committee that sought to fund a private prosecution against Hain because of the latter's anti-apartheid activities: Mark Garnett, *From Anger to Apathy, The British Experience since 1975* (Jonathan Cape, 2007) 74; Hain, n 84, 80.
[85] It can also be said that NAFF was also motivated by its support for the then government in South Africa. In relation to South Africa, NAFF's strident anti-communism led it to adopt the ancient proverb that declares that 'the enemy of my enemy is my friend'. Although NAFF did not condone apartheid, an editorial in *Free Nation*, in 1977 stated: 'South Africa's government is neither a Communist nor a Fascist dictatorship. In this sense, it has some claim to belong to the small community of the free world … Even with press freedom curtailed, South Africa is a relatively liberal society by comparison with the average UN member state': Nugent, above n 35, 85-6.
[86] Gouriet, above n 53, 444.
[87] Lord Denning, *The Discipline of Law* (Butterworths, 1979) 128.

refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public who has a sufficient interest can himself apply to the court itself'.[88] To similar effect, Lawton LJ said that 'if … there was reason to think that an Attorney-General was refusing improperly to exercise his powers, the courts might have to intervene to ensure that the law was obeyed'.[89]

However, Gouriet's application for an injunction was dismissed by Stocker J. Gouriet immediately lodged an appeal to the Court of Appeal. On the following day - 15 January 1977, a Saturday - a bench comprised of Lord Denning, by no means a friend of organised labour,[90] and Lord Justices Lawton and Ormrod granted an interim injunction until 18 January 1977.

In reaching their decisions, both Lord Denning[91] and Lawton LJ[92] relied upon the principles they had expressed in *McWhirter*. In what Gouriet, many years later, described as a 'fearless' defence of the rule of law,[93] Lord Denning said:

> [W]hen the Attorney-General comes, as he does here, and tells us that he has a prerogative — a prerogative by which he alone is the one who can say whether the criminal law should be enforced in these courts or not — then I say he has no such prerogative. He has no prerogative to suspend or dispense with the laws of England. If he does not give his consent, then any citizen of the land — any one of the public at large who is adversely affected — can come to this court and ask that the law be enforced. Let no one say that in this we are prejudiced. We have but one prejudice. That is to uphold the law. And that we will do, whatever befall. Nothing shall deter us from doing our duty.[94]

In coming to their decisions, both Lord Denning and Lawton LJ were swayed, in part at least, by a belief or suspicion that Silkin had been influenced by political considerations in refusing to grant his fiat. Thus, Lord Denning doubted whether Silkin's decision to refuse his consent 'had been influenced only by legitimate considerations and had not taken into account anything extrinsic or irrelevant' and further said that it was 'very debatable whether [Silkin] … directed himself properly in regard to all the considerations in the matter'. For Lord Denning, the injunction was justified 'until the time when [Silkin] can come before us and show us good reasons (if there are any) why

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[88] *A-G ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629, 649.
[89] Ibid 657.
[90] In extra-judicial statements at the time, Lord Denning said that trade unions were 'far too powerful for the nation's well-being', that '[t]he power of the great trade unions is perhaps the greatest challenge to the rule of law', and that it is the trade unions who 'take away the liberty of the individual': quoted in Kenny Miller, 'The Labours of Lord Denning' in P Robson and P Watchman (eds), *Justice, Lord Denning and the Constitution*, Gower Publishing Co, Farnborough, 1981, 126, 129. Lord Denning's views on trade unions stemmed from his judicial philosophy which had as one of its cardinal elements the principle of freedom under the law. He expressed this view in a book just before his retired in 1982 as follows: '[T]he most important function in the law is top restrain the abuse of power by any of the holders of it – no matter whether they be the Government, the newspapers, the television, *the trade unions*, the multi-national companies, or anyone else': Lord Denning, *What Next in the Law*, (Butterworths, 1982) vi (emphasis added).
[91] *Gouriet v Union of Post Office Workers* [1977] QB 729, 737.
[92] Ibid 739.
[93] Gouriet, above n 53, 278.
[94] *Gouriet v Union of Post Office Workers* [1977] QB 729, 763.

the proceedings should not continue'.[95] Lawton LJ was more explicit when, having stated he had 'used [his] imagination as best [he could] to see what good legal reason' Silkin had for refusing to grant his consent, went on to say that he could 'conceive of many political reasons why [Silkin] decided not to intervene'.[96] As John Edwards aptly observed, '[Lawton LJ's] observation is regretfully suggestive of the same kind of bias that was itself being condemned and calls into question the objectivity of the court'.[97]

The interim injunction granted by the Court of Appeal was warmly welcomed by NAFF. John Lewis, a NAFF Council member at the time, subsequently wrote that the Court of Appeal's decision was important for it demonstrated:

1. that unions cannot break the law with impunity even for professed idealistic purposes

2. that the Attorney-General is not above the law

3. that the individual in a free society can always have recourse to the courts in defending his rights, though that recourse in itself presupposes the existence of independently minded individuals with independent sources of material and financial support.[98]

On a more practical level, because the UPOW complied with the interim order of the Court of Appeal and called off the proposed industrial action, NAFF, and indeed the Conservative Party, gained a significant political victory. It was around this time that Thatcher told one of her colleagues that NAFF was doing more than anyone else for freedom in the United Kingdom.[99]

Following a further hearing on 18 January 1977 as to whether the interim injunction should be continued, on 27 January 1977, a majority of the Court of Appeal ruled that the court had no power to review the Attorney-General's decision to reject Gouriet's fiat application. In his dissent, Lord Denning again referred to, and relied upon, the views he expressed in *McWhirter*.[100]

Gouriet then appealed to the House of Lords on the question of whether he had a right to pursue the claim for injunctive relief in circumstances where no private right of his own was also infringed and where the Attorney-General had refused to grant his fiat to relator proceedings. In a unanimous decision, delivered on 26 July 1977, which caused Lord Denning 'much disappointment',[101] the House of Lords ruled against Gouriet on this question. In so doing, it also reaffirmed long-standing authority, principally the House of Lords decision in *London County Council v Attorney General*,[102] that a court cannot review the Attorney-General's decision to refuse to grant his or her fiat to relator

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[95] Ibid 738. Peter Hain, in his memoirs, asserts that in the wake of the Grunwick dispute and the *Gouriet* case, Lord Denning said: 'By and large I hope we are keeping the [Labour] government in order'. However, Hain does not provide a source for this statement: Hain, above n 84, 127.
[96] *Gouriet v Union of Post Office Workers* [1977] QB 729, 739.
[97] Edwards, above n 11, 131.
[98] John Lewis, 'Freedom of Speech and Publication' in K W Watkins (ed), *In Defence of Freedom* (Cassell, 1978) 84, 97-8.
[99] Young, *One of Us, A Biography of Margaret Thatcher* (Pan Books, 1989) 111.
[100] *Gouriet v Union of Post Office Workers* [1977] QB 729, 759.
[101] Lord Denning, *The Closing Chapter* (Butterworths, 1983) 229.
[102] [1902] AC 165, 167-8.

proceedings. All five Law Lords explicitly rejected the validity of Lord Denning's dictum to the contrary in *McWhirter*.[103]

A number of Law Lords criticised the political considerations that seemed to have influenced Lord Denning and Lawton LJ in their judgments granting the interim injunction. Viscount Dilhorne, himself a former Attorney-General, undoubtedly had their comments in mind when he observed that simply because an Attorney-General rejected an application for consent to relator proceedings, 'it should not be inferred from his refusal to disclose [his reasons for doing so] that he acted wrongly'.[104] Furthermore, his Lordship noted that 'the inference that [the Attorney-General] abused or misused his powers is not one that should be drawn'.[105] Lord Diplock viewed the statements made by Lord Denning and Lawton LJ as 'regrettable'.[106] In relation to Lord Denning, it has been observed that his comments exemplified what has been described as 'his Achilles heel as a judge', namely, 'too great a readiness to confuse personal prejudice with his notions of justice'.[107]

For NAFF, the House of Lords decision, delivered two weeks after the success of Operation Pony Express in the Grunwick dispute, was a bitter disappointment. Viscount De L'Isle criticised the decision, seeing it as a warning that 'the law is being moved, and moved very fast, away from the principle of security which it gives to the rights of individuals'.[108] The House of Lords' decision was also an expensive one for NAFF. It had a costs bill in excess of £90,000, a sum that it raised in a matter of weeks by means of an appeal to its members.[109]

D Gouriet *in the Political Realm*

The *Gouriet* case attracted significant public interest[110] and received widespread press attention. For example, the editorial in *The Times* on 28 July 1977, two days after the House of Lords decision, read as follows:

> It is not the good faith of the Attorney-General of any government in question. It is rather that the way in which the public interest is perceived is all too likely to be

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[103] *Gouriet v Union of Post Office Workers* [1978] AC 435, 483 (Lord Wilberforce), 495 (Viscount Dilhorne), 502 (Lord Diplock), 511 (Lord Edmund-Davies) and 521 (Lord Fraser of Tullbelton). In so doing the House of Lords also rejected the decision of the Canadian Supreme Court in *Thorson v Attorney-General of Canada (No 2)* (1974) 43 DLR (3rd) 1, 18 which was consistent with Lord Denning's dictum. In Australia, Lord Denning's dictum was explicitly rejected in *Australian Conservation Foundation v The Commonwealth* (1980) 146 CLR 493, 506 (Aiken J, overruling the decision of in *Benjamin v Downs* [1976] 2 NSWLR 199, 210-1, where Helsham J applied Lord Denning's dictum), 527 (Gibbs J).

[104] *Gouriet v Union of Post Office Workers* [1978] AC 435, 489.

[105] Ibid 491.

[106] Ibid 506.

[107] Justice James Douglas, Lord Denning: His Judicial Philosophy' (2016) 90 *Australian Law Journal* 107, 108.

[108] Lord De L'Isle, 'Freedom and the Constitution' in K W Watkins (ed), *In Defence of Freedom* (Cassell, 1978) 1, 10.

[109] Carol Harlow and Richard Rawlings, *Pressure Through Law* (Routledge, 1992) 146.

[110] Gouriet himself appeared in a debate sponsored by the Cambridge University Law Society during the 1977-1978 academic year where he argued against the motion 'That private prosecutions are a genuine menace to the rule of Law': D Massey, 'Cambridge University Law Society, 1977-78' (1978) 37 *Cambridge Law Journal* 375, 375.

> coloured by the experience of a man who has spent the whole of his political career in the service of one party. It does not matter which party. It is simply that there is a very considerable danger of a person with this background and cast of mind seeing the public interest in a way that to others may seem indistinguishable from political convenience … What has caused most public unease about the present case has been the feeling, well-founded or not, that the Attorney-General withheld his consent because on grounds of broad public policy he did not wish to upset the trade union movement. It undermines respect for the law if there is a widespread suspicion that what is perfectly respectable, even if misjudged, as a central element of government policy is being applied beyond its proper sphere.[111]

The *Gouriet* case was also of significant concern and interest to the leadership of the Conservative Party in opposition. This is confirmed by the fact that it was a specific agenda item for meetings of Margaret Thatcher's Leader's Consultative Committee in early 1977 when the UPOW's industrial action was announced and the case came before the Court of Appeal.[112] Thatcher herself, who saw the action of the UPOW as part of 'a wider challenge by the far Left to the rule of law', wrote in her memoirs that '[t]he attitude of Sam Silkin … to law-breaking by trade unions had been revealed as at best ambiguous', and further, that the Labour government displayed a 'shifty attitude to the law and individual rights' that she felt was summed up in Silkin's description of 'certain types of union activity as "lawful intimidation"'.[113] Thus, for NAFF, the Conservative Party, and an increasing section of the general populace, Silkin's rejection of Gouriet's fiat application, demonstrated that the Labour Government was captive to the demands of the union movement.

The Attorney-General's decision to reject Gouriet's fiat application was also a matter debated in Parliament. In the wake of the two decisions of the Court of Appeal in *Gouriet*, in the House of Commons on 27 January 1977, Silkin was questioned by opposition members as to his reasons for refusing to grant his fiat to Gouriet. Silkin, who would also later defend his course of action in print,[114] made the same essential points that he made when arguing the cases before the Court of Appeal[115] and the House of Lords.[116] He explained that it was an Attorney-General's 'duty to consider broader issues of public interest and to base his conclusion on where the balance of public interest lies'. In relation to Gouriet's fiat application, Silkin said:

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[111] Australian Law Reform Commission, Standing in Public Interest Litigation, Report No 27 (1985) 91-2 [161].
[112] 'Minutes of Leader's Consultative Committee Meeting' (19 January 1977) <http://fc95d419f4478b3b6e5f-3f71d0fe2b653c4f00f3217576 0e96e7.r87.cf1.rackcdn.com/9BC0E5293628477DB9DD7E329895126D.pdf>; 'Minutes of Leader's Consultative Committee Meeting' (26 January 1977) <http://fc95d419f4478b3b6e5f-3f71d0fe2b653c4f00f3217576 0e96e7.r87.cf1.rackcdn.com/6D39C5E63962427CAB16ED7B7593E8CF.pdf>.
[113] Thatcher, above n 37, 400.
[114] Rt Hon S C Silkin QC MP, 'The Functions and Position of the Attorney-General in the United Kingdom' (1978-1979) 12 *Bracton Law Journal* 29; Rt Hon S C Silkin QC MP, 'The Office of Attorney General' (1980) 4 *The Trent Law Journal* 21.
[115] *Gouriet v Union of Post Office Workers* [1977] QB 729, 742.
[116] *Gouriet v Union of Post Office Workers* [1978] AC 435, 443-4.

> The taking of injunction proceedings in my name had the inherent risk, at that early stage, of inflaming the situation before the need for it was demonstrated and might well result in breaches of the law and inconvenience to the public over a much wider area than the two sections of Post Office workers affected [by the proposed industrial action].[117]

He stated that therefore, 'the balance of public interest was against giving consent to Mr Gouriet's application'.[118] Silkin also pointed out that the Conservative Party Attorneys-General had, in similar situations in the past, acted as he had done in relation to Gouriet's application.[119] For example, in 1973, the UPOW had imposed a similar boycott on mail to and from France in protest against France's nuclear tests in the Pacific Ocean.[120] Sir Peter Rawlinson, the Conservative Party's Attorney-General at that time, and Silkin's immediate predecessor, took no action to stop the boycott. Indeed, in his appearance before the Court of Appeal in *McWhirter*, Rawlinson adopted exactly the same position as Silkin did in *Gouriet*.[121] Furthermore, Rawlinson publicly endorsed and supported Silkin's arguments in *Gouriet*.[122] However, Rawlinson's views no longer represented the approach of the Conservative Party under the leadership of Margaret Thatcher.

