



# the sydney law review

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# *'Sovereignty' and its Relevance to Treaty-Making Between Indigenous Peoples and Australian Governments*

SEAN BRENNAN,<sup>\*</sup> BRENDA GUNN<sup>\*\*</sup> AND GEORGE WILLIAMS<sup>\*\*\*</sup>

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## *Abstract*

The idea of a treaty or treaties between Indigenous peoples and Australian governments has long been a subject of debate. One argument that often arises is the idea that such agreements are not achievable because they are inconsistent with Australian 'sovereignty'. This article explores whether sovereignty is indeed a roadblock to modern treaty-making. It analyses what the term means as well as uses of it in Australia by Indigenous peoples, governments and the courts and how it is applied in other nations. The article concludes, after analysing some common objections, that as a matter of public law the concept of sovereignty need not be an impediment to treaty-making in Australia.

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## 1. *Introduction*

‘We recognise that this land and its waters were settled  
as colonies without treaty or consent.’

Prime Minister John Howard, 11 May 2000<sup>1</sup>

‘A nation ... does not make a treaty with itself.’

Prime Minister John Howard, 29 May 2000<sup>2</sup>

The first statement by Prime Minister John Howard is a matter of fact. From that fact flows a sense of grievance, felt by many Indigenous people and shared by many other Australians, that ultimate political and legal authority — or ‘sovereignty’ — was never properly secured by the Crown over the Australian landmass. The second statement is an assertion. It suggests that it is impossible to use a treaty to remedy the way that the continent was settled and the Australian nation constructed. The difficulty, it has been argued, is that ‘implicit in the nature of a treaty is recognition of another sovereignty, a nation within Australia’.<sup>3</sup> Whether Indigenous people have the power and authority as a matter of law to negotiate and enter into such agreements lies at the heart of the contemporary treaty debate in Australia. This is a difficult question because the concept of sovereignty is elusive and there is no constitutional recognition of Indigenous people or their place within the Australian nation.<sup>4</sup> Using Australian and comparative public law principles, this paper explores whether ‘sovereignty’ is indeed a roadblock to a modern-day treaty or treaties<sup>5</sup> between Indigenous peoples and the wider Australian community.<sup>6</sup>

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1 John Howard, *Reconciliation Documents* (Media Release, 11 May 2000): <[www.pm.gov.au/news/media\\_releases/2000/reconciliation1105.htm](http://www.pm.gov.au/news/media_releases/2000/reconciliation1105.htm)> (23 December 2003). Howard responded to the Council for Aboriginal Reconciliation’s *Australian Declaration Towards Reconciliation* by saying there were several areas of disagreement which prevented the Government offering its full support for the document. ‘For the information of the public’ he attached a version of the document ‘to which the government would have given its full support’.

2 John Laws, *Interview with John Howard, Prime Minister of Australia* (Sydney, 29 May 2000): <[www.pm.gov.au/news/interviews/2000/laws2905.htm](http://www.pm.gov.au/news/interviews/2000/laws2905.htm)> (23 December 2003). David Yarrow pointed out to the authors that Prime Minister Howard’s statement bears a striking similarity to an assertion made by former Canadian Prime Minister, Pierre Trudeau, at the time his newly elected government released its 1969 White Paper on Aboriginal policy: ‘We will recognise treaty rights. We will recognise forms of contract which have been made with the Indian people by the Crown and we will try to bring justice in that area and this will mean that perhaps the treaties shouldn’t go on forever. It’s inconceivable, I think, that in a given society one section of the society have a treaty with the other section of society. We must all be equal under the laws and we must not sign treaties amongst ourselves’: Peter Cumming & Neil Mickenberg (eds), *Native Rights in Canada* (2<sup>nd</sup> ed, 1972) at 331.

3 Robert French, ‘The Constitution and the People’ in Robert French, Geoffrey Lindell & Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 60 at 78.

4 See George Williams, ‘Race and the Australian Constitution: From Federation to Reconciliation’ (2000) 38 *Osgoode Hall Law Journal* 643.

5 Australia is the only Commonwealth nation that does not have a treaty with its Indigenous peoples: *Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Canberra: AusInfo 2000) 6.

We begin by examining the origins of the term 'sovereignty' and the various meanings it has acquired over past centuries. From this diversity of meanings, we identify key themes relevant to the current Australian debate about treaty-making. We explore how the concept of sovereignty has been used in Australia by Indigenous peoples, government and the courts. We then look at how it has been applied by governments, courts and Indigenous people in other comparable English-speaking countries where the relationship between Indigenous peoples and the settler state is an ongoing source of political and legal concern. Finally, we discuss sovereignty within the context of some public law and policy objections that have been made to negotiating a treaty settlement in Australia.