Finally, the widespread coverage of NAFF's activities in the *Gouriet* case and its other anti-union campaigns, played a part in building the political momentum that ultimately led the Conservative Party to a slender victory in the 1979 general election. Following her election victory, on 18 May 1979, Thatcher wrote to Gouriet, thanking him (and by extension NAFF) 'for being such a great help during the years in Opposition'.[123] However, with Thatcher's victory, NAFF's concerns with enforcing the law appeared to change. NAFF was nowhere to be heard in condemning Silkin's successor, Sir Michael Havers, when, in 1979, he controversially failed to prosecute violations of sanctions imposed against the Ian Smith regime in Rhodesia. Although the case did not involve relator proceedings, Havers' decision not to launch a prosecution raised the same issues as were raised against Silkin in his decision not to grant his consent to relator proceedings in *Gouriet*.[124]

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[117] United Kingdom, Parliamentary Debates, House of Commons, 27 January 1977, vol 724, cols 1702-1703.
[118] Ibid 1703.
[119] Ibid.
[120] Edwards, above n 11, 335.
[121] *Attorney-General ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629, 638-9.
[122] Silkin, 'The Functions and Position of the Attorney-General in the United Kingdom', above n 114, 36.
[123] *Tory! Tory! Tory! The Road to Power*, BBC Television documentary, broadcast in March 2006 as the second of three episodes on the Thatcher years as leader of the Conservative Party <https://www.youtube.com/watch?v=ABn3EmUcU7g>.
[124] Edwards, above n 11, 325-34.

IV STANDING AFTER *GOURIET*

Although the decision in *Gouriet* was subsequently reaffirmed by the highest of authority in both the United Kingdom[125] and Australia,[126] it nonetheless prompted widespread debate in both countries about the role of the Attorney-General more generally, as well as in regards to relator proceedings.

In the United Kingdom, Lord (Harry) Woolf, who had appeared as junior counsel alongside Silkin in *Gouriet*, both before the Court of Appeal and the House of Lords, argued for the establishment of a Director of Civil Proceedings, accountable to the Lord Chancellor or Attorney-General, to undertake, inter alia, the responsibilities of the Attorney-General in relation to fiat applications. In making this suggestion, Lord Woolf observed the following:

> One difficulty which the Attorney-General has in intervening is that the media and in consequence the public are quite incapable of appreciating that he is not intervening wearing his political hat but wearing his public interest hat. This means that the Attorney may be inhibited from intervening in situations where otherwise he might well do so.[127]

On the other hand, Lord Goldsmith, an Attorney-General during the Blair Labour government, opposed the idea suggested by Lord Woolf, arguing that the Attorney-General should be accountable to parliament and that there should be established a Select Committee to regularly scrutinise his or her decisions.[128]

In Australia the Australian Law Reform Commission published a discussion paper, in 1978, in which it proffered the view that, because the Attorneys-General may be faced with conflicts of interest, 'there would appear to be merit in establishing an independent statutory officer charged with the duty of determining what indictments are to be laid'.[129]

However, in both the United Kingdom and Australia, these recommendations were never implemented.

On the other hand, since *Gouriet* there has been a significant relaxation of the standing requirements in both the United Kingdom and Australia, so much so that the

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[125] *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 93 at 638-9 (Lord Diplock), 649 (Lord Scarman); *Stoke on Trent v B & Q (Retail) Ltd* [1984] AC 754 at 770-1 (Lord Templeman). The Privy Council, in *Mohitt v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343, 3450, referred to *Gouriet* as a 'binding statement of English law'.

[126] *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493, 527 (Gibbs J); *Barton v The Queen* (1980) 147 CLR 75, 90-1 (Gibbs and Mason JJ); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 218 (Mason J), 283 (Wilson J); *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 261 (Gaudron, Gummow and Kirby JJ), 281 (McHugh J).

[127] Harry Woolf, 'Public Law – Private Law: Why the Divide? – A Personal View' [1986] *Public Law* 220, 235.

[128] Rt Hon Lord Goldsmith QC, 'Independence – Myth or Mystery?, Annual Denning Lecture' (27 November 2007) <http://www.filewiz.co.uk/bacfi/denning_lecture_2007.pdf>.

[129] Australian Law Reform Commission, *Access to the Courts – Vol I Standing: Public Interest Suits*, Discussion Paper No 4 (1978) 24.

applications for the Attorney-General's fiat are even rarer now than previously, thereby leaving the relator action 'somewhat high and dry'.[130]

In the United Kingdom, procedural changes, in 1978, incorporated into Order 53, rule 3(5) of the Rules of the Supreme Court, which were subsequently codified in s 31(3) of the *Supreme Court Act 1981* (UK) have resulted in the prerogative and equitable remedies all becoming available in a single form of proceeding, instituted by leave given to an applicant with a 'sufficient interest in the matter to which the application relates'.[131]

In Australia, the expansion of standing has been achieved by both the development of the general law and legislation. In relation to the former, in *Australian Conservation Foundation Inc v The Commonwealth*, Gibbs J reframed the 'special damage' test in the second limb of *Boyce* to one of a 'special interest in the subject matter of the action'.[132] As was pointed out by Gaudron J in *Truth About Motorways Limited v Macquarie Infrastructure Management Limited*,[133] the 'special interest' test 'extended' the standing exception in the second limb of *Boyce*,[134] as was demonstrated by the subsequent application of the 'special interest' test in *Onus v Alcoa of Australia Ltd* (*Onus*)[135] and *Bateman's Bay*.[136] In *Onus*, Brennan J pointed out that the concept of 'special interest' could embrace non-material interests, which would have been insufficient to grant standing under the 'special damage' test in *Boyce*. According to his Honour, such an expansion of standing rights was justified because '[t]o deny standing would deny to an important category of modern public statutory duties an effective procedure for curial enforcement'.[137] Indeed, it has been argued that the cases applying the 'special interest' test indicate that the law is gravitating towards a principle that would 'permit any private individual to bring proceedings in his or her own name against breach of a statutory prohibition if the court thinks he or she has a sufficient or substantial interest'.[138]

In relation to the legislative reform in Australia, a broad right of standing was recommended by the Australian Law Reform Commission in 1985, which, in s 8(2) of a proposed draft bill on standing, proposed that 'every person has standing to commence and maintain a proceeding to which this Act applies unless the court, on application, finds that, by commencing and maintaining the proceeding, the plaintiff is merely meddling'.[139] Although this recommendation has not been implemented, individual legislative provisions, by granting standing to a wide range of persons, have dramatically extended the scope of private individuals who are able to enforce public rights. By

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[130] Michael Taggart, 'The Impact of Apartheid on Commonwealth Administrative Law [2006] *Acta Juridica* 158, 162.
[131] These provisions have been considered in cases such as *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617; *R v Secretary for Foreign and Commonwealth Affairs ex parte World Development Movement Ltd* [1995] 1 WLR 386.
[132] *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493, 527.
[133] (2000) 200 CLR 591.
[134] *Truth About Motorways Limited v Macquarie Infrastructure Management Limited* (2000) 200 CLR 591, 609.
[135] (1981) 149 CLR 27.
[136] (1998) 194 CLR 247. For a detailed discussion of the impact of the 'special interest' test see *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492, 502-18 (Sackville J).
[137] *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 73.
[138] J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (LexisNexis Butterworths, 5th ed, 2015) 735.
[139] Australian Law Reform Commission, above n 111, 216.

expanding the right to standing beyond the confines of the principles in *Boyce*, the effect of these provisions is to obviate the need for private individuals to seek the Attorney-General's fiat.[140] Examples here include: (i) ss 44ZZE and 80 of the *Competition and Consumer Act 2010* (Cth), which entitle 'any person' to seek an injunction in relations to the enforcement of various provisions of that Act; (ii) s 232 of the *Australian Consumer Law* which entitles 'any person' to seek an injunction in relations to the enforcement of various provisions of the *Australian Consumer Law*; (iii) s 123 of the *Environmental Planning and Assessment Act 1979* (NSW) which allows 'any person … whether or not any right of the person has been or may be infringed by or as a consequence of [a breach of the Act]', to commence proceedings in the Land and Environment Court to restrain a breach of the Act; (iv) s 487(2) of the *Environmental Protection and Biodiversity Act 1999* (Cth) which grants standing to environmental groups and organisations in relation to the enforcement of the Act's provisions; and (v) s 5(1) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) which grants standing to '[a] person who is aggrieved by a decision to which the Act applies', to appeal to the Federal Court of Australia for judicial review of that decision.[141]

Furthermore, in Queensland, legislative reform has arguably overruled the fiat rule. Section 7(1)(g) of the *Attorney General Act 1999* (Qld) enables the Attorney-General to 'grant fiats to enable entities, that would not otherwise have standing, to start proceedings in the Attorney-General's name' *inter alia* 'to enforce and protect public rights'. As that power is not exempt from the effect of Queensland's *Judicial Review Act 1991* (Qld), in *Sharples v O'Shea*,[142] Holmes J said, in *obiter* comments, 'that the application of *Gouriet* must indeed be doubted'.[143]

V CONCLUSION

Given that the Attorney-General is a politician and government minister, a decision to grant or refuse consent to relator proceedings is inevitably going to raise the question of whether, or to what extent, the decision reached was one based upon political considerations. As Edwards, in his detailed study on the office of the Attorney-General, concludes, '[w]hichever decision is finally decided upon, public and parliamentary criticism must be expected'.[144] This was clearly evident in relation to the *Gouriet* case. Given that the facts of *Gouriet* raised important political questions relating to industrial relations, and given that the government and opposition had significantly different attitudes to these questions, it was inevitable that, whatever the decision that Silkin made on Gouriet's fiat application, it was going to ignite a political reaction. Whatever were its merits, the decision to reject the fiat application was undeniably one that was also 'friendly' towards the union movement which was the Labour Party's core constituency. Had the decision gone the other way, it would have been welcomed, at least grudgingly, by NAFF and the Conservative Party.

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[140] *Allan v Transurban City Link Limited* (2001) 208 CLR 167, 185 (Kirby J).
[141] Other examples are noted by Kirby J in *Truth About Motorways Limited v Macquarie Infrastructure Management Limited* (2000) 200 CLR 591, 640-2. A person aggrieved in relation to this legislation has been described as 'the broadest of technical terms, indicating that the required interest need not be legal, proprietary, financial or otherwise tangible. Nor need it be peculiar to the particular applicant': *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492, 507 (Sackville J).
[142] [2002] QSC 94.
[143] *Sharples v O'Shea* [2002] QSC 94, [8].
[144] Edwards, above n 11, 327.

In the wake of the *Gouriet* decision, in both the United Kingdom and Australia, there has been significant expansion of standing rights, partly through a broadening of the general law principles on standing and partly through legislative provisions. Although these developments have reduced the practical importance of relator proceedings, the fiat rule still remains the law in both countries. The fact that one cannot always get the fiat of the Attorney-General, but is often able to avoid the need for it, is, perhaps, summed up in the memorable words of Mick Jagger and Keith Richards:

> You can't always get what you want
>
> But if you try sometimes, well, you just might find
>
> You get what you need.[145]

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[145] From the song 'You Can't Always Get What You Want' on the album *Let it Bleed* (1969).

THE ISSUE OF BETTERMENT IN CLAIMS FOR REINSTATEMENT COSTS

AVA SIDHU*

The issue of 'betterment' is often raised in tort and contract claims for replacement or repair costs. As there are differences of opinion and approach in dealing with betterment, this article discusses this area of law to provide a better understanding of betterment and the predicament it poses as to whether an account for betterment should be allowed or not, and if so when and why.

I INTRODUCTION

In situations where the plaintiff replaces or repairs property destroyed or damaged by the defendant's tort or breach of contract, it is often alleged that the replaced or repaired property is improved or is better in some way than the original and that the plaintiff's damages should therefore be reduced to reflect this.[1]

Central to the betterment argument is the principle of compensation, aimed at giving effect to the compensatory goal of damages, by requiring the court to award damages, which will place the plaintiff in the same position as if the defendant's tort or contractual breach did not occur.[2] Theoretically, allowing the plaintiff the reinstatement costs measure of loss can fulfil the principle of compensation by placing the plaintiff in the same position as if the wrong did not occur. However, it can also potentially place the plaintiff in a better position, if the reinstated property is better or improved in some way when compared with the original. Arguably, the principle of compensation would be infringed if the reinstatement cost is not reduced to account for the alleged betterment.

An important point to make at the outset is that an allegation of betterment giving rise to an issue of betterment triggers two separate and sequential issues or inquiries for the court to determine: a) whether the alleged betterment exists on the facts of any given case (the issue as to the existence of betterment); and if so, b) whether an account for betterment should be allowed or not (the issue as to its accountability or deductibility). There can of course be serious difficulties trying to disentangle the specific findings of the court, if the issues are conflated.

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* LLB (Hons) (University of Singapore) LLM (UWA) MPhil (UWA); Lecturer, University of Notre Dame Australia.

[1] See eg, *Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88; *Anthoness v Bland Shire Council* [1960] SR (NSW) 659; *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313. See also *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447.

[2] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; *Robinson v Harman* (1848) 1 Exch 850, 855; 154 ER 363, 365. See also *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 285–6 [13]; *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191; *Todorovic v Waller* (1981) 150 CLR 402, 412; *Johnson v Perez* (1989) 166 CLR 351, 371; *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80; *Haines v Bendall* (1991) 172 CLR 60, 63.

The courts have noted that there are 'differing views'[3] or 'differences of opinion'[4] on the betterment issue. It has been noted further that the 'judicial exercise has not been particularly assisted by some undefined notions of the concept of benefit' and 'their treatment in some of the cases'.[5] Commentators have likewise noted that whether the defendant should be given credit for betterment is 'a controversial question, leading to apparently conflicting answers'.[6] In a discussion of cases in this area of law another commentator concluded that the 'authorities do not present an entirely consistent picture'.[7]

In light of differences in opinion and approach in dealing with betterment, it remains to be resolved and settled as to what would fall within the term 'betterment', and when and why an account for betterment should or should not be allowed. This article examines this area of law to provide a better understanding of betterment and the issues it raises. This article also argues and provides support for a general approach to account for betterment ('the principle of accountability'), subject to reasoned exceptions, in order to put in place a principled and just framework of approach in dealing with betterment.[8]

Towards the above end, the article is structured as follows: Part II outlines briefly how damages are assessed; Part III examines the concept of betterment and its constituent elements (which will assist in determining the issue and inquiry as to the existence of betterment on the facts of any given case); Part IV draws upon factors that may possibly have affected the courts' consideration of the betterment issue concerning its accountability; Part V discusses and provides support for the suggested general approach to account for betterment; and Part VI discusses the basis and scope of potential exceptions to the principle of accountability.

II ASSESSING DAMAGES

Where the context allows, the terms used in this article are as follows: 'property' refers to land (including buildings and fixtures) and/or goods; 'damage' refers to any impairment

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[3] *Von Stanke v Northumberland Bay Pty Ltd* [2008] SADC 61 [130] (Lovell J).
[4] *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313 [27] (Sheller JA).
[5] *Optus Networks Pty Ltd v Leighton Contractors Pty Ltd* [2002] NSWSC 327 [1353] (Hunter J). Lovell J had also noted that there were 'differing views' on 'betterment and how it is to be applied': *Von Stanke v Northumberland Bay Pty Ltd* [2008] SADC 61 [130].
[6] Harold Luntz and David Hambly, *Torts: Cases and Commentary* (LexisNexis Butterworths, 5th revised ed, 2006) 612. See also M J Tilbury, *Civil Remedies Vol Two: Remedies in Particular Contexts* (Butterworths, 1993) 202, where it was commented that the betterment issue was 'still controversial' as to 'whether or not any deduction is to be made' for the improved condition of a chattel when claiming for repair cost.
[7] Catherine Penhallurick, 'The Principle of "Betterment" in Damages for Contract and Tort' (2002) 22 *Australian Bar Review* 109, 109.
[8] This article only deals with the issues indicated above. Other issues concerning betterment (for example, how betterment should be valued in monetary terms, or how matters of proof should be determined in betterment disputes) fall outside the scope of this article and will therefore not be discussed. In relation to the various issues concerning betterment, see Ava Sidhu, *A Critical Examination of the Betterment Predicament in the Assessment of Damages for Damage or Destruction to Property in Tort and Contract Claims* (MPhil Thesis, University of Western Australia, 2014).

to the plaintiff's property falling short of destruction; 'destruction' refers to total destruction, including constructive total loss (where repair is impracticable or uneconomic); and 'reinstatement costs' refer to repair costs and/or replacement costs.

A *Dominance of the Compensatory Goal and Principle*

The principal remedy for breaches in tort and contract is an award of damages, aimed at providing the plaintiff with monetary compensation for damage and loss suffered as a consequence thereof.[9] The central role played by compensation is well recognised. For example, Windeyer J in *Skelton v Collins* described compensation as 'the cardinal concept'.[10] He referred to the principle of compensation, which gives effect to the compensatory objective, as 'the one principle that is absolutely firm, and which must control all else'.[11]

The 'principle of compensation' (also commonly referred to as the *restitutio* or indemnity principle) is often traced back to the following two 19th century English authorities.[12] Lord Blackburn in *Livingstone v Rawyards Coal Co* formulated the principle of compensation in the context of tort claims as follows:

> [W]here any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[13]

Parke B in *Robinson v Harman* formulated the compensation principle in the context of contract claims as follows:

> The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.[14]

What may appear above as different formulae of loss are 'simply the result of the different nature of the rights or interests protected, not of a different purpose of relief'.[15] Lord Diplock's articulation below clarifies the position by unifying both formulae of loss:

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[9] Compensation is not the exclusive purpose and goal of remedies under private law. Non-compensatory objectives are, however, strictly exceptional (and can be found, for example, in exemplary, restitutionary, nominal, contemptuous and vindicatory damages).
[10] (1966) 115 CLR 94, 128.
[11] Ibid. The High Court lately reaffirmed the compensation principle as the 'ruling principle' governing the recovery of damages: *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 285–6 [13]. See also other Australian authorities cited at above n 2.
[12] The principle of compensation can also be traced back even further to early English maritime cases, such as *The Gazelle* (1844) 2 W Rob 279, 166 ER 759 (Adm); *The Clyde* (1856) Swab 23, 166 ER 998 (Adm); *The Pactolus* (1856) Swab 173, 166 ER 1079 (Adm); *The Clarence* (1850) 2 W Rob 283 (Adm).
[13] (1880) 5 App Cas 25, 39.
[14] (1848) 1 Exch 850, 855; 154 ER 363, 365.
[15] Sirko Harder, Measuring Damages in the Law of Obligations: The Search for Harmonised Principles (Hart Publishing, 2010) 10.

[T]he measure of damages recoverable for the invasion of a legal right, whether by breach of a contract or by commission of a tort, is that damages are compensatory. Their function is to put the person whose right has been invaded in the same position as if it had been respected as far as the award of a sum of money can do so.[16]

B *Where Land is Damaged or Destroyed*

Cases of damage to or destruction of land (including buildings or other fixtures) are prominent in both tort (often made under negligence, trespass or nuisance)[17] and contract. Claims can be made concurrently in tort and contract, as in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*.[18]

In cases of damage to or destruction of land (including buildings or other fixtures), application of the compensation principle usually gives rise to two competing measures of loss, either 'the reinstatement costs' measure (representing either repair costs or replacement costs involved), or 'the diminution in value' measure (representing the difference between the value of the subject land or building immediately prior to the damage and its value immediately thereafter).[19] Where the parties disagree as to which measure of loss should apply, the courts usually apply 'the test of reasonableness', requiring consideration as to what in the particular circumstances of the case would most reasonably give effect to the compensation principle.[20] The issue is one of fact. In evaluating various indicia of 'reasonableness' the following factors may be relevant: the type of property involved and its usage; the extent of injury to the property; the availability or absence of a market in the property; the proportionality between the different measures of loss; and whether the plaintiff intends to use the money that would be recovered on a reinstatement costs basis to actually do the repair work.[21] Each of these factors is not in itself exclusive or decisive. Situations involving breaches of

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[16] *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] AC 774 (HL), 841.

[17] Physical damage to land (including buildings or other fixtures) often arises from incidents such as fire, floods, vibrations, or any other impact caused by the defendant's wrongful act or neglect. As land is of a permanent nature, it cannot ordinarily be physically destroyed; however, land can be considered a constructive total loss from physical damage inflicted. Misuse of land, such as by severe erosion of its topsoil, can also result in total destruction of its economic value.

[18] [1970] 1 QB 447 ('*Harbutt's*').

[19] Pantalone v Alaouie (1989) 18 NSWLR 119, 137; Evans v Balog [1976] 1 NSWLR 36, 40; Bellgrove v Eldridge (1954) 90 CLR 613, 618; Westwood v Cordwell [1983] 1 Qd R 276. The reinstatement costs measure is usually more costly than the diminution in value measure. The same position generally applies to both tort and contract actions: Bowen Investments Pty Ltd v Tabcorp Holdings Ltd [2008] FCAFC 38 [29]. There are also other general measures of loss representing different ways of valuing the plaintiff's loss suffered (for example, the market value of the subject property, the cost of a substitute, or the capitalized potential of the subject property). The plaintiff is also entitled to claim consequential losses suffered (for example, loss of profits, loss of use of the land, or cost of alternative accommodation during the period of reinstatement). Injunctive or self-help relief may also be sought if necessary.

[20] Bellgrove v Eldridge (1954) 90 CLR 613, 618; Evans v Balog [1976] 1 NSWLR 36, 39–40, 119; Pantalone v Alaouie (1989) 18 NSWLR 119, 137; Ruxley Electronics & Construction Ltd v Forsyth [1996] AC 344. The courts consider in particular the reasonableness of the plaintiff's desire to reinstate the property, as judged in part by the advantages to the plaintiff (if reinstatement is allowed), and as weighed against the additional cost to be borne by the defendant in having to pay the reinstatement costs over the diminished value.

[21] Ibid. See also Unique Building Pty Ltd v Brown [2010] SASC 106; Wespoint Management Ltd v Chocolate Factory Apartments Ltd [2007] NSWCA 253; Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd [2012] NSWCA 184.

building contracts usually present additional factors to be considered. In *Bellgrove v Eldridge* the High Court held that a building owner is entitled to reinstatement costs, if reinstatement was necessary to produce conformity to the building contract and it was also a reasonable course to adopt.[22]

C *Where Goods are Damaged or Destroyed*

Cases of damage to or destruction of goods are more prominent in tort than in contract and are often claimed in negligence, trespass or nuisance.

Where the plaintiff's goods are damaged by the defendant's wrong, the usual measure of damages is 'either the cost of repairing it or of replacing it, whichever is the most appropriate in the circumstances'.[23] The same test of reasonableness as discussed above in relation to land applies to goods. The question as to what would be reasonable is often influenced by what the cheaper alternative would be, unless of course the more expensive option can be justified under the circumstances.[24] There are various other indicia, including: difficulties in obtaining similar substitute goods (for example, if the goods involved are unique or rare);[25] difficulties in undertaking the repair required (which may be associated with the amount of time, trouble, expense, or risk involved in undertaking such repair); its usefulness to the plaintiff's business; and the condition of the goods before the damage.[26]

Where the plaintiff's goods are destroyed by the defendant's wrong, the plaintiff's usual loss is the market value of the goods at the time and place of the loss, which usually means the market price of a replacement.[27] In exceptional circumstances where an exact replacement is justified and reasonable, the value may be the cost of manufacture of a replacement.[28]

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[22] (1954) 90 CLR 613, 617. The High Court also reaffirmed this approach in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272. See also *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344,where it was held that the reinstatement costs measure was not reasonable in the circumstances of the case.

[23] *Jansen v Dewhurst* [1969] VR 421; *Murphy v Brown* (1985) 1 NSWLR 131, 135–136.

[24] *Jansen v Dewhurst* [1969] VR 421. Sheller JA remarked that the 'approach is no different whether the destruction of or damage to property results from breach of contract or negligence [under tort]': *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313 [37].

[25] *Anthoness v Bland Shire Council* [1960] SR (NSW) 659 (where a Bristol motor car could not be easily replaced).

[26] *Murphy v Brown* (1985) 1 NSWLR 131, 133, 136; *Von Stanke v Northumberland Bay Pty Ltd* [2008] SADC 61 [61]; *Darbishire v Warran* [1963] 1 WLR 1067, 1072 (Harman J), 1077 (Pearson J).

[27] *The Clyde* (1856) Swab 23, 166 ER 998; *Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88, 99–100; *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246; *Liesbosch Dredger v SS Edison* [1933] AC 449, 468. In appropriate circumstances the value may also include the costs of adaptation.

[28] *Jones v Port of London Authority* [1954] 1 Lloyd's Rep 489; *Uctkos v Mazzetta* [1956] 1 Lloyd's Rep 209, 216.

III A CLEARER UNDERSTANDING OF THE CONCEPT OF BETTERMENT AND ITS ELEMENTS

It is apparent that an allegation of betterment can only arise where the reinstatement measure of loss applies and the plaintiff claims for the reinstatement costs.

The examination and discussion below will render a better understanding of the concept of betterment and its constituent elements. This will assist in determining the issue and inquiry as to the existence of betterment on the facts of any given case. With betterment premised upon the plaintiff being overcompensated, it will be made clear that the following three elements must be demonstrated before any finding of betterment can be made: a) an improvement in the reinstated property; b) a benefit to the plaintiff; and c) a resultant improvement in the plaintiff's financial position.

A *Occurrence of Overcompensation to be Satisfied*

1 *The First Element: An Improvement in the Reinstated Property ('the Improved Property' Requirement)*

When a plaintiff repairs or replaces damaged or destroyed property as a consequence of the defendant's tort or breach of contract, the reinstated property is often different not only in appearance, but also in relation to other aspects. Improvements alleged could possibly include any or more of the following: that the reinstated property is new; more valuable; more modern in design or technology; bigger or more spacious; more durable or more strongly built; offers a longer life; offers more efficiency; or is otherwise more productive. Improvements could possibly be the result of improved materials, design or technology used when repairing or replacing the original property. It is apparent that to allege betterment there must exist on the facts an improvement in the reinstated property, whether reflected in its appearance, capacity, or otherwise, when compared with the original property.

Hoad v Scone Motors Pty Ltd is an often-cited case on betterment.[29] In this case a fire caused by the defendant's negligence destroyed the plaintiff's farming equipment (namely a tractor and mower). As the farming equipment was unable to be replaced with suitable local second-hand replacements, the plaintiff purchased new ones and claimed the full replacement costs incurred. The defendant argued on appeal that the replacement costs claimed should be reduced to account for betterment. The majority (Moffit P and Hutley JA) took the view that the plaintiff, through the purchase of new equipment to replace the old, had become better off and that this should be accounted for.[30] The majority ordered a new trial in order to obtain more information on material events up to the date of the trial (including whether the plaintiff had sold, or would sell, the replaced equipment upon expiry of the plaintiff's farm lease). It appears that the majority were prepared to make a finding of betterment and allow an account for it, if they could obtain such information. This aspect of the majority judgment requires closer scrutiny. On the facts disclosed, other than being new and presumably more valuable as a consequence thereof, the replaced equipment did not exhibit any improvement over the original equipment. The dissenting judge, Samuels JA, also raised this issue,

[29] [1977] 1 NSWLR 88 ('*Hoad*').
[30] Ibid 96 (Moffit P).

pointing out that the new equipment 'was no more than a mere replacement for the old, and as nearly equivalent as the circumstances in which the plaintiffs were placed would permit' and that it was used by the plaintiff in its business as dairy farmers in exactly the same way as the original equipment.[31] In the absence of any improvement in the reinstated property (beyond being new and presumably more valuable as a consequence thereof) a finding of betterment would be questionable.

It is apparent from the above discussion that it would be necessary to firstly demonstrate an improvement in the reinstated property before a finding of betterment can be made. As the authorities clearly indicate, the improvement must be beyond 'new replacing old'.[32]

2 *The Second Element: A Benefit to the Plaintiff ('the Benefit' Requirement)*

In *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc*,[33] Hely J remarked that in situations where the reinstatement measure of loss is applied, betterment can only be argued if the plaintiff 'acquired something more than *resitutio in integrum*'. With betterment premised upon the plaintiff being overcompensated, there must consequently be a benefit to the plaintiff (the second element). Such benefit must flow or result from the improved property (that is, the first element discussed above).

In *Nationwide New Ltd v Power and Water Authority* the court questioned whether the superior replacements could 'confer a benefit' upon the plaintiff.[34] To result in improving the plaintiff's financial position, there must be *real* benefit to the plaintiff. In *South Parklands Hockey & Tennis Inc v Brown Falconer Group Pty Ltd* the court noted that, notwithstanding the plaintiffs would be 'getting a new playing surface ahead of time

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[31] Ibid 103.