In this article, we find that debates about sovereignty are important — they deal with the most fundamental questions of legitimate power and authority — but they do not appear to be inherently unresolvable.<sup>7</sup> After examining the different meanings of the term and the different ways that Australia and other countries have wrestled with its dilemmas, we conclude that as a matter of public law the concept of sovereignty itself poses no roadblock to moving forward with a process of treaty-making. In discussing the possibility of modern treaty-making in Australia we take a broad view of what a 'treaty' or treaty-like agreement might be.<sup>8</sup> Essentially we apply the term to comprehensive agreements reached between Indigenous peoples and governments that have a political or governmental

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6 See also on sovereignty in this context, Michael Dodson, 'Sovereignty' (2002) 4 *Balayi: Culture Law and Colonisation* 13; William Jonas, 'Recognising Aboriginal Sovereignty — Implications for the Treaty Process' (Paper presented at the ATSIC National Treaty Conference, Canberra, 27 August 2002) 6: <[www.treatynow.org/docs/jonas.doc](http://www.treatynow.org/docs/jonas.doc)> (23 December 2003); Marcia Langton, 'The Nations of Australia', Alfred Deakin Lecture, 21 June 2001: <[www.abc.net.au/rn/deakin/stories/s300007.htm](http://www.abc.net.au/rn/deakin/stories/s300007.htm)> (24 December 2003); Lisa Strelein, 'Missed Meanings: The Language of Sovereignty in the Treaty Debate' (2002–2003) 20 *Arena Journal* 83. This article does not attempt to tackle the significance and status of treaties made between Indigenous peoples and governments under international law.

7 In discussing Neil MacCormick's recent book *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (1999) in the context of the ongoing controversy over national sovereignty within the European Union, Peter Oliver says that while a pluralistic notion of sovereignty sounds like a recipe for confusion 'the rush for certainty is not always warranted'. Later he says it is MacCormick's 'distinctive contribution to point out that this question, the sovereignty question, does not need a definitive answer'. Peter C Oliver, 'Sovereignty in the Twenty-First Century' (2003) 14 *KCLJ* 137 at 171. See also the conclusion drawn by the Canadian Royal Commission on Aboriginal Peoples on the issue of sovereignty, text below at n124.

8 See the discussion of what the term 'treaty' might encompass in Sean Brennan, *Why 'Treaty' and Why This Project?*, Discussion Paper No. 1, Treaty Project, Gilbert + Tobin Centre of Public Law, January 2003: <<http://www.gtcentre.unsw.edu.au/publications.asp#Treaty%20Project%20Discussion%20Papers>> (30 June 2004). This Paper suggests that the idea of a treaty conveys certain ideas in terms of premise, process and outcome. The *premise* or starting point is acknowledgment, a mutual recognition of negotiating authority and also of the past exclusion of Indigenous people from the processes by which the Australian nation was constructed. The (default) *process* in a treaty relationship is that of negotiation as the primary way of doing business, ahead of litigation, legislation and administration, which have been more typical methods by which governments have dealt with Indigenous issues. The *outcomes* which treaty advocates have spoken of might be summarised as rights and opportunities.

character, that involve mutual recognition of the respective jurisdiction each side exercises in entering into the agreement and that have a binding legal effect.<sup>9</sup> Whether or not such a process is desirable, and what any treaty might contain, are separate questions of politics and policy not addressed in this article.

## 2. *The Uses of Sovereignty*

In references made to ‘sovereignty’, the same themes emerge again and again: the concept is important, but also elusive and very much dependent on its context.<sup>10</sup> As one study has recently suggested:

The uninterrupted quest for a so-called ‘proper’ or ‘adequate’ definition of ‘sovereignty’, in both its internal and international ramifications, bears witness to the unfading materiality of this word for human society.... However, far from being semantically crystallised, this word has in fact never stopped changing.<sup>11</sup>

Although he did not invent the concept, French lawyer, philosopher and writer Jean Bodin is widely seen as the ‘father’ of sovereignty. A recent investigation of his work suggests he propounded the concept to meet a particular purpose at a particular time. Sixteenth Century France was wracked by violence and war. With

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- 9 We note that in his landmark study as a Special Rapporteur for the UN’s Commission on Human Rights, Miguel Alfonso Martinez took a similarly broad approach to the characterisation of such agreements. At one point he referred to them as ‘formal and consensual bilateral juridical instruments’ (at [82]). More generally he said ‘the decision of the parties to a legal instrument to designate it as an “agreement” does not necessarily mean that its legal nature differs in any way from those formally denominated as “treaties”’ (at [40]) and that ‘one should avoid making oneself a prisoner of existing terminology’ (at [53]). He went on to say that ‘a narrow definition of ‘a treaty’ and ‘treaty-making’ would hinder or pre-empt any innovative thinking in the field. Yet it is precisely innovative thinking that is needed to solve the predicament in which many indigenous peoples find themselves at present’. Miguel Alfonso Martinez, ‘Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations’, Final Report, E/CN.4/Sub.2/1999/20, 22 June 1999: <<http://ods-dds-ny.un.org/doc/UNDOC/GEN/G99/137/73/PDF/G9913773.pdf?OpenElement>> (30 June 2004).
- 10 There is a wealth of literature discussing the discriminatory assumptions embedded in the conclusive presumption that Indigenous and non-state societies lacked sovereignty. This body of literature is not dealt with in the present article, but see, eg, Robert Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990). Kent McNeil has also noted that sovereignty is ‘a European concept, arising out of the development of the nation-state. So care needs to be taken in applying the concept in other parts of the world, where societies were not necessarily organized on the nation-state model, and where an equivalent conception of sovereignty may not have existed in the minds of the people’. Kent McNeil, ‘Sovereignty on the Northern Plains: Indian, European, American and Canadian Claims’ (2000) 39 *Journal of the West* 10 at 11.
- 11 Stéphane Beaulac, ‘The Social Power of Bodin’s ‘Sovereignty’ and International Law’ (2003) 4 *Melbourne Journal of International Law* 1 at 24–25. Marcia Langton has also dealt with this issue recently. She notes Stephen Krasner’s observation that ‘since Jean Bodin and Thomas Hobbes “first elaborated the notion sovereignty in the 16<sup>th</sup> and 17<sup>th</sup> centuries”, it has always been malleable in practice’. Marcia Langton, ‘Unsettling Sovereignties’ in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004) 31.

authority collapsing, Bodin wanted to save the monarchy: 'The end he sought was the establishment of a coherent system of political organisation; the means he promoted to reach this objective was the concentration of supreme power in as few hands as possible'.<sup>12</sup> This was sovereignty in its original form: that is, legal and political authority constructed to be absolute and monolithic as a bulwark against social chaos. The idea of sovereignty has been applied many times since, again frequently with a political or rhetorical purpose in mind. Over centuries sovereignty has acquired multiple meanings, few of which now resemble Bodin's concept of a single omnipotent king at the top of a pyramid of power.

At its most general, sovereignty is about the power and authority to govern. On that much, at least, there is a rough consensus amongst those who seek to define the term. Beyond that, context becomes important and different interpretations emerge. This is true even according to a range of dictionaries and other authoritative reference works. The *Macquarie Dictionary*<sup>13</sup> defines 'sovereignty' as:

1. the quality or state of being sovereign
2. the status, dominion, power, or authority of a sovereign
3. supreme and independent power or authority in government as possessed or claimed by a state or community
4. a sovereign state, community, or political unit.

Other specialist dictionaries and reference books provide slightly different meanings. The *Butterworths Australian Legal Dictionary* states: 'Sovereignty is an attribute of statehood from which all political powers emanate.... However sovereignty is rarely absolute; it is generally limited by duties owed to the international community under international law'.<sup>14</sup> According to the *Constitutional Law Dictionary*: 'Sovereignty is the power by which a state makes and implements its laws, imposes taxes, and conducts its external relations.... The notion of sovereignty was countered or altered in some respects by the concept of popular sovereignty, which retains for the governed ultimate control in a political sense'.<sup>15</sup> The *Dictionary of International & Comparative Law* defines 'sovereignty' as: 'the ability of a state to act without external controls on the conduct of its affairs'.<sup>16</sup> In *A Dictionary of Modern Politics*, 'sovereignty' is defined as 'the right to own and control some area of the world ... [It] depends on the idea of independent rule by someone over somewhere ... [It] can, at the same time, be used inside one country. One can talk about the sovereignty of the people'.<sup>17</sup> A leading nineteenth century text on international law contained the following, more nuanced definition:

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12 Id at 22.

13 *Macquarie Dictionary* (3<sup>rd</sup> ed, 1997) at 2028.

14 *Butterworths Australian Legal Dictionary* (1997) at 1094.

15 Ralph Chandler (ed), *The Constitutional Law Dictionary* (1987) at 654.

16 *Dictionary of International and Comparative Law* (3<sup>rd</sup> ed, 2003).

17 David Robertson, *A Dictionary of Modern Politics* (1985) at 305.

Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally. Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public laws... but which may more properly be termed constitutional law. External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law,... but may more properly be termed international law.<sup>18</sup>

From such definitional diversity, four key themes emerge. The first is a distinction between *external* and *internal* sovereignty. Roughly, this parallels the difference between foreign affairs and domestic politics, between international law and constitutional law. External sovereignty is about who has the power on behalf of the nation to deal externally with other nation-states. Internal sovereignty looks at how and where power is distributed within territorial boundaries, such as through a federal system or according to the separation of powers between different arms of government. The second distinction is between definitions of sovereignty that focus on the power of *institutions*, and those that focus on the power of the *people*. A third distinction is closely related to the second. It contrasts the formal view of sovereignty, which emphasises *legal* authority,<sup>19</sup> from the more fluid *political* understanding of the term. Fourth, there has been an evolution in meaning away from the view of Bodin (and of Thomas Hobbes in his *Leviathan* which was first published in 1651) — that a sovereign has *absolute, monopolistic and irrevocable* power — to a more *qualified* understanding of the term. Under this modern ‘realist’ conception, sovereignty is divisible and capable of being shared or pooled across different entities or locations.<sup>20</sup> Aspects of each of these themes can be seen in the legal and rhetorical debates that surround the treaty-making process, and the idea of Indigenous sovereignty, in Australia and other like nations.

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18 Henry Wheaton, *Elements of International Law* (1878) at 28–29, quoted in *New South Wales v Commonwealth* (1975) 135 CLR 337 at 376 (McTiernan J).

19 Albert Dicey wrote a highly influential analysis of the English Constitution at the end of the 19<sup>th</sup> century and said that the ‘sovereignty of Parliament is (from a legal point of view) the dominant characteristic of our political institutions’. He defined Parliamentary sovereignty by saying that under the English Constitution Parliament has ‘the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament’. Albert Dicey, *Introduction to the Study of the Law of the Constitution* (10<sup>th</sup> ed, 1962) at 39–40. For an interesting discussion of this traditional view of parliamentary sovereignty, Jeffrey Goldsworthy’s recent book which championed it and Neil MacCormick’s book which seeks to break from it in favour of a more ‘diffusionist’ perspective, see Peter C Oliver, ‘Sovereignty in the Twenty-First Century’ (2003) 14 *KCLJ* 137.