[32] In *Optus Networks Pty Ltd v Leighton Contractors Pty Ltd* [2002] NSWSC 327 [1393] (affirmed on appeal in *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333), the court made it clear that there was 'no general doctrine of betterment' where merely 'new replaces old after total loss'. In *Paper Australia Pty Ltd v Ansell Ltd* [2007] VSC 484 [180] (Bongiorno J), the court held that the new MG cylinder being merely 'the modern equivalent of the old MG cylinder' was insufficient for betterment to be made out. In *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* [2004] FCA 1211 [488] (Hely J), the court looked for 'added extras' (beyond new replacing old) when considering if a finding of betterment can be made. More directly, Samuels JA in *Hoad* [1977] 1 NSWLR 88 asserted that betterment cannot arise 'merely because a plaintiff gets new for old'. See also *Harbutt's* [1970] 1 QB 447, 476, where Cross LJ stated that the defendants were not entitled to claim betterment 'simply on the ground that the plaintiffs have got new for old'. In *Nan v Black Pine Manufacturing Ltd* (1991) 80 DLR (4th); 1991 CanLII 1144 (BCCA) the court reaffirmed that it cannot be assumed 'that simply by getting a new house for an old one Mr Nan had enjoyed some element of "betterment"'. See also Denis J Power and Duane E Schippers, 'Good Intentions, Reasonable Actions: Recovery of Pecuniary Damages for Property Losses' in Law Society of Upper Canada, *Law of Remedies Principles and Proofs* (Carswell, 1995) 127, 173, which states that the last decision 'suggests that even where the plaintiff has received new for old this is insufficient to satisfy betterment as there may not be any real tangible financial advantage to the plaintiff in such a case'.

[33] [2004] FCA 1211 [488].

[34] [2006] NTSC 32 [120]. The plaintiff claimed damages against the defendant for negligence and breach of statutory duty relating to three electrical disturbances in the electricity grid, which damaged the plaintiff's electrical and telephonic plant and equipment. Although the court concluded that there were no breaches on the part of the defendant, it went on to consider the issue of damages.

when the surface would have to be replaced', this would be 'of no real benefit' to them.[35] Further afield in *Voaden v Champion (The 'Baltic Surveyor' and 'Timbuktu')*, the court questioned whether there was a 'corresponding advantage' to the plaintiff from the reinstated property.[36] Also in *McMillan Bloedel Ltd v Canadian National Railway*, the court questioned whether the reinstated property could offer the benefit of increased capacity with more efficiency, productivity and greater profits.[37]

Some additional observations may be made in regards to the benefit to the plaintiff. References such as an 'advantage to the plaintiff',[38] or a 'real benefit to the plaintiffs', may point to a more subjective approach, requiring the benefit to relate specifically to the particular plaintiff involved.

References to a 'real benefit to the plaintiff'[39] also imply that such benefit must not be merely speculative. In *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd*, Sheller JA held that there was no evidence of 'any advantage to the plaintiff beyond the speculative proposition that the new pavement might last longer than the old one would have'.[40] In *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd*, Giles JA held that the purported benefit 'was no more than speculative'.[41] In *Voaden v Champion*, the same point was made that the benefit must not be 'entirely speculative'.[42]

A distinction may be made between 'speculative' and 'potential' benefits based upon the degree of likelihood of their occurrence. In practical terms, both types of benefit are likely to fall short of the benefit requirement, because they are both unlikely to achieve the result of improving the plaintiff's financial position (the third element). It would be sensible and prudent to reject outright such speculative or potential benefits to avoid onerous and costly exercises with little benefit to the parties.

There would often be more difficulties if the reinstated property is only part of a bigger item, such as a new engine, or other component, installed in an original car. Rix LJ elaborates on these difficulties:

> Take the ordinary case of the repair of some part of a machine. Where only a new part can be fitted or is available, the betterment is likely to be purely nominal: for unless it can be posited that the machine will outlast the life left in the damaged

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[35] [2004] SASC 81 [126] (Debelle J) ('*South Parklands*'). The defendants in this case rendered negligent advice to the plaintiff's architects and engineers. This resulted in a defective dual-purpose playing-field being constructed for the plaintiff.

[36] [2002] EWCA Civ 89 (31 Jan 2002); [2002] l Lloyd's Rep 623 [58]. The defendant's negligent mooring of its vessel (the Timbuktu) resulted in its sinking, as well as the dragging down of the plaintiff's pontoon and vessel (the Baltic Surveyor). The court had to assess the plaintiff's loss.

[37] [1989] OJ 1604 (Ont SC) (Unreported, 27 Sept 1989, O'Driscoll J). The plaintiff's aspenite board mill suffered fire damage as a result of the defendant's negligence. The damage necessitated replacement of the damaged electric wiring in the dryer control room, as well as the roof and sliding panels).

[38] *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313 [55].

[39] [2004] SASC 81 [126].

[40] [2001] NSWCA 313 [55] ('*Hyder*'). Referring to this, Hodgson JA in *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 [262] stated, 'the prospect that, about sixteen years in the future the new pavement would probably continue for four years longer than the original pavement should have done, was considered too remote and speculative'.

[41] [2005] NSWCA 443 [34].

[42] [2002] EWCA Civ 89 (31 Jan 2002) [58]; [2002] l Lloyd's Rep 623.

> part just before it was damaged, the betterment gives the claimant no advantage; and in most cases any such benefit is likely to be entirely speculative.[43]

In *Paper Australia Pty Ltd v Ansell Ltd*,[44] replacement of a damaged cylinder represented only a part of the whole paper-making machine. The difficulty of satisfying the benefit requirement in such circumstances led the court to conclude that there was no evidence of any 'relevant benefit'.[45] It would be necessary in these situations to evaluate how significant such a reinstated part bears to the entire item, or how such a part can on its own be of any real benefit to the plaintiff.

3 *The Third Element: A Resultant Improvement in the Plaintiff's Financial Position ('the Improved Financial Position' Requirement)*

The final element to satisfy the existence of betterment requires proving the plaintiff's resultant financial improvement, brought about by the improvement in the reinstated property (the first element) and the benefit it generated (the second element). The plaintiff's superior financial position subsequent to the wrong represents the overcompensation that betterment is premised upon.

This third element requires the benefit accruing to the plaintiff (under the second element) to be both realisable and quantifiable in monetary terms. Thus if an improvement in the reinstated property gives rise to the benefit of an increased value, but the plaintiff cannot realise such benefit (for example, by selling the property), the third element would be found to be absent, unless a sale can be said to be imminent, and not too distant or remote in time. Using another example, if the improvement in the reinstated property delivers the benefit of a bigger property, but the plaintiff, being an owner-occupier, would not be able to realise any increased rental, the third element would similarly be found to be absent.

4 *Definition of Betterment cum Three-Elements Test and its Application*

The above analysis of betterment is grounded upon the principle of compensation and the framework of law underpinning damages awards. It would be useful to go one step further to articulate a definition of betterment reflecting its individual elements, which can then serve as an expedient and reliable test for consistent findings of betterment to be reached. To this end the following definition of betterment is suggested:

'Betterment' is the improvement in the plaintiff's property, which has been reinstated by repair or replacement, as a result of the damage or destruction caused to the property by the defendant's wrong in tort or contract, which delivers a real benefit or advantage to the plaintiff and leads to an improvement in the plaintiff's financial position after the wrong.

The efficacy of the suggested definition with its three-elements test can be demonstrated using the factual scenario of *State Transport Authority v Twhiteco Pty Ltd*.[46] Here, the underside of a railway bridge was struck due to the defendant's negligence. As a prudent

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[43] *Voaden v Champion* [2002] EWCA Civ 89 (31 Jan 2002) [58]; [2002] l Lloyd's Rep 623.
[44] [2007] VSC 484 (Bongiorno J) ('*Paper Australia*').
[45] [2007] VSC 484 [355] (Bongiorno J).
[46] (1984) Aust Torts Reps 80–596 ('*State Transport*').

managerial decision, the plaintiff redesigned and reconstructed a bridge capable of bearing heavier duty trains and requiring less maintenance. The Court found that the plaintiff received not just a 'new [bridge] for an old bridge', but one which was of 'superior physical dimensions, [had] a longer life expectancy and less maintenance costs than that which it replaced'.[47] In applying the suggested definition cum test, as regards the first element that there must be an improvement in the reinstated property beyond new replacing old, this can be easily fulfilled upon the above finding of 'superior physical dimensions'. The second element, that there must be a real benefit to the plaintiff from the improved reinstated property, can also be fulfilled without too much difficulty given the finding of savings of maintenance costs. However, for the third element, that there must be a resultant financial improvement in the plaintiff's position subsequent to the wrong, the following remarks by the court that point to a lack of evidence, would mean that it remains unfulfilled:

> I have strong evidence as to the extended life of the bridge as rebuilt, and I have direct evidence of its superior technical features. Unfortunately, I have no evidence as to the financial advantages accruing to the Railways by virtue of the superior bridge ... In this case I do not have any evidence to assess in monetary terms why the betterment factor itself should be discounted.[48]

The following two examples can also be used to illustrate the interaction of the three elements of betterment. Suppose for example, that a building which is damaged is used as the plaintiff's home. It is reinstated with a more contemporary design using stronger beams and less internal walls, thereby offering the plaintiff more accommodation space. If the plaintiff used the reinstated property in the same way as previously, the improvement and benefit requirements (the first two elements) can be satisfied, but the financial improvement element (the third element) would not be satisfied. Using another example, suppose that the building damaged is used by the plaintiff for investment purposes; it is reinstated in the same manner as in the first example. In offering more accommodation space, which can thereby result in a higher rental than previously, both the first and second elements can be satisfied. If it can be shown further that the plaintiff in fact secured a higher rental, the third element would also be satisfied (thereby confirming that betterment exists in this example).

IV FACTORS POSSIBLY AFFECTING CONSIDERATION OF THE BETTERMENT ISSUE: WHETHER OR NOT TO ACCOUNT FOR BETTERMENT

Having discussed in depth the concept of betterment and its constituent elements, the issue as to its accountability (whether or not to account for the betterment found to exist on the facts) can now be looked into. The discussion below focuses upon three cases to gain more insight into what factors may, have, or can possibly affect the courts' consideration of this issue.

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[47] Ibid 68,622.
[48] Ibid 68,623.

A Anthoness *(Inclination to Overcompensate Rather than Financially Disadvantage Plaintiff)*

In *Anthoness v Bland Shire Council*,[49] the defendant caused the plaintiff's car to be damaged. The appeal court affirmed the trial judge's decision to award full repair costs, reiterating the trial judge's concern that a reduction of the repair costs would 'forc[e] the plaintiff to put his hand in his pocket'.[50] The appeal court also stated that such reduction would be contrary to the plaintiff's 'right against the wrong-doer … for *restitutio*', which must be effected 'without calling upon the party injured to assist'.[51] It may possibly be inferred that the court appeared more concerned with protecting or securing the plaintiff's interests over that of the defendant's. Possibly, the plaintiff's status as the wronged or innocent party (as opposed to the defendant's as the wrong-doer) may have had some influence. This approach inclines towards overcompensating the plaintiff, rather than disadvantaging the plaintiff financially. It accordingly reflects an inclination not to account for betterment.

B Hoad *(Focus upon Plaintiff's True or Net Loss; Inclination to Avoid Overcompensating Plaintiff*)

The majority judges in *Hoad* were in favour of accounting for betterment as long as it can be made out.[52] They focused strongly on the plaintiff's true or net loss, thereby placing due emphasis upon the compensatory goal of a damages award. Moffit P stressed that the plaintiff should not receive any compensation greater than its 'net loss' or 'net detriment',[53] which he saw as representing the plaintiff's 'true loss'.[54] He added that he found it difficult to accept the concern raised in *Anthoness*, that the plaintiff 'should not be forced to invest their money in buying new equipment'.[55] According to him, an award of damages granted 'upon a basis which would provide greater compensation, or appear to do so, would need critical examination'.[56] The court's focus upon the plaintiff's true or net loss and its concern to avoid overcompensating the plaintiff reflect an inclination to account for betterment.

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[49] (1960) SR (NSW) 659 ('*Anthoness*').

[50] Ibid 665. The court's focus upon justifying why betterment should not be deducted appears to have been constrained to fully ascertain the existence of betterment. The court appears to have conflated the first issue in determining the existence of betterment with the second issue of its accountability. Although the court did not directly address the question as to what is meant by betterment, it can be inferred that the court was prepared to view an increase in the value of the reinstated property as sufficient to satisfy the existence of betterment. This would only satisfy the first two elements (ie, the improved reinstated property and benefit requirements) of the suggested three-elements test of betterment. The extensive repair works carried out by the plaintiff of the damaged Bristol car could satisfy the first element. That it was consequently presumed to be more valuable would satisfy the second element. The court did not, however, specifically consider if the improved reinstated property and its presumably increased value would in fact result in improving the plaintiff's financial position. This may be demonstrated, if there was perhaps an intended sale of the reinstated property. As indicated above, the third element requires the benefit accruing to the plaintiff (under the second element) to be both realisable and quantifiable in monetary terms.

[51] Ibid 666.

[52] [1977] 1 NSWLR 88.

[53] Ibid 96.

[54] Ibid 94, 95.

[55] Ibid 95.

[56] Ibid 95.

C Hyder *(To Evaluate 'Material' Considerations)*

In *Hyder*,[57] the plaintiff replaced defective pavement, which collapsed four years after its construction, with new pavement that offered a similar life expectancy of 20 years as the original. Similar to the approach in *Hoad*,[58] the majority in *Hyder* acknowledged the concept of betterment. However, the difference in their approaches was that in *Hyder* there was no unequivocal willingness to account for betterment, as appears the case in *Hoad*. In the course of his judgment, Sheller JA (one of the majority judges in *Hyder*) noted that there were 'differences of opinion' on the betterment issue.[59] According to him, a finding of betterment would not in and of itself trigger an account for betterment, but would be dependent upon 'several considerations' that would have to be 'material'.[60] He adapted Dr Lushington's approach in *The Gazelle* by shifting his approach from one which does not favour accounting for betterment,[61] to one which favours it, but at the same time takes into account material considerations, such as whether betterment could have been avoided. In Sheller JA's words:

> To adapt the words of Dr Lushington, the question is whether on the evidence a greater benefit than mere indemnification could be avoided without exposing the plaintiff to some loss or burden.[62]

It appears that Sheller JA made an attempt to reconcile two concerns—not overcompensating the plaintiff with not imposing any undue burden upon the plaintiff. The question of avoidability (including whether there was a choice or not) would be a

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[57] [2001] NSWCA 313. The plaintiff in this case succeeded in its negligence action against its engineer and architect. On appeal, the architect failed in his attempt to have the plaintiff's damages reduced by 20 per cent, on the ground that the plaintiff already had four years' use of the original pavement, or alternatively that the plaintiff would have an additional four years' use of the new pavement. The majority (Sheller and Giles JJA) held that it was not appropriate to reduce damages for the four years' use of the pavement. Sheller JA reasoned, that '[t]he facts in *Hoad* and *British Westinghouse* are distinguishable from the facts in this case. The plaintiff had no choice but to replace the defective pavement with new pavement' and that it 'could not do so by paying less for a four year old pavement': at [55]. In relation to the alleged betterment, Sheller JA stated, that '[t]here was no evidence of any advantage to the plaintiff beyond the speculative proposition that the new pavement might last longer than the old one would have, if it had been properly laid. Moreover as Giles JA has remarked in his reasons for judgment, it is not appropriate to use a "crude percentage discount" to reduce the amount awarded. … On the evidence in this case, no allowance should be made from betterment': at [55]. Giles JA reasoned, that '[t]he general principle of *restitutio in integrum*, so that a plaintiff should be compensated for its loss but not over-compensated, is undoubted. Its application will vary according to the circumstances. In the present case the owner was entitled to a sound pavement, and from the time it was laid the pavement failed and the owner did not have a sound pavement. It had to be replaced, and the owner could not replace it with a sound four year old pavement': at [107]. As for the alleged betterment, Giles stated that '[a]ny benefit to the owner seems to be that, whereas it would otherwise have had to spend money repairing or replacing the pavement in (say) 2015, having constructed the pavement in 1999 it will now not have to spend money repairing or replacing it until (say) 2020. So the owner will have the use for five years of the money spent on the repair or replacement. If any allowance in favour of the architect is to be made, I do not think it should be by the crude percentage discount suggested by the owner': at [107].