### 3. *Indigenous Sovereignty in Australia*

#### A. *Indigenous Uses of Sovereignty*

There has always been a range of views and voices on sovereignty within Aboriginal and Torres Strait Islander communities in Australia. The decision by the High Court in *Mabo v Queensland (No 2)*<sup>21</sup> to recognise land rights that derive from traditional law and custom has given additional impetus to this debate. We seek here to identify some recurrent themes in the diversity of Indigenous views expressed about the notion of sovereignty.

Indigenous people often say that they were sovereign before Australia was colonised, that their sovereignty was never extinguished and thus it remains intact today. This view is articulated, for example, by Michael Mansell:

Aboriginal sovereignty does exist. Before whites invaded Australia, Aborigines were the sole and undisputed sovereign authority. The invasion prevented the continuing exercise of sovereign authority by Aborigines. The invasion and subsequent occupation has not destroyed the existence of Aboriginal sovereignty.<sup>22</sup>

The reason sovereignty is retained, on this argument, is that it was never validly extinguished. In the eyes of many Indigenous people, the explanation for absolute British control over the Australian landmass is deeply unconvincing. This causes them to question the validity and legitimacy of non-Indigenous sovereignty or legal authority. After examining the international law bases for the acquisition of new territory and assertion of sovereignty, Mick Dodson concluded that 'the foundations of the sovereignty of the Australian state remain a mystery'. Noting that *Mabo (No 2)* recognises the ongoing operation of traditional law and custom, Dodson said that the 'reconstruction of the settlement thesis by the High Court, in

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20 Referring to economic deregulation in New Zealand which saw 'much locally owned industry pass into foreign hands', Stephen Turner said that this experience, common to many other countries over the last two decades, has led to claims that full national sovereignty no longer exists, 'that no political body can fully control economic operations in the physical space over which it presides'. Stephen Turner, 'Sovereignty, or the Art of Being Native' (2002) 51 *Cultural Critique* 74 at 79. See also a recent statement by the Australian Foreign Minister Alexander Downer about overseas intervention by Australia. He told the National Press Club in an address on 26 June 2003: 'Sovereignty in our view is not absolute. Acting for the benefit of humanity is more important': <[http://www.foreignminister.gov.au/speeches/2003/030626\\_unstableworld.html](http://www.foreignminister.gov.au/speeches/2003/030626_unstableworld.html)> (30 June 2004). Later in responding to a question he said 'for people who think the only thing that matters is this 19<sup>th</sup> Century notion of sovereignties, the only thing that matters in international relations. – I always say, it's not the only thing that matters. It's important, but it's not the only thing that matters': <[http://www.dfat.gov.au/media/transcripts/2003/030626\\_qanda.html](http://www.dfat.gov.au/media/transcripts/2003/030626_qanda.html)> (30 June 2004).

21 (1992) 175 CLR 1.

22 Michael Mansell, *Aboriginal Provisional Government: Finding the Foundation For a Treaty With the Indigenous Peoples of Australia* (2002): <[www.faira.org.au/issues/apg05.html](http://www.faira.org.au/issues/apg05.html)> (23 December 2003). See Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (1996).

order to accommodate Native Title fundamentally undermines it. The sovereign pillars of the Australian state are arguably, at the very least, a little legally shaky'.<sup>23</sup>

The thing designated as 'sovereignty' that many Indigenous people say they had and still retain is not an easy concept to grasp. It deals with authority at its most fundamental level. Irene Watson says:

We were 'sovereign' peoples, and we practised our sovereignty differently from European nation states. Our obligations were not to some hierarchical god, represented by a monarch. Our obligations were to law and we were responsible for the maintenance of country for the benefit of future carers of law and country.<sup>24</sup>

For others, sovereignty describes their capacity to make decisions across the range of political, social and economic life:

Sovereignty can be demonstrated as Aboriginal people controlling all aspects of their lives and destiny. Sovereignty is independent action. It is Aborigines doing things as Aboriginal people, controlling those aspects of our existence which are Aboriginal. These include our culture, our economy, our social lives and our indigenous political institutions.<sup>25</sup>

From these preliminary observations we can see that when Indigenous people adopt the word sovereignty to express their political claims it involves a deliberate choice.<sup>26</sup> The word is used to convey a sense of prior and fundamental authority, drawing attention to the widespread dissatisfaction with the orthodox explanation of British 'settlement'. For many, it is a verbal approximation of an innate sense of identity and of legal and political justice. It has structural as well as rhetorical resonance.

As we saw in the previous section of this article, however, sovereignty brings with it multiple implications. It is a loaded term precisely because it deals with ultimate authority and its use is often wedded to a strong rhetorical purpose. By using a concept borrowed from Western legal and political thought, Indigenous advocates run the risk of their opponents selecting the most politically damaging interpretation available, to invalidate all competing interpretations. All the nuance can be lost.

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23 Dodson, above n6 at 18.

24 Irene Watson, 'Aboriginal Laws and the Sovereignty of *Terra Nullius*' (2002) 1(2) *Borderlands e-journal* at [49]: <[www.borderlandsejournal.adelaide.edu.au/vol1no2\\_2002/watson\\_laws.html](http://www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/watson_laws.html)> (31 May 2003).

25 National Aboriginal and Islander Health Organisation, *Sovereignty* (1983) <[www.kooriweb.org/foley/news/story8.html](http://www.kooriweb.org/foley/news/story8.html)> (23 December 2003) quoted in Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003) at 100.

26 Dodson, above n6; William Jonas, 'Recognising Aboriginal Sovereignty — Implications for the Treaty Process' (Paper presented at the ATSIC National Treaty Conference, Canberra, 27 August 2002) at 6: <[www.treatynow.org/docs/jonas.doc](http://www.treatynow.org/docs/jonas.doc)> (23 December 2003); Lisa Strelein, 'Missed Meanings: The Language of Sovereignty in the Treaty Debate' (2002–2003) 20 *Arena Journal* 83.

When hearing assertions of Indigenous sovereignty, it is important to remember that non-Indigenous people freely use the word sovereignty in different ways to describe different versions of political authority.<sup>27</sup> For example, they may be referring to the external sovereignty of the nation-state to deal with other nation-states on an equal footing under international law. Or they may be pointing to the internal distribution of authority within the territorial boundaries of the nation-state. They may even be referring to the sovereignty of the people in a democracy to elect their government or change the Constitution by referendum.

Similarly, Indigenous people use the word sovereignty in different contexts to convey different ideas. Some use it to engage directly with the idea of external sovereignty, arguing for recognition as a separate and independent nation. In 1992, the Aboriginal Provisional Government proposed 'a model for the Aboriginal Nation — a nation exercising total jurisdiction over its communities to the exclusion of all others. A nation whose land base is at least all crown lands, so called. A nation able to raise its own economy and provide for its people'.<sup>28</sup> In *Treaty '88*, Kevin Gilbert also argued that Aboriginal people should sign a treaty as a fully sovereign nation.<sup>29</sup>

However, Larissa Behrendt has pointed out that for many

the recognition of sovereignty is a device by which other rights can be achieved. Rather than being the *aim* of political advocacy, it is a *starting point* for recognition of rights and inclusion in democratic processes. It is seen as a footing, a recognition, from which to demand those rights and transference of power from the Australian state, not a footing from which to separate from it.<sup>30</sup>

This internal perspective on sovereignty seems compatible with much of the current advocacy in Indigenous politics, using the language of 'governance' and 'jurisdiction' as exercised by Indigenous 'polities'.<sup>31</sup> Notions of internal sovereignty also correspond, for many, with the long-term political campaign

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27 See text accompanying nn10–20 above.

28 Aboriginal Provisional Government, *Intellectual Prisoners* (1992) Foundation for Aboriginal and Islander Research Action: <[www.faira.org.au/issues/apg01.html#prisoners](http://www.faira.org.au/issues/apg01.html#prisoners)> (23 December 2003).

29 Kevin Gilbert, 'Aboriginal Sovereignty: Justice, the Law and Land' (1998): <[www.aiatsis.gov.au/lbry/dig\\_prgm/treaty/t88/m0066865\\_a/m0066865\\_p1\\_a.rtf](http://www.aiatsis.gov.au/lbry/dig_prgm/treaty/t88/m0066865_a/m0066865_p1_a.rtf)> (31 May 2003).

30 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (2003) at 99.

31 See, for example, Marcia Langton & Lisa Palmer 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004). See also the papers given at the Indigenous Governance Conference, Canberra, 3–5 April 2002: <[www.reconciliationaustralia.org/graphics/info/publications/governance/speeches.html](http://www.reconciliationaustralia.org/graphics/info/publications/governance/speeches.html)> (23 December 2003), and at the Building Effective Indigenous Governance Conference, Jabiru, 4–7 November 2003: <[www.nt.gov.au/cdsca/indigenous\\_conference/web/html/papers.html](http://www.nt.gov.au/cdsca/indigenous_conference/web/html/papers.html)> (23 December 2003). See generally the Harvard Project on American Indian Economic Development Harvard Project: <[www.ksg.harvard.edu/hpaied/](http://www.ksg.harvard.edu/hpaied/)> (23 December 2003).

waged by Indigenous peoples and their supporters for self-determination, another term borrowed from international law and Western political thought.

Internationally, the *Draft United Nations Declaration on the Rights of Indigenous Peoples*<sup>32</sup> makes no reference to sovereignty, but Article 3 states that 'Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' Writing soon after *Mabo (No 2)*, Noel Pearson said he was sceptical 'whether the concept of sovereignty as understood in international law is an appropriate expression' and instead favoured the use of 'self-determination':

a concept of sovereignty inhered in Aboriginal groups prior to European invasion insofar as people have concepts of having laws, land and institutions without interference from outside of their society. This must be a necessary implication of the decision in *Mabo* against terra nullius.... Recognition of this 'local indigenous sovereignty' could exist internally within a nation-state, provided that the fullest rights of self-determination are accorded.<sup>33</sup>

Many Indigenous people also frame their claim to sovereignty in popular, rather than strictly institutional, terms. In this sense, sovereignty is seen as something inherent. It is the basic power in the hands of Indigenous people, as individuals and as groups, to determine their futures. As inherent sovereignty does not result from grant by the Australian Constitution or any other settler document or institution, it does not require recognition by a government or court in order to activate it. 'It is about exercising autonomy, both at an individual level and as a "people". On this view Indigenous people can assert sovereignty in their day-to-day actions: there is a personal aspect to sovereignty'.<sup>34</sup> That account echoes the 'Cape York view' of self-determination put forward by Richie Ah Mat:

self-determination is about practice, it is about actions, it is about what we do from day to day to make changes, it is about governance. It is about taking responsibility for our problems and for our opportunities: because nobody else will take responsibility for our families, our children, our people. We have to do it ourselves.<sup>35</sup>

If we understand talk of sovereignty and self-determination to be about nuance as well as deliberate rhetorical force, then we gain a different appreciation for the debate. Indigenous assertions of sovereignty assume their place in the ongoing framing and revision of the political settlement in Australia.<sup>36</sup> A range of

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32 UN doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56.