[58] [1977] 1 NSWLR 88.

[59] [2001] NSWCA 313 [27].

[60] Ibid [30].

[61] (1844) W Rob 279; 166 ER 759.

[62] *Hyder* [2001] NSWCA 313 [30].

material consideration to take into account when considering whether or not to account for betterment.[63]

D *Summing Up*

When dealing with the betterment issue the proper focus should be upon the plaintiff's true or net loss, as apparent in *Hoad*.[64] This would give effect to the compensatory goal and principle of damages. A focus upon other considerations that stray from the compensation principle (for example, the interests or status of the parties), would be misconceived. In relation to the approach in *Hyder*,[65] it is not entirely clear as to what the 'several' or 'material' considerations referred to are or should be.

V A GENERAL APPROACH TO ACCOUNT FOR BETTERMENT: THE PRINCIPLE OF ACCOUNTABILITY

It is argued in this article that a general approach to account for betterment, subject to reasoned exceptions, will put in place a principled and just framework of approach in dealing with betterment.[66] There is strong support and justification for the suggested general approach of accountability. This approach is consistent with and enhances the existing framework of law on damages, in particular the compensatory goal and principle, and the avoided loss rule of mitigation. Policy considerations provide additional support. This approach is further fortified by the corrective justice theory of law.

A *Consistent with Principles under the Law of Damages*

1 *General Approach of Accountability Preferred over Alternative Approach*

A general approach to account for betterment subject to exceptions is preferred to the alternative of a general approach *not* to account for betterment subject to exceptions. Unlike the alternative approach, the suggested approach is fully in accordance with the compensatory goal and principle of a damages award. Under the current framework of the law on damages, where compensation is recognised as the paramount goal, it would be anomalous and unjust to impose a general framework of approach that allows the plaintiff to recover more than the actual loss suffered.

The suggested approach also aligns with the approach gaining favour in regards to compensating benefits where there is a general inclination towards accountability, as Grubb explains:

The better position, it is submitted, is that deductibility of gains should now be the rule, whatever their source … In so far as a claimant wishes to prevent a benefit being brought into account, he will have to bring himself within a particular exception allowing him to recover more than his actual loss.[67]

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[63] See above n 57.
[64] [1977] 1 NSWLR 88.
[65] [2001] NSWCA 313.
[66] The reasoned exceptions will be discussed in Part VI.
[67] Andrew Grubb (ed), *The Law of Damages (Butterworths Common Law Series)* (LexisNexis Butterworths, 2003) 99. 'Compensating benefits' are benefits or gains which arise as a consequence

2 *In Harmony with the Compensatory Goal and Principle*

A general approach to account for betterment is justifiable as a matter of principle. As aptly observed, the courts 'are loathe to award damages which have the effect of overcompensating the plaintiff', and in order 'to address this concern the courts [have] developed the concept of betterment'.[68] A general approach to account for betterment gives full effect to the compensatory goal and principle, as highlighted by the following passage in the context of reinstating property:

> The execution of repairs may make the chattel more valuable than it was before it was injured. Clearly it would be unreasonable in many cases to restore the article to its exact physical condition at the time of the accident, warts and all. Yet in principle it does not follow that the plaintiff should thereby benefit and still recover the full cost of repairs. To be consistent with the general compensatory principle a sum should be deducted from the plaintiff's award for the consequent increase in the 'value' of his article.[69]

In the context of destruction or damage to property, *restitutio* or indemnification means restoring the value of the plaintiff's actual loss.[70] In *Hoad*, Moffit P described the plaintiff's actual or true loss as its 'net loss'[71] or 'net detriment'.[72] He accordingly cautioned against awarding damages for 'greater compensation'[73] than the plaintiff's actual loss. As has been aptly observed by a commentator, a damages award aimed at providing 'full indemnification' must cap the award to the 'plaintiff's actual loss'.[74]

Replacement or repair expenditure, as prima facie measures of loss, serve only as indicators of the value of the plaintiff's loss. These measures of loss should thus be merely seen as the starting point of the damages assessment process. As Tilbury explains, there can be a 'disjuncture' between the 'plaintiff's actual loss' and a 'formulaic general measure of damages based on a model of paradigm loss'.[75] A deduction from the reinstatement measure of loss to account for betterment, yielding to the notion of compensation, would therefore be appropriate and just.

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of the wrong. They are not limited as betterment is to claim for reinstatement costs in situations where property damaged or destroyed is reinstated.

[68] Power and Schippers, above n 32, 169.

[69] See A I Ogus, *The Law of Damages* (Butterworths, 1973) 134.

[70] Although a damages claim for reinstatement costs may appear to replicate relief *in specie*, it remains essentially a damages claim for monetary compensation. The High Court made it clear that a plaintiff cannot recover 'more than [what] he or she has lost': *Haines v Bendall* (1991) 172 CLR 60, 63. In *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 [260] (Hodgson JA), the court emphasised that the plaintiff should only 'be compensated for its loss, and no more'.

[71] [1977] 1 NSWLR 88, 96.

[72] Ibid 96.

[73] Ibid 91.

[74] Robert B Munroe, 'An Overview of Pecuniary Damages in Personal Injury Claims' in Law Society of Upper Canada, *Law of Remedies: Principles and Proofs* (Carswell, 1995) 51, 55.

[75] Michael Tilbury, 'Reconstructing Damages' (2003) 27 *Melbourne University Law Review* 697, 703.

It has been pointed out that what lies at 'the heart of the current debate on the meaning of loss'[76] is the issue of whether a subjective or objective (or as it has been put, concrete or abstract) viewpoint should be applied. Under a subjective approach, damages are assessed by reference to the plaintiff's actual circumstances. In its pure form under the objective approach, the presumption is applied that the plaintiff's loss consists of the amount determined on the basis of a fixed formula, such as the reinstatement measure, without reference to the plaintiff's actual circumstances. While there is certainly a 'practical need for a simple rule that can be administered in a clear, expeditious and certain way',[77] this ought to be counterbalanced by a 'need to calculate damages in a way that expresses the real loss of the claimant'.[78] As Bridge points out, there is 'a policy for damages to express the injured party's true loss'.[79] Preference for a subjective approach, allowing adjustments for betterment, is therefore justifiable.

Expressed through the converse of the compensatory principle, the courts have often urged that the plaintiff should not be overcompensated. The courts have also expressed this in terms that the plaintiff should not be enriched by receipt of a windfall gain representing betterment.[80] For example, a deduction for betterment was urged in *Hyder*, so that the plaintiff would not gain 'a windfall he was not entitled to'.[81] In *Bushells Pty Ltd v Commonwealth*, the plaintiff's expenditure for restoring a damaged awning was subjected to an account for betterment as it 'would [otherwise] enrich the plaintiff'.[82] In *Stephenson v State Bank of New South Wales Ltd*, the court explained that 'restoration would bring the appellant an enormous and unmerited windfall advantage' unless betterment was accounted for.[83]

In *Anthoness*, the court cited various English authorities to infer that the 'wrong-doer' ought to 'bear the cost without deduction'.[84] Clearly, the overriding dominance of the compensatory goal of a damages award necessitates a sustained focus upon the plaintiff's loss itself, rather than upon any other extraneous considerations, such as the parties' moral culpability or blameworthiness. As likewise reasoned in the following passage:

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[76] Djakhongir Saidov and Ralph Cunnington, 'Current Themes in the Law of Damages: Introductory Remarks' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 1, 19.
[77] Michael Bridge, 'The Market Rule of Damages Assessment' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 431, 436.
[78] Ibid 436–437.
[79] Saidov and Cunnington, above n 76, 20.
[80] Commentators have made similar observations. For example, one commentator observed that in doing more than restoring the plaintiff to his 'rightful position' under the compensation principle, the plaintiff would be 'confer[red] a windfall gain': Grant Hammond, 'The Place of Damages in the Scheme of Remedies', in P D Finn (ed), *Essays on Damages* (Law Book Co, 1992) 192, 222. Another commentator observed that there is 'an element of windfall' conferred upon the plaintiff where 'damages have been given for reinstatement of buildings without reduction for betterment': Brian Coote, 'Contract Damages, Ruxley, and the Performance Interest' (1997) 56(3) *Cambridge Law Journal* 537, 548.
[81] [2001] NSWCA 313 [22] (Meagher JA).
[82] [1948] St R Qd 79, 92 (Macrossan CJ) ('*Bushells*').
[83] (1996) 39 NSWLR 101, 110 (Sheller JA).
[84] *Anthoness* (1960) SR (NSW) 659, 666. The cited English authorities included the following: *The Pactolus* (1856) Swab 173; 166 ER 1079; *The Gazelle* (1844) 2 W Rob 279; 166 ER 759; *The Munster* (1896) 12 TLR 264.

[T]he argument [is] that the defendant deserves to pay, as he is the tortfeasor and wrongdoer, and that as between the plaintiff and defendant any windfall should go to the plaintiff. The new view has laid bare the fallacy in this argument – that this whole approach runs contrary to the basic idea that damages are compensatory and not punitive.[85]

3 *In Harmony with the Avoided Loss Rule of Mitigation*

Situations involving betterment and mitigation often overlap with each other.[86] As alluded to by Fisher J:

> [I]it is worth noting that different labels have been used to describe positive gains flowing from steps taken to rectify an injury caused by a defendant. Sometimes the word 'mitigation' has been used ... and sometimes 'betterment' ... 'Mitigation' may be the more appropriate word when describing a limitation upon the extent of the primary loss itself and 'betterment' when describing a positive advantage which can be set off against the primary loss but the two overlap and nothing should turn on the terminology.[87]

In referring to the mitigation principle in his seminal speech in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rly Co of London Ltd*, Viscount Haldane explained that it qualifies the compensation principle, by requiring a plaintiff to take 'all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage, which is, due to his neglect, to take such steps'.[88] The mitigation principle can be broken down into three rules, with only the third rule, which relates to avoided loss (commonly referred to as 'the avoided loss rule' of mitigation), of relevance to this discussion.[89] Under the avoided loss rule, the defendant is required to compensate for actual loss suffered by the plaintiff, to the

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[85] Harvey McGregor, 'Compensation versus Punishment' (1965) 28 *Modern Law Review* 629, 632. The explanation which was targeted directly at collateral benefits applies likewise to betterment.

[86] The factual situation in *Hoad* [1977] 1 NSWLR 88 can help illustrate situations wherein betterment and mitigation can overlap. When the plaintiff's tractor and mower were destroyed by fire caused by the defendant's negligence, the plaintiff purchased new replacements to resume its business and mitigate its loss. Assuming that the new replacements exhibited improvements and the plaintiff benefited from the sale of the replacements (upon expiry of its farm lease), the alleged profit from a higher resale price for the replacements can be characterised as arising from both mitigation and betterment.

[87] [1999] 2 NZLR 99, 105 (Fisher J).

[88] [1912] AC 673, 689 ('*British Westinghouse*'). In relation to mitigation generally, see Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th ed, 2009) 217; Michael Bridge, 'Mitigation of Damages in Contract and the Meaning of Avoidable Loss (1989) 105 *Law Quarterly Review* 398, 398; Harvey McGregor, 'The Role of Mitigation in the Assessment of Damages' in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 329, 330–331.

[89] See generally R G Lawson, 'Mitigation of Damages: Recent Developments' [1978] 128 *New Law Journal* 1185; Harvey McGregor, 'The Role of Mitigation in the Assessment of Damages' in Djakhongir Saidov and Ralph Cunnington (eds), above n 88, 349. The first rule bars the plaintiff from claiming for loss due to his failure to take reasonable steps to reduce his loss (commonly referred to as 'the avoidable loss rule'). The second rule allows the plaintiff to recover reasonable expenses incurred as a consequence of mitigation.

exclusion of any benefits or savings accruing to the plaintiff from mitigation.[90] Betterment would fall under such benefits.

Given that factual situations involving betterment can also fall within the avoided loss rule of mitigation, it is essential that these rules harmonise and do not conflict with each other. As the suggested general approach to account for betterment harmonises with the avoided loss rule of mitigation, which deducts benefits accruing from mitigation, consistency under the law of damages is thereby maintained.[91]

B *Supported by Policy Considerations*

Policy considerations provide further support for the suggested approach. It can be argued, from an economic rationale, that a general approach to account for betterment can have the desired beneficial effect of deterring the plaintiff from carrying out any unnecessary or excessive repairs, or the replacement of damaged or destroyed property. Making a similar point, Ogus stated that such an approach can 'deter the plaintiff from executing unnecessary repairs at the expense of the defendant'.[92] It will ultimately have the desired effect of avoiding or discouraging 'economic waste' on the part of the plaintiff. More broadly, it will encourage and result in more careful management of economic resources by society generally.

C *Reinforced by Corrective Justice Theory*

The suggested general approach, requiring gains in the form of betterment to be deducted under the assessment process, is reinforced by the corrective justice theory of law, which underpins the law of damages. The damages award 'to restore, as nearly as money can do, the injured party to that person's rightful position' is grounded upon the corrective justice theory of law.[93] As Hammond explains:

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[90] Viscount Haldane in *British Westinghouse* [1912] AC 673 pronounced that when in the course of business the plaintiff 'has taken action arising out of the transaction, which action has diminished his loss, the effect of actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act': at 689. The words 'arising out of the transaction' is important, as under the avoided loss rule not all benefits accruing to the plaintiff are taken into account; only those benefits that arise out of the transaction are taken into account. There are difficulties in determining whether the benefit is one that arises out of the transaction. See *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278; *Hussey v Eels* [1990] 2 QB 227; *Manwelland Pty v Dames & Moore Pty Ltd* [2001] QCA 436; *Brown v Dream Homes SA Pty Ltd* [2008] 102 SASR 93; *Hussain v New Taplow Paper Mills Ltd* (1988) AC 514; *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* [2005] NSWCA 443. In reducing the plaintiff's recoverable damages to the extent to which the plaintiff ought to have avoided or had in fact avoided the loss in question, the mitigation principle serves as a necessary corollary to the compensation principle. Based largely upon policy considerations, its benefits include the following: it promotes a more fair and just system of compensation; it reflects a desire to discourage activities which are economically wasteful and to encourage a more prudent management of resources; and it serves as a useful mechanism to reduce the overall cost to society of compensable injuries allowed under the law.

[91] See generally Lawson, above n 89; McGregor, 'The Role of Mitigation in the Assessment of Damages' in Saidov and Cunnington (eds), above n 88, 337; David McLauchlan, 'Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events' in Djakhongir Saidov and Ralph Cunnington (eds), above n 88, 349.

[92] Ogus, above n 69, 134.

[93] Grant Hammond, 'The Place of Damages in the Scheme of Remedies', in P D Finn (ed), *Essays on Damages* (Law Book Co, 1992) 192, 222. Corrective justice is 'based on a simple and elegant idea [that] when one person has been wrongfully injured by another, the injurer must make the injured

The traditional argument for this proposition is based on the straight-forward idea of corrective justice. … If we restore the plaintiff to her rightful position, she will not suffer. If we did less, part of the harm would not be remedied, and therefore there would be incompleteness of remedy. If we did more, we would be conferring a windfall gain.[94]

Where the plaintiff's property is destroyed, the relationship between right and remedy under the corrective justice theory necessitates accounting for betterment, on the basis that the plaintiff's entitlement and the defendant's obligation must be limited to only 'the

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party whole'; it is clear that tort law 'recognises the corrective justice ideal by providing a mechanism through which defendants who have wrongfully injured plaintiffs are required to compensate those plaintiffs for their injuries, and thereby make them whole insofar as this is practically possible': Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 *Georgetown Law Journal* 695, 695. Corrective justice is acknowledged to be the most influential non-economic analysis on tort law. Under it, tort law embodies a system of first-order duties (duties which prohibit conduct or inflicting of injury) and second-order duties (duties of repair). A defendant's duty of repair under corrective justice explains not only why the plaintiff has a right of action but also why the defendant must pay the plaintiff compensatory damages. See generally Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 25 *University of Toronto Law Journal* 349; Jules L Coleman, *Risks and Wrongs* (Oxford University Press, 1992); Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge University Press, 1998); Aristotle, *Nicomachean Ethics*, Book 5.4 (M Ostwald trans, 1962). There are other theories offering explanations of private law, such as distributive justice (which deals with the sharing of a benefit or burden and involves comparing the potential parties to the distribution in terms of a distributive criterion), retributive justice, and economic theories. A strand of thinking, rights-based theory or analysis, has developed in private law scholarship in recent times, with the primary focus upon the law of torts, where there has been intense debate. Rights analysis seeks to develop an understanding of private law obligations driven by the recognition of the rights we have against each other. It is 'strongly associated with anti-instrumentalism and the idea that torts is and should be concerned primarily or exclusively with notions of interpersonal morality, rather than the pursuit of community welfare goals': Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2014) 1, 2. Nolan and Robertson point out that 'not all "rights theorists" rely on the concept of corrective justice in their scholarship, and [that] some are explicitly critical of it': at 26. They also point out that 'the most striking claims of rights theorists, and the most significant implications of rights analysis, may well be those that concern secondary or remedial rights, rather than primary rights', as 'it is in the approach to remedies that the contrast between the rights-based model and rival models of private law is at its most stark': at 20. According to the approach of one rights theorist, Robert Stevens, 'substitutive damages' represent the value of the right infringed. Referring to this, Nolan and Robertson infer that 'in this way the law of damages aims, not to compensate loss, but to give the claimant the "next best" thing to not having the right violated': at 20. They clarify though that 'in addition to an amount representing the value of the right, a damages award may include consequential loss arising from the infringement of the right': at 20. In discussing Stevens' rights-based approach with its substitutive damages, Burrows makes various observations: that the 'substitutive damages' advanced by Stevens for 'all cases of tort and breach of contract is non-compensatory'; that 'the basic award of [substitutive] damages is to provide a substitute for, and hence to vindicate, the right that has been infringed'; that in valuing the right infringed it is 'irrelevant … whether a claimant has suffered any loss, although, where it has, consequential compensatory damages can be added': Andrew Burrows, 'Damages and Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2014) 275, 277. In raising a number of objections to Stevens' substitutive damages, Burrows concludes that it 'does not stan[d] up to close scrutiny': at 278. In particular, Burrows states that 'the Stevens approach falls down in imagining that we sensibly can, or would want to put a value on the right that has been infringed rather than the consequential impact of that infringement': at 280.

[94] Grant Hammond, 'The Place of Damages in the Scheme of Remedies', in Finn (ed), above n 93.

object's equivalent',[95] to the exclusion of any betterment. Weinrib explains this in greater detail in the following passage:

> [T]he defendant who, in breach of her duty, destroys an object belonging to the plaintiff does not thereby destroy the plaintiff's right to the object. The plaintiff remains linked to the defendant through a right that pertains to the object as an undamaged thing … Even if the object no longer exists as a physical entity, the parties continue to be related to each other through the object's normative connection to the plaintiff and the consequent duty on the defendant to act in conformity with that connection. Instead of being embodied in the object itself, the right and its correlative duty with respect to the object now take the form of an entitlement and have the defendant furnish the plaintiff with its value.[96]

Just as the plaintiff's right is no longer embodied in the specific object, which has been destroyed, but in an entitlement to receive the object's equivalent from the defendant, so the defendant's duty is no longer to abstain from its destruction, which has already taken place, but to provide the plaintiff with the object's equivalent.[97]

Under corrective justice, the two parties to the action are said to be linked by a relationship of correlativity. In linking the plaintiff and the defendant to correct the injustice and in trying to re-establish the initial inequality of the gain and restoring it to the other party, corrective justice ignores considerations extraneous to the notion of compensation, such as the individual interests of the parties involved, or other unilateral considerations favourable or unfavourable to both or either of the parties. Neither party can therefore rightly complain of being sacrificed to advance the interests of the other. In this way, corrective justice reasoning is not composed of what has been described as a 'hodge-podge of considerations applying to the parties individually and then somehow traded off against one another'.[98]

Corrective justice also looks upon the concept of wrongdoing as that of fault within the doing itself, and not within the doer. Therefore, moral culpability of the defendant is not a condition of the plaintiff's claim to repair under corrective justice. Unlike distributive justice, corrective justice entirely disregards the 'worthiness' of a person and does not include as one of its necessary elements a criterion of distribution in light of which a determination of worthiness can be made. Distributive justice, on the other hand, takes into account those determinate features selected by a criterion or criteria of distribution.

Consequently, factors extraneous to the notion of compensation that may be raised by the parties (as apparent in *Anthoness*)[99] would fall outside the scope of compensation and must accordingly be ignored under corrective justice's conception of a damages award. Such extraneous considerations can possibly include references to: the status or worthiness of the parties; the needs of the parties (financial or otherwise); or any other non-compensatory considerations.

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[95] Ernest Weinrib, *Corrective Justice* (Oxford University Press, 2012) 91.
[96] Ibid 90.
[97] Ibid 90–91.
[98] Ibid 3.
[99] (1960) SR (NSW) 659. See discussion of this case in Part IV(A).

The corrective justice theory of law, with its exclusive focus upon the plaintiff's loss, as explained above, would therefore strongly support the general approach to account for betterment.

D *Summing Up*

As apparent from the above discussion, the suggested general approach to account for betterment is consistent with and fortified by fundamental remedial principles, policy considerations and the corrective justice theory of law. This approach to accounting for betterment will therefore put in place a principled and just framework of approach in dealing with betterment. The general approach is made flexible by the potential of being displaced by reasoned exceptions, as will be discussed in the next Part.

VI SUBJECT TO REASONED EXCEPTIONS (TO THE PRINCIPLE OF ACCOUNTABILITY)

The basis and justification for exceptions that can displace the general approach of accountability, as well as the scope and range of such exceptions, are discussed below. The exceptions, by displacing the general approach, offer a just and reasoned approach for the plaintiff to be overcompensated under circumstances when betterment should not be accounted for. As discussed below, the exceptions reflect 'exceptional' circumstances, including those based upon legal or regulatory requirements, where there is an urgent reinstatement to resume the plaintiff's business to avoid jeopardy, or when reinstating property possessing long life (or property that was never intended to be replaced).

The exceptions can generally be rationalised under the distributive justice theory. They can also be rationalised and justified under the general law: first, through qualifying the mitigation rule of avoided loss where the plaintiff has no choice in the circumstances; and second, through adapting Dr Lushington's remarks in *The Gazelle* [100] to accommodate circumstances where the plaintiff also has no choice.

When considering the scope and range of the exceptions, the following caution by Rix LJ should be noted:

> [C]ases where a claimant recovers more than he has lost, as will happen where betterment occurs without a … deduction, ought as a matter of principle [to] be exceptional.[101]

Given that the exceptions are 'exceptional' as a matter of principle, two inferences can be made: first, that the exceptions should reflect 'exceptional' circumstances; and second, that the exceptions should not be overly extended.

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[100] (1844) 2 W Rob 279; 166 ER 759.

[101] *Voaden v Champion* [2002] EWCA Civ 8 [85] (Rix LJ). Cresswell LJ also made a similar observation in *Kuwait Airways Corporation v Iraqi Airways Co* [2004] EWHC 2603 (Comm), that it 'ought to be exceptional not to make a deduction for betterment': at [321].

A *Basis and Support for Exceptions*

1 *The Distributive Justice Theory*

While the general approach to account for betterment can be rationalised under the corrective justice theory, the exceptions, on the other hand, can generally be rationalised under the distributive justice theory of law. As distributive justice can take into account determinate features selected by a criterion or criteria of distribution, it would allow considerations extraneous to the compensation goal as well as unilateral considerations concerning or favouring one party to be taken into account.[102] Distributive justice reasoning allows one party's interest (the defendant's in the case of the exceptions) to be sacrificed to advance the interests of the other (the plaintiff). Unlike corrective justice, distributive justice can be composed of what has been described as a 'hodge-podge of considerations applying to the parties individually and then somehow traded off against one another'.[103]

Distributive justice can thus take into account the exceptional circumstances of the parties, including their needs (financial or otherwise), their worthiness or any other non-compensatory or unilateral considerations. In a general sense, it can be rationalised that under exceptional circumstances the plaintiff, being the worthier of the two parties, can therefore justifiably be overcompensated if betterment is not accounted for.

2 *Qualifying the Mitigation Rule of Avoided Loss (Where the Plaintiff Has No Choice in the Circumstances)*

In *Lagden v O'Connor*,[104] Lord Hope noted that in assessing the plaintiff's damages, benefits (which would include betterment) that have resulted from mitigation would have to be taken into account under the mitigation rule of avoided loss. His Lordship then queried the impact upon the said rule where the plaintiff had no choice when remediating the damage suffered. As his Lordship puts it:

> But what if the injured party has no choice? What if the only way that is open to him to minimize his loss is by expending money which results in an incidental and additional benefit which he did not seek but the value of which can nevertheless be identified? Does the law require gain to be balanced against loss in these circumstances? If it does, he will be unable to recover all the money that he had to spend in mitigation. So he will be at risk of being worse off than he was before the accident. That would be contrary to the elementary rule that the purpose of an award of damages is to place the injured party in the same position as he was before the accident as nearly as possible.[105]

Lord Hope raised Dr Lushington's statement in *The Gazelle* that 'it is not open to the wrongdoer to require the injured party to bear any part of the cost of obtaining such indemnification for his loss as will place him in the same position as he was before the

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[102] Weinrib, above n 95, 3.
[103] Ibid.
[104] [2004] 1 All ER 277 (House of Lords). Nicholls, Slynn and Hope LJJ were in the majority, with Lord Hope delivering the leading judgment.
[105] Ibid [30]. Lord Hope delivered the leading speech in the House of Lords.

accident'.[106] He also raised and compared the situation in *Harbutt's*, where there was no choice on the plaintiff's part to avoid the benefit alleged, with that in *British Westinghouse*, where the plaintiff had such a choice.[107] He went on to calibrate and qualify the mitigation rule of avoided loss, that if the plaintiff had no other choice in the circumstances, the resulting benefit should be viewed as being merely incidental to mitigation and it would consequently be inappropriate to deduct such benefit. As reasoned by Lord Hope:

> So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted.[108]

Lord Hope also raised policy, by reasoning that where 'the law shows that the lack of choice should be taken into account in the assessment of damages, the policy of the law ought to be to provide the innocent party with that remedy'.[109]

Based on the above analysis and reasoning, the general approach to account for betterment should be displaced where, in reinstating damaged or destroyed property in the course of mitigation, 'the claimant had no other choice available to him'.[110]

3 *Adapting Dr Lushington's Remarks in* The Gazelle *(to Accommodate Circumstances where the Plaintiff as No Choice)*

Dr Lushington's remarks in *The Gazelle* (mentioned earlier in parts) is set out in full below:

> The right against the wrongdoer is for a *restitutio in integrum*, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.[111]

Drawing from Dr Lushington's remarks, it can be reasoned that it would be justifiable under the law not to account for betterment in circumstances where there is an 'impossibility of otherwise effecting such indemnification without exposing' the plaintiff 'to some loss or burden, which the law will not place upon him'.[112] As appears from Dr

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[106] *The Gazelle* (1844) 2 W Rob 279; 166 ER 759; *Lagden v O'Connor* [2004] 1 All ER 277 [31].
[107] *Harbutt's* [1970] 1 QB 447; *British Westinghouse* [1912] AC 673.
[108] *Lagden v O'Connor* [2004] 1 All ER 277 [34].
[109] Ibid [40].
[110] Ibid [34].
[111] (1844) 2 W Rob 279; 166 ER 759, 760. Although it may be argued that the plaintiff in the above passage may be seen as *not* having been overcompensated, this should be rejected, as it would unduly extend the concept of indemnification.
[112] Ibid.

Lushington's remarks, there is an obvious need to balance the concern not to overcompensate the plaintiff, with the concern not to impose upon the plaintiff any undue burden or loss. One way to achieve such a balance is to consider whether the alleged betterment was avoidable or not, or more broadly if the plaintiff had a choice or not in avoiding the alleged betterment. In applying such reasoning and adapting Dr Lushington's remarks, Sheller JA in *Hyder* shifted Dr Lushington's approach from one which does not account for betterment, to one which allows it where the betterment involved is unavoidable:

> To adapt the words of Dr Lushington the question is whether on the evidence a greater benefit than mere indemnification could be avoided without exposing the plaintiff to some loss or burden.[113]

The reasoning above can be adopted to justify displacing the general approach to account for betterment where it can be shown that the plaintiff had no choice in avoiding the alleged betterment when it reinstated the property. More broadly, the exception here can be used to accommodate circumstances were the plaintiff has no choice. Unlike the preceding exception, the exception here is broader, not being limited to mitigation.