33 Noel Pearson, 'Reconciliation: To Be or Not to Be: Separate Aboriginal Nationhood or Aboriginal Self-Determination and Self-Government Within the Australian Nation?' (1993) 3(61) *ALB* 14 at 15.

34 Behrendt, above n30 at 101.

35 Richard Ah Mat, 'The Cape York View', paper presented at the Treaty Conference, Murdoch University, Perth, 27 June 2002: <[www.treaty.murdoch.edu.au/Conference%20Papers/ah%20mat%20speech.htm](http://www.treaty.murdoch.edu.au/Conference%20Papers/ah%20mat%20speech.htm)> (23 December 2003).

Indigenous views exist as the preceding paragraphs reveal. Some Indigenous people seek to challenge the Australian government's authority in the external sense of the word sovereignty. But it is equally important to recognise that many others adopt an internal perspective. These advocates seek to re-negotiate the place of Indigenous peoples within the Australian nation-state, based on their inherent rights and their identity as the first peoples of this continent. This vision of an Australia where, in practical terms, sovereignty is shared or 'pooled' is consistent with the way the concept has evolved in Western thought. Sovereignty can encompass the role of people as well as institutions, it has a political as well as a legal significance and it is far more common to have qualified power than the rule of an absolute and monolithic sovereign.

### ***B. The Commonwealth Government and Indigenous Sovereignty***

The Howard Government does not generally engage with the language of Indigenous sovereignty. However, its position on the use of treaties between Indigenous peoples and the wider Australian community is clear. The government is not willing to negotiate or to enter into such agreements. This position was stated during several interviews with Prime Minister Howard on 29 May 2000, the day after a quarter of a million people took part in the 'People's Walk for Reconciliation' across the Sydney Harbour Bridge (hundreds of thousands more people joined bridge walks and related events in cities and towns around Australia).<sup>37</sup>

Although the precise wording varied, the Prime Minister's position remained constant: a country does not negotiate a treaty with itself. For example, in his interview with John Laws, the Prime Minister said: 'I'll try and reach agreement but a nation, an undivided united nation does not make a treaty with itself'.<sup>38</sup> Similarly, in his interview with Alan Jones, he stated: 'I mean nations make treaties, not parts of nations with each other'.<sup>39</sup> And finally, in his interview on the 7:30 Report, Howard stated: 'Countries don't make treaties with themselves, they make treaties with other nations and the very notion of a treaty in this context conjures up the idea that we are two separate nations'.<sup>40</sup> Although the Prime Minister did not explicitly state that Indigenous people do not possess a form of

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36 As Langton & Palmer put it recently, 'Even if, as [Henry] Reynolds argues, there is a clear distinction to be made between the states and nations, or even if national sovereignty is an accretive and divisible bundle of things, the question remains: what of Aboriginal customary authority and forms of governance, and the modern-day adaptations of those traditions and customs in new political formations? How are they expressed and how do they mediate between the state and indigenous jurisdictions?' Langton & Palmer, above n31 at 36.

37 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (Canberra, 2000) at 60.

38 John Laws, Interview with John Howard, Prime Minister of Australia (Sydney, 29 May 2000): <[www.pm.gov.au/news/interviews/2000/laws2905.htm](http://www.pm.gov.au/news/interviews/2000/laws2905.htm)> (23 December 2003).

39 Alan Jones, Interview with John Howard, Prime Minister of Australia (Sydney, 29 May 2000): <[www.pm.gov.au/news/interviews/2000/laws2905.htm](http://www.pm.gov.au/news/interviews/2000/laws2905.htm)> (23 December 2003).

40 Transcript of the Prime Minister The Hon John Howard Interview with Tim Lester, 7.30 Report, 29 May 2000: <[www.pm.gov.au/news/interviews/2000/7302905.htm](http://www.pm.gov.au/news/interviews/2000/7302905.htm)> (19 December 2003).

sovereignty, his statements are consistent with an absolute view of sovereignty based upon its external aspect. By focussing only on this conception of sovereignty, Prime Minister Howard denies any other form of jurisdiction in the hands of Indigenous people that might authorise the negotiation of treaty-like instruments.