B *Scope and Range of Exceptions (Exemplified by Exceptional Circumstances)*

As mentioned earlier, given that the exceptions are 'exceptional' as a matter of principle, the exceptions should therefore reflect 'exceptional' circumstances. The discussion below will therefore highlight a number of cases which can possibly exemplify the exceptional circumstances required to potentially fall within the exceptions.

1 *Legal or Regulatory Requirements*

In reinstating destroyed or damaged property, the plaintiff may be obliged to comply with certain legal or regulatory requirements. With the plaintiff left with no choice but to reinstate in the manner compelled by the law, any resulting betterment would therefore be unavoidable. Such exceptional situations should be excepted from the general approach of accountability.

In *Bushells*, the awning that was damaged by the defendant was rendered unsafe and the plaintiff was legally obliged to erect a more substantial structure in order to comply with requirements under certain ordinances.[114] As a consequence, the plaintiff obtained a better and more valuable fixture than the original it replaced. Although the majority allowed a deduction for betterment on the ground that the plaintiff would otherwise be 'enriched',[115] their failure to consider the effect of the obligatory legal requirement imposed upon the plaintiff in carrying out the reinstatement leaves the decision open to question. This point was raised by Stanley J in his dissenting judgement:

In those circumstances the City Architect in the discharge of his duty under the ordinances ordered the plaintiff to repair the awning with the result that the plaintiff had to spend some £500 to comply with the order and overcome the damage caused by the

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[113] *Hyder* [2001] NSWCA 313, [30].
[114] (1948) St R Qd 79.
[115] Ibid 92. 'Enriched' is used in the sense of being overcompensated.

driver's negligence. In fact the awning as repaired in compliance with the order was substantially different in design and method of construction from what had existed before the accident; but the plaintiff had no choice. Had it failed to spend the money in compliance with the order it would have been liable to prosecution in addition to a liability that the Council would have done the work at the plaintiff's expense.[116]

On the above analysis, the circumstances exemplified by *Bushells* should be regarded as exceptional and thus be excepted from the general approach of accountability. [117]

The factual scenarios in the following cases should also similarly be able to satisfy the type and category of exception discussed. As any reinstatement works to be carried out had to meet the requirements of the Council involved, Campbell J in *Roberts v Rodier* reasoned that in such a situation 'the appropriate way of applying the principle of compensation would be to make no deduction on account of the betterment, because the plaintiff could not be compensated without also providing her with the betterment'.[118] In *Gwam Investments Pty v Outback Health Screenings Pty Ltd*, White J, the minority judge, reasoned that it 'would be inappropriate' to make any deduction 'on account of betterment' where 'the plaintiff was left with a mobile testing unit which was unusable' and it had no choice but to acquire a 'bigger and more expensive vehicle' as a consequence of the need to comply with the law.[119] In *Harbutt's*, Denning LJ pointed out that town planning requirements current at the time had compelled the plaintiff to redesign and replace the burnt-out factory building.[120]

2 *Urgent Reinstatement to Resume Plaintiff's Business to Avoid Jeopardy*

An exception should also be recognised in circumstances where there is an urgent need to resume the plaintiff's business in order to avoid it being jeopardised, as any resulting betterment would usually be unavoidable. Two case examples are discussed below.[121]

In *Paper Australia*,[122] the defendant's negligent servicing of the plaintiff's cylinder (used in its paper making machine) led to the cylinder's rubber cover being separated from the cylinder. Unable to secure a second hand replacement, the plaintiff replaced it with a new cylinder. In concluding that the plaintiff was 'not obliged to give credit to the

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[116] Ibid.
[117] (1948) St R Qd 79.
[118] [2006] NSWSC 282 [151] (New South Wales Supreme Court).
[119] [2010] SASC 37 [162] (Full Court of the Supreme Court of South Australia) (Gray, White and Kelly JJ). The majority judges (Gray and Kelly JJ) found that there was 'no real attempt' by the defendant to prove betterment: at [58]. The above reasoning of the minority judge, however, remains instructive (assuming that betterment can be satisfied on the facts).
[120] [1970] 1 QB 447, 467. Nathan J in *State Transport* described *Harbutt's* as a case where 'as a matter of law and in order to comply with town planning requirements then in force, a factory owner was obliged to replace a burnt-out factory with a superior building to that which was destroyed': *State Transport* (1984) Aust Torts Reps 80-596, 68,622. Campbell JA in *Gagner Pty Ltd v Canturi Corporation Pty Ltd* expressed the view that it would be inappropriate to account for betterment, where as in *Harbutt's*, 'reinstatement of the old factory was not legally permissible, so a new factory was built': *Gagner Pty Ltd v Canturi Corporation Pty Ltd* [2009] NSWCA 413 at [118].
[121] Another possible case example is that of *Harbutt's* [1970] 1 QB 447, where it was clear that there was an urgent need to replace the factory and resume the plaintiff's business in order to avoid jeopardising its business. All three judges alluded to this: at 473 (Widgery LJ); 468 (Lord Denning MR); 475-76 (Cross LJ).
[122] [2007] VSC 484 (Supreme Court Victoria) (Bongiorno J).

defendant for the better MG cylinder',[123] Bongiorno J was influenced by the fact that there was a likelihood of substantial market loss, which could have jeopardised the business.[124]

In the English case of *Bacon v Cooper (Metals) Ltd*,[125] the defendant in breach of contract delivered to the plaintiff for fragmentation a bale of metal that included a large lump of steel, which broke up the plaintiff's fragmentiser. The fragmentiser included a rotor that was damaged beyond repair. The plaintiff's business came to an abrupt halt and would have been jeopardised if the fragmentiser was not repaired quickly. In light of the possibility of the plaintiff's business being jeopardised and the absence of other options (other than to reinstate as carried out), Cantley J held that the plaintiff was therefore 'entitled to recover the whole cost of the replacement rotor'.[126] Relying upon Dr Lushington's statement in *The Gazelle*, that 'the law will not place this burden on the plaintiff to relieve the defendant from some of the unavoidable consequences of their wrong',[127] Cantley J did not think that it would be appropriate to account for betterment under the above circumstances.

3 *Reinstating Items Possessing Long Life (or Never Intended to Be Replaced)*

An exception should also be considered in situations where buildings or chattels with long or unlimited life spans are reinstated. This can be rationalised on the ground that the plaintiff would never have had to replace such property either in the plaintiff's lifetime or that of its business, but for the defendant's default.

As buildings can last indefinitely, the term 'non-wasting assets' is often applied to them. Chattels, on the other hand, requiring periodic replacement, are commonly referred to as 'wasting assets'. Moffit P in *Hoad* raised the distinction between chattels as wasting assets and buildings as non-wasting assets as follows:

To replace the destroyed building [as in *Harbutt's*], capital had to be laid out to erect a like building in the only way it could be, namely with new materials. The plaintiffs were not in the business of buying and selling factories. They needed the replacement factory for indefinite use. There was no question of it being sold. Prior to its destruction there was no contemplation of reconstructing it in the foreseeable future. The facts in the present case are quite different. Farm equipment depreciates rapidly, and it is either written off or is replaced at short intervals. Planned replacement at short intervals was in fact the business practice of the plaintiffs. If this practice would have continued, then the consequence of the fire was merely to accelerate the inevitable capital expense of acquiring a new tractor and mower.[128]

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[123] Ibid [363]. This assumes that betterment can be satisfied on the facts.
[124] This was based upon findings that the 'only option available to the plaintiff to replace the cylinder was to acquire a new one' and that '[s]peed was of the essence, as the plaintiff was of the belief … that its market for MG paper was in danger of being lost, if production was not resumed as quickly as possible': ibid at [350].
[125] [1982] 1 All ER 397.
[126] *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397, 402.
[127] (1844) 2 W Rob 279; 166 ER 759 (Adm).
[128] [1977] 1 NSWLR 88, 94.

Importantly, Moffit P added that he did not think that the decision in *Harbutt's* would have been the same, 'if the factory had been fifty years old, and at the time of the fire, there were plans to demolish and rebuild it in a year's time'.[129] The issue concerning whether there were or could be any planned replacements would therefore be an important factor to take into consideration.

A case in point is *Von Stanke v Northumberland Bay Pty Ltd*.[130] A collision occurred between the plaintiff's and defendant's vessels owing to the defendant's negligence. Unable to find a second hand vessel to replace the severely damaged vessel, the plaintiff ordered a new vessel to be built to similar specifications as the original. Lovell J stated that generally, 'the plaintiff should credit the defendant for the fact that the plaintiff now receives new goods in place of old except where the plaintiff would never have replaced the chattel in question',[131] as he found to be the situation in this case.

D *Summing Up*

Exceptions to the general approach of accountability, as justified under the law and distributive justice, can offer a just, reasoned and principled approach to allow overcompensating the plaintiff in exceptional circumstances. In considering how the exceptions can be drawn together, the common element or link can be drawn from Dr Lushington's statement in *The Gazelle*:[132] that it would be justifiable under the law not to account for betterment in circumstances where there is an 'impossibility of otherwise effecting such indemnification without exposing' the plaintiff 'to some loss or burden, which the law will not place upon him'.[133] The terms 'unavoidable' or 'incidental' may be used to describe the nature of betterment which can result from such exceptional circumstances.[134]

The situations discussed above exemplify only some of the potential exceptions and are therefore not exclusive. The list of exceptions should remain open so that the court can continue to retain and exercise its discretion on such matters. It is important though that the exceptions be restricted and not overly extended, given that they would run counter to the compensation principle in allowing overcompensation to occur.

VII CONCLUSION

The question as to when and why an account for betterment should or should not be allowed is not fully resolved or settled. This article has therefore closely examined the concept of betterment and its constituent elements to provide a clearer understanding of betterment.

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[129] [1977] 1 NSWLR 88, 95.
[130] [2008] SADC 61.
[131] Ibid [130].
[132] (1844) 2 W Rob 279; 166 ER 759, 760.
[133] Ibid.
[134] Possibly also, the following additional terms may be considered when describing the nature of such betterment: forced; inevitable; or justifiable betterment.

It has also argued and provided support for a general approach to account for betterment, subject to reasoned exceptions. The suggested approach would put in place a principled framework of approach in dealing with betterment, which would in the long run lead to more consistent, reasoned and just outcomes in disputes where betterment is alleged.

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CASE NOTE
COMMERCIAL DEALINGS WITH GOVERNMENT: THE CAUTIONARY TALE OF *VICTORIA V TATTS*

MAX TURNER*

I INTRODUCTION

Legislation has the potential to modify or extinguish rights conferred by contract. Contention arises when legislation undermines the rights of a private party to a commercial dealing with government, leaving the private party without adequate legal remedy in Australia. This is the 'sovereign risk' borne by private parties when striking bargains with government. *Victoria v Tatts Group Ltd* ('*Tatts Case*')[1] involved the materialisation of a sovereign risk, whereby the unanimous High Court of Australia ('High Court') narrowly construed Tatts Group Ltd's ('Tatts') right to compensation pursuant to a contract with the State of Victoria ('Victoria'), after significant reform to the gambling and gaming industry. Along with the factually analogous *Tabcorp Holdings Ltd v Victoria* ('*Tabcorp Case*'),[2] which was concurrently heard, yet separately decided, by the High Court, the *Tatts Case* demonstrates the risks of private dealings with government. The case calls into question the inadequacy of the current remedial framework for sovereign risk and sheds light on important issues of contractual construction.

II FACTS

The *Gaming Machine Control Act 1991* (Vic) ('1991 Act') heralded the first legislated regulation of gambling activity involving the use of gaming machines in Victoria.[3] The holder of a 'gaming operator's licence', issued pursuant to s 33 of the 1991 Act, was entitled to facilitate gaming in approved Victorian venues.[4] On 14 April 1992, gaming operator's licences were exclusively issued to the then Totalisator Agency Board of Victoria ('TAB') and the then Trustees of the Will and Estate of the Late George Adams (now 'Tatts'), creating a duopoly in the gaming market.

TAB was privatised in 1994 and became Tabcorp. The *Gaming and Betting Act* 1994 (Vic) ('1994 Act')[5] facilitated the privatisation scheme, and provided for the grant of a conjoined gaming and wagering licence to Tabcorp for an 18 year term.[6] In order to

* 5th Year BA LLB Student, Macquarie Law School.
1 *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392 ('*Tatts Case*').
2 *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376 ('*Tabcorp Case*').
3 *Gaming Machine Control Act* 1991 (Vic) ('*1991 Act*').
4 *Tabcorp Holdings Ltd v Victoria* (2016) 90 ALJR 376, 379 [11].
5 *Gaming and Betting Act* 1994 (Vic) ('*1994 Act*').
6 Ibid ss 8, 12(1).

equalise the competitive footing of the duopolists, Victoria entered into an agreement with Tatts ('1995 Agreement') on terms that largely replicated those of the 1994 Act applicable to Tabcorp. Specifically, clause 7.1 of the 1995 Agreement entitled Tatts to a 'terminal payment' in the event that 'the Gaming Operator's Licence [granted to Tatts] expires without a new gaming operator's licence having [been] issued to [Tatts].'[7]

The gaming and gambling industry underwent significant regulatory change in 2008. Upon expiration of Tatts' and Tabcorp's licences, a new licensing regime took effect — resulting in the issuance of 'Gaming Machine Entitlements' ('GMEs') to approved venues — pursuant to amendments to the *Gambling Regulation Act 2003* (Vic) ('2003 Act'),[8] a re-enactment of the 1994 Act. No new licences were issued. The duopoly had ended.

III LITIGATION HISTORY

Tatts commenced proceedings against Victoria in the Supreme Court of Victoria ('Supreme Court') to claim its terminal payment, owed under clause 7 of the 1995 Agreement. Hargrave J held that Tatts was entitled to the terminal payment. His Honour premised his judgment on the likelihood of a reasonable and honest businessperson understanding a 'new gaming operator's licence' after the expiry of the defined Gaming Operator's Licence as 'any licence or other authority of substantially the same kind as [Tatts'] existing gaming operator's licence.'[9]

The Court of Appeal upheld the decision of the primary judge.[10]

IV THE DECISION IN THE *TATTS CASE*

The High Court unanimously allowed Victoria's appeal. The High Court held that the phrase new gaming operator's licence was confined to a gaming operator's licence issued pursuant to the 1991 Act (as amended, re-enacted or replaced from time to time), and that the 1995 Agreement was predicated on the existence and continuation of the duopoly. This involved significant departure from the Supreme Court and Court of Appeal's findings that a new gaming operator's licence extended to substantially similar gaming authorities. [11] Consequently, Tatts was not entitled to compensation in accordance with the 1995 Agreement, because no new gaming operator's licence was issued.

The High Court prefaced its reasoning by confirming that the proper construction of commercial contracts requires consideration of their text, context and purpose.[12] The text, context and purpose of clause 7 of the 1995 Agreement were analysed in turn.