Rather than mentioning any form of Indigenous sovereignty, the Commonwealth Government prefers to speak of Indigenous people being 'equal' members of the Australian nation. For example, the *Executive Summary of the Commonwealth Government Response to the Final Report of the Council for Aboriginal Reconciliation*<sup>41</sup> speaks of 'a sincere desire to see Indigenous people not just treated as equals, but to experience equity in all facets of Australian life'. This would require recognition that Indigenous people, like all other Australians, share in whatever form of sovereignty is said to underpin the Australian nation. However, this approach does not necessarily recognise any other distinct form of authority continuing to inhere in Indigenous peoples as the first peoples of the nation.<sup>42</sup>

Despite its position that Indigenous people should be seen as 'equal' to non-Indigenous Australians, the Government does acknowledge the 'special' place of Indigenous people within Australian society. The *Executive Summary* states: 'As a nation, we recognise and celebrate Indigenous people's special place as the first Australians'.<sup>43</sup> Because of their 'special' status, the government does recognise the need for some consultation with Indigenous communities: 'if our policies are to have traction, they must be designed and delivered through genuine partnership of shared responsibility between all governments and Indigenous people'.<sup>44</sup> While the Government has indicated that one of its priorities is 'increasing opportunities for local and regional decision making by Indigenous people',<sup>45</sup> it has steered away from using terms such as sovereignty and self-determination, preferring terms such as 'self-management' and 'self-reliance'.<sup>46</sup> Recognising the 'special'

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41 *Executive Summary of the Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report — Reconciliation: Australia's Challenge* (September 2002) at 1.

42 Other governments have taken a different approach to Indigenous issues. On the State government level see for example Western Australia, *Statement of Commitment to a New and Just Relationship Between The Government of Western Australia and Aboriginal Western Australians* (10 October 2001): <<http://www.dia.wa.gov.au/Policies/StateStrategy/StatementOfCommitment.aspx>> (4 June 2004) which, amongst other things includes the following statement: 'Aboriginal people have continuing rights and responsibilities as the first people of Western Australia, including traditional ownership and connection to land and waters. These rights should be respected and accommodated within the legal, political and economic system that has developed and evolved in Western Australia since 1829'. For a different approach at Federal level see for example the speech of then Prime Minister of Australia, Paul Keating, at Redfern Park in Sydney on 10 December 1992 in Paul Keating, 'Redfern Park Speech' (2001) 5(11) *JLB* 9, where he talked of ATSIC 'emerging from the vision of Indigenous self-determination and self-management'.

43 *Executive Summary*, above n41 at 1.

44 *Id* at 2.

45 *Ibid*.

46 *Ibid*.

status of Indigenous people apparently does not connote any retained or inherent power and authority. Most recently the Howard Government has announced its intention to abolish the Aboriginal and Torres Strait Islander Commission (ATSIC) in the following terms:

[w]e believe very strongly that the experiment in separate representation, elected representation, for indigenous people has been a failure. We will not replace ATSIC with an alternative body. We will appoint a group of distinguished indigenous people to advise the Government on a purely advisory basis in relation to aboriginal affairs. Programmes will be mainstreamed, but arrangements will be established to ensure that there is a major policy role for the Minister for Indigenous Affairs.<sup>47</sup>

Herein lies a gulf between the Government and many of the most prominent voices within the Indigenous community.

### **C. *The High Court on Sovereignty***

The High Court has examined the concept of sovereignty in a number of public law contexts. Before moving to what the Court has said about Indigenous sovereignty, we look first at some of these other situations. One theme that emerges is the Court's own recognition that there are several different perspectives on the concept and that the context in which the issue arises is an important consideration.<sup>48</sup> For example, when the Australian States challenged the Commonwealth's assertion of sovereignty and sovereign rights over the sea, the seabed and the continental shelf in the *Seas and Submerged Lands Case*<sup>49</sup> in 1975, Jacobs J described sovereignty as 'a concept notoriously difficult of definition' and acknowledged the distinction that can be drawn between external and internal sovereignty.<sup>50</sup> 'External sovereignty' was seen as a power and right under international law to govern a part of the globe 'to the exclusion of nations or states or peoples occupying other parts of the globe'.<sup>51</sup> Looked at from the outside, external sovereignty is 'indivisible because foreign sovereigns are not concerned' with the way power is carved up within the borders of a nation-state.<sup>52</sup> Internally, on the other hand, the 'right to exercise those powers which constitute sovereignty may be divided vertically or horizontally ... within the State. There, although a sovereignty among nations may

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47 Transcript of the Prime Minister the Hon John Howard MP, Joint Press Conference With Senator Amanda Vanstone, Parliament House, Canberra, 15 April 2004: <<http://www.pm.gov.au/news/interviews/Interview795.html>> (24 June 2004). See Aboriginal and Torres Strait Islander Commission Amendment Bill 2004 (Cth).

48 As Barwick CJ acknowledged, sovereignty 'is a word, the meaning of which may vary according to context' (*New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337 at 364). More recently, Gleeson CJ, Gaudron, Gummow and Hayne JJ of the High Court said that sovereignty has long been recognised as 'a notoriously difficult concept which is applied in many, very different contexts' (*Yarmirr v Commonwealth* (2001) 208 CLR 1 at 52–53).

49 *Seas and Submerged Lands Case*, *ibid.*

50 *Id* at 479. His approach was quoted with approval in *Yarmirr*, above n48 at 53 by Gleeson CJ, Gaudron, Gummow and Hayne JJ.

51 *Seas and Submerged Lands Case*, above n48 at 479.

52 *Id* at 479–480.

thus be indivisible, the internal sovereignty may be divided under the form of government which exists'.<sup>53</sup> In other words, internal sovereignty in Australia is necessarily divided. The Constitution divides power between the Commonwealth government and the different States and territories<sup>54</sup> and separates the powers of the different organs of government — the executive, the parliament and the courts.