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[7] *Tatts Case* (2016) 90 ALJR 392, 394 [3].
[8] *Gambling Regulation Act 2003* (Vic) ('*2003 Act*'); *Gambling Regulation Amendment (Licensing) Act* 2008 (Vic); *Gambling Regulation Amendment (Licensing) Act* 2009 (Vic); *Gambling Regulation Amendment Act* 2009 (Vic).
[9] *Tatts Group Ltd v Victoria* [2014] VSC 302 (26 June 2014) [95].
[10] *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [133]–[146].
[11] *Tatts Group Ltd v Victoria* [2014] VSC 302 (26 June 2014) [95]; *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [147].
[12] *Tatts Case* (2016) 90 ALJR 392, 401 [51], citing *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990 [46]–[51].

Looking first to the language of the 1995 Agreement, the High Court held that clause 7 of the 1995 Agreement was confined to a licence granted in accordance with the 1991 Act,[13] contrary to the broad interpretation given by the Court of Appeal. Similarly, insertion of the word 'new' into new gaming operator's licence did not vary the presumption that the phrase should be used in a consistent manner with gaming operator's licence.[14]

In addition to the language of the 1995 Agreement, the High Court found further support for its conclusion in the context and purpose of the 1995 Agreement.[15]

First, the High Court was particularly critical of the Court of Appeal's framing of the central issue[16] — what an honest and reasonable businessperson, in the position of the parties at the point of entry into the 1995 Agreement, would have understood a new gaming operator's licence to mean.[17] This was because the Court of Appeal's formulation did not reflect the context and purpose of the 1995 Agreement, specifically that it was predicated upon the existence of the duopoly.[18] That the continuation of the duopoly was at the core of the 1995 Agreement was reflected within numerous clauses, recitals and the Treasurer's letter attached as Schedule 2.[19] Consequently, the High Court rejected previous suggestions of the 'commercial nonsense' of Victoria's promise to make the terminal payment to Tatts.[20]

Second, the High Court sourced contextual support from the differing 'businesses' protected by the Gaming Operator's Licence and GMEs respectively. The High Court held that Tatts' gaming machine business (comprising the acquisition, supply, installation and operation of gaming machines) was far broader than the GME, which was limited in its 'effect and value, both geographically and functionally.'[21]

The divergence of reasoning between the High Court and Court of Appeal highlights the complexities and difficulties associated with interpretation of commercial contracts. Though both the High Court and Court of Appeal approached their analysis of the key issue in the same manner, with reference to the text, context and purpose of clause 7 of the 1995 Agreement,[22] the quest to ascertain the parties' objective intention yielded conflicting conclusions. The commercial ramifications of such interpretive disparity are concerning. Commercial parties must now meticulously and thoroughly craft their bargains to ensure that their commercial position is protected from any bench.

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[13] *Tatts Case* (2016) 90 ALJR 392, 401 [49].
[14] Ibid 401–2 [53]–[59].
[15] Ibid 402 [61].
[16] Ibid 402–3 [61]–[63].
[17] *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [146].
[18] *Tatts Case* (2016) 90 ALJR 392, 403 [64].
[19] Ibid 396 [18].
[20] *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [157]–[158]; *Tatts Group Ltd v Victoria* [2014] VSC 302 (26 June 2014) [101]–[102].
[21] *Tatts Case* (2016) 90 ALJR 392, 404 [73].
[22] Ibid 401 [51], citing *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990 [46]–[51]; *Victoria v Tatts Group Ltd* [2014] VSCA 311 (4 December 2014) [87]–[94], citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-7 (French CJ, Hayne, Crennan and Kiefel JJ).

V CRITIQUE

The significance of the *Tatts Case* extends beyond what was expressed in the High Court's judgment. Critically, the High Court elected to leave untouched two vexing legal issues. The first is whether ambiguity must be found within the text of the contract before a court may turn its attention to surrounding circumstances. Secondly, the Court did not determine whether private parties ought to be compensated for government default and sovereign risk. As will be demonstrated, the High Court's silence on these relevant matters can be heard just as loudly as their judgment against Tatts.

A *The Ambiguity Gateway*

Recent decisions of the High Court have clarified the proper construction of commercial contracts,[23] allowing for the consideration of the context and commercial reality of the contract at the time of drafting, in addition to the language of the contract. However, the *extent to which* surrounding circumstances may be considered to aid contractual interpretation remains an ongoing concern.[24] The controversy of opinion stems from Mason J's formulation of the 'true rule' of contractual interpretation in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* ('*Codelfa*'),[25] that evidence of surrounding circumstances is admissible so as to clarify ambiguous language, but not to contradict unambiguous language.[26] The contention peaked when in a refusal to grant special leave,[27] the High Court remarked that courts are bound to follow the precedent in *Codelfa* until it is otherwise reconsidered by the High Court.[28] Despite the uncertainty surrounding the precedential weight of special leave applications,[29] intermediate appellate courts were thrown into disarray by the conflicting lines of reasoning being simultaneously affirmed by the High Court.[30]

It appears that the High Court is awaiting a case with factual surrounding circumstances that contradict unambiguous words in order to resolve this issue once and for all. Regardless, the High Court's reluctance to use the *Tatts Case* to revisit the 'true rule' will frustrate commercial contractors and academics alike.

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[23] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 89 ALJR 990 [46]–[51]; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; see also *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1.

[24] Justice Robert McDougall, 'Construction of Contracts: The High Court's Approach' (Paper presented at the Commercial Law Association Judges' Series, Sydney, 26 June 2015) [5].

[25] (1982) 149 CLR 337 ('*Codelfa*').

[26] Ibid 352 (Mason J).

[27] See *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1.

[28] Ibid [3] (Gummow, Heydon and Bell JJ).

[29] Kevin Lindgren, 'The Ambiguity of 'Ambiguity' in the Construction of Contracts' (2014) 38(2) *Australian Bar Review* 153; Derek Wong and Michael Brent, 'Western Export Services v Jireh International: Ambiguity as the Gateway to Surrounding Circumstances?' (2012) 86(1) *Australian Law Journal* 57.

[30] See generally Troy Keily, 'High Court Declines to Clarify the Codelfa 'Ambiguity Principle' (2016) 44 *Australian Business Law Review* 61; Justice Robert McDougall, 'Construction of Contracts: The High Court's Approach' (2015) 4 *Journal of Civil Litigation and Practice* 141. The disparity of opinion in intermediate appellate courts is evidenced in *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR 113, 130 [71]; *contra Technomin Australia Pty Ltd v Xstrata Nickel Australia Operations* (2014) 48 WAR 261.

B *Remedying Sovereign Risk*

The fact that private parties cannot and will not be remediated for the defaults of government is alarming. This is particularly so when the materialisation of a sovereign risk can be characterised as a private party acting to their detriment in reliance upon antecedent government conduct.[31] Notably, the language of this characterisation closely resembles the modern concept of private law estoppel.[32] Given the striking similarities, it is unsurprising that various academics and members of the judiciary have contemplated the possibility of administrative law courts applying an analogous 'administrative estoppel'[33] in Australia. The Chief Justice of the High Court promisingly opined in 2003, that 'the possibility that estoppels may apply in public law is *not* foreclosed by the current state of authority in Australia.'[34] Such a public law remedy would accord with the 'manifest unfairness' recognised by the Court of Appeal.[35]

In spite of the well reasoned views in support of the integration of a public law estoppel, the weight of Australian case law indicates otherwise. The decisions of *Attorney-General (NSW) v Quin* ('*Quin*')[36] and *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* ('*Lam*')[37] traced the development and demise of the 'legitimate expectations' remedy — a former public law remedy akin to public law estoppel. However, Justice Perram acknowledges that, despite constitutional differences, many other comparable administrative law systems (such as France, the European Union and the United Kingdom) habitually relieve private parties in similar estoppel-type circumstances involving government dealings.[38]

Regardless of whether administrative estoppel will weave its way into the fabric of public law, the *Tatts Case* does not appear to be suitable for its application for two reasons. First, implicit in the High Court's reasoning was the fact that Tatts was not susceptible to government default. The 1995 Agreement contemplated the change in duopoly status that ultimately precluded Tatts from receiving its terminal payment. Secondly and finally, the 1995 Agreement would have been an inappropriate contract to enforce. The analogy between private law estoppel and a public law counterpart ceases in relation to the parties affected. Whilst private law estoppel concerns a bilateral legal relationship, a public law equivalent would have to additionally account for the interests of the general

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[31] Justice Nye Perram, 'General Principles of Law in Civilian Legal Systems: What Lessons for Australian Administrative Law?' (Speech delivered at the AGS Administrative Law Symposium, Canberra, 21 June 2013) <http://www.fedcourt.gov.au/publications/judges-speeches/justice-perram/perram-j-201#_ftn7>.

[32] See generally Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (LexisNexis Butterworths, 2nd ed, 2013) ch 12; see generally *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.

[33] See, eg, G T Pagone, 'Estoppel in Public Law: Theory, Fact and Fiction' (1984) 7 *University of New South Wales Law Journal* 267; Justice Duncan Kerr, 'Administrative Law in an Interconnected World: Where to from Here?' (2013) 74 *Australian Institute of Administrative Law Forum* 36; see especially Perram, above n 31.

[34] Justice Robert French, 'The Equitable Geist in the Machinery of Administrative Justice' (2003) 39 *Australian Institute of Administrative Law Forum* 1, 11.

[35] *Victoria v Tatts Group Ltd* [VSCA] 311 (4 December 2014) [61]–[62].

[36] *A-G (NSW) v Quin* (1990) 170 CLR 1 ('*Quin*').

[37] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 215 CLR 1 ('*Lam*').

[38] Perram, above n 31.

public.[39] Accordingly, Justice Perram's species of administrative estoppel would unlikely apply in the context of the *Tatts Case* for want of public interest in the perpetuation of a socially and economically damaging industry duopoly. As eluded to in the *Tatts Case*,[40] the 'socio-economic issues attending gambling' and anti-competitive contracts, arrangements and understandings are generally contrary to the public interest.[41] This would have inevitably led to Tatts' preclusion from pleading administrative estoppel.

VI CONCLUSION

The *Tatts Case* will be remembered as a cautionary tale in the context of commercial dealings with government. Without any adequate protection from unforeseeable adverse government conduct, private parties may only rely on careful and precise drafting to mitigate sovereign risk, particularly in regulated and volatile industries. This cautious approach to contractual drafting is also suitable in light of the uncertainty throughout Australia surrounding the 'true rule' of objective contractual interpretation. Whether a proactive High Court or legislature will resolve these issues is yet to be seen.

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[39] *R v East Sussex County Council; Ex Parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58, 66 [34] (Lord Hoffman); Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32 *Melbourne University Law Review* 470, 490.
[40] *Tatts Case* (2016) 90 ALJR 392, 404 [72].
[41] Sir William Searle Holdsworth, *A History of English Law* (Sweet & Maxwell, 2nd ed, 1937) vol 8, 65–62; see also *Competition and Consumer Act 2010* (Cth) s 45.

CONTRIBUTORS

Kate Chetty is currently an acting Deputy Defence General Counsel at the Department of Defence, practising in government and administrative law. She is also a sessional lecturer at the University of Canberra, and convenes the unit Law of Communication. Kate's research interests are in constitutional rights, the separation of judicial power, and the defence power. As well as law, Kate has qualifications in communications (advertising and marketing) and is currently undertaking a Master of Business.

David Clark is a Professor of Law at Flinders University specialising in public law and constitutional history. He has published widely in Australia and in international publications, especially on habeas corpus and Magna Carta. His principle work considers the modern echoes of key constitutional inheritances. His current work considers the Australian uses of the Bill of Rights 1689. He also combines his academic work with practical legal activities. In 2016, for example, he took part in constitutional reform discussions in Tasmania and was a member of the Commonwealth Parliamentary Association delegation to Samoa where he conducted post election seminars on parliamentary privilege.

Eliza Fitzgerald is a 2015 graduate of Macquarie University, having completed a Bachelor of Laws with first class honours and a Bachelor of Arts majoring in English Literature. Her research interest in public international law began after competing in the Philip C. Jessup International Law Moot, where her team placed third in the Australian rounds. She currently works in the Constitutional & Native Title Law Group at the NSW Crown Solicitor's Office.

Michael Legg is an Associate Professor, UNSW Law Australia and Director of the IMF Bentham Class Actions Initiative at UNSW Law. He is an expert in civil procedure and complex litigation including class actions and regulatory litigation. Michael is the author of *'Complex Civil Litigation and Case Management*' (2011) Federation Press and co-author of *'Annotated Class Actions Legislation'* (2014) LexisNexis and '*Civil Procedure in New South Wales*' (2016) Thomson Reuters. He is also admitted as a legal practitioner in Australia and the USA where he has acted on class actions and other high stakes, bet-the-company litigation. Michael is a member of the Law Council of Australia's Class Actions Committee, the Law Society of NSW's Future Committee and a member of the board of directors of the Australian Pro Bono Centre.

Peter Radan is a Professor of Law at Macquarie University and a Fellow of the Australian Academy of Law. His teaching is primarily in the areas of contract law and equity and trusts, areas in which he has co-authored both textbooks and casebooks. His research areas are in contracts, equity and trusts, and secession.

Ava Sidhu holds an LLB (Hons) degree from the University of Singapore, and LLM and M Phil degrees from the University of Western Australia. She is a lecturer with The University of Notre Dame Australia. Her previous experience includes practising as an advocate and solicitor at the Singapore Bar, working as a legal officer, as well as serving as the Associate Editor of the University of Notre Dame Australia Law Review. Her areas of research include the law of remedies, contract and torts.

Gillian Triggs is an Emeritus Professor and is the President of the Australian Human Rights Commission, with a five year appointment. She was Dean of the Faculty of Law and Challis Professor of International Law at the University of Sydney from 2007-12 and Director of the British Institute of International and Comparative Law from 2005-7. She is a former Barrister and a Governor of the College of Law. Professor Triggs has combined an academic career with international commercial legal practice and has advised the Australian and other governments and international organisations on international legal and trade disputes. Her focus at the Commission is on the implementation in Australian law of the human rights treaties to which Australia is a party, and to work with nations in the Asia Pacific region on practical approaches to human rights. Professor Triggs' is the author of many books and papers on international law, including *International Law, Contemporary Principles and Practices* (2nd Ed, 2011).

Max Turner is a fifth year student undertaking a Bachelor of Laws with a Bachelor of Arts majoring in German Studies at Macquarie University. He is currently a Student Editor of the Macquarie Law Journal and is thrilled to have made his first contribution to an academic journal. His academic interests include contract law, competition law, administrative law and civil procedure, whereas his extra-curricular interests include travelling, mooting and enjoying all codes of rugby. Max looks forward to commencing as a graduate at Herbert Smith Freehills in 2018.

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Macquarie Law School
Macquarie University
NSW 2109
Australia
T: +61 (2) 9850 6783
law.mq.edu.au