The High Court has recognised that within the Australian system of public law sovereignty is qualified and shared, rather than absolute, in other contexts as well. The Court has acknowledged that for much of the nation's history, Australia's external sovereignty was actually shared with the United Kingdom.<sup>55</sup> It is difficult even to pinpoint the precise time at which the Commonwealth fully attained its external sovereignty. This was captured in a quote from a recent High Court decision, with its deliberately imprecise compression of historical events: '*At or after federation, Australia came to take its place in international affairs and its links with the British Empire changed and dissolved.*'<sup>56</sup> [Emphasis added.]

In the Court's eyes, the claim to external sovereignty *offshore* is qualified by the public rights of navigation and fishing and the international right of innocent passage.<sup>57</sup> This non-Indigenous claim to sovereignty and sovereign rights over the territorial sea, seabed and beyond has also been evolutionary rather than static in character.<sup>58</sup> It has changed significantly and several times over the last few hundred years,<sup>59</sup> with the common law each time moving in step.<sup>60</sup> In the meantime, political and legal uncertainty has surrounded issues of offshore sovereignty. For example, for much of the twentieth century the States mistakenly asserted that they had some sovereign or proprietary rights in the territorial sea.<sup>61</sup>

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53 *Id* at 480.

54 *Id* at 385 (Gibbs J), 444 (Stephen J). In *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 67 Brennan J, with Mason CJ and McHugh J agreeing, said that the 'sovereign powers' to grant interests in land, reserve it for particular purposes and extinguish native title, are vested in the State of Queensland.

55 For example, *Seas and Submerged Lands Case*, above n48 at 408 (Gibbs J), 443 (Stephen J), 469 (Mason J). Federal Court judge Robert French has said recently that we 'should not underestimate how large and for how long the imperial connection loomed in Australian constitutional jurisprudence': French, above n3 at 72. Brad Morse writes in a similar vein of his own country: 'Canada was formally confirmed as a semi-independent country in 1867, with Great Britain retaining ultimate control over all foreign affairs until the *Statute of Westminster 1931* and over amendments to Canada's Constitution until 1982.' Bradford W Morse, 'Indigenous-Settler Treaty Making in Canada' in Marcia Langton, Maureen Tehan, Lisa Palmer & Kathryn Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People* (2004) at 59.

56 *Yarmirr*, above n48 at 58 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

57 *Id* at 56 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

58 *Id* at 103 (McHugh J): 'The sovereignty that the coastal state exercises over the territorial sea is also subject to the developing international law. As international law changes, so does the content of the sovereignty of the coastal state over its territorial sea.'

59 Including as recently as 1994 in Australia, as reflected by the ratification of the United Nations Convention on the Law of the Sea, which entered into force in Australia on 16 November 1994: 1994 Australia Treaty Series No 31; 21 ILM 1261.

60 See *Seas and Submerged Lands Case*, above n48 at 494 (Jacobs J) and *Yarmirr*, above n48 at 53–60 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).



Despite the confusion, Australians continued to control the offshore territory and exploit its resources.

Members of the High Court have also developed the idea of popular sovereignty. The Australian Constitution is set out in s 9 of the *Commonwealth of Australia Constitution Act* 1900, an Act of the British Parliament. When enacted, the source of the Constitution's status as higher law was thought to derive from the British Parliament and not from the Australian people. In other words, the instrument was effective because of its enactment in the United Kingdom, not because of its acceptance by the Australian people at the referendums held between 1898 and 1900.<sup>62</sup> Over time, understandings of the Australian Constitution have changed, in part because of the evolution of Australian independence.<sup>63</sup>

Today, many see the Constitution as deriving its efficacy and legitimacy from the Australian people. The idea of popular sovereignty is supported by s 128 of the Constitution, which provides for amendment of the Constitution by the Australian people voting at a referendum initiated by the federal Parliament.<sup>64</sup>

In *Bisticic v Rokov*<sup>65</sup> Murphy J stated that: 'The original authority for our Constitution was the United Kingdom Parliament, but the existing authority is its continuing acceptance by the Australian people.'<sup>66</sup> His approach anticipated later judicial opinion, and the idea of popular sovereignty has since gained wider acceptance among the judges of the High Court. Mason CJ, for example, stated in *Australian Capital Television Pty Ltd v Commonwealth*<sup>67</sup> that the *Australia Act* 'marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people'. Similarly, Deane J argued in *Theophanous v Herald & Weekly Times Ltd*<sup>68</sup> that the present legitimacy of the Constitution 'lies exclusively in the original adoption (by referendums) and subsequent maintenance (by acquiescence) of its provisions by the people'.<sup>69</sup> Or, as McHugh J stated in *McGinty v Western Australia*,<sup>70</sup> 'Since the passing of the *Australia Act* (UK) in 1986, notwithstanding some considerable theoretical

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61 *Yarmirr*, above n48 at 56–57 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

62 Owen Dixon, 'The Law and the Constitution' (1935) 51 *LQR* 590 at 597 ('It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions.').

63 See the *Statute of Westminster 1931* (UK) (as applied in Australia by the *Statute of Westminster Adoption Act 1942* (Cth)) and the *Australia Acts* of 1986. See generally Geoff Lindell, 'Why is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Fed LR* 29.

64 Under s 128 constitutional change cannot be initiated by popular will as such a power rests exclusively with the Commonwealth Parliament. See *McGinty v Western Australia* (1996) 186 CLR 140 at 274–275 (Gummow J).

65 (1976) 135 CLR 552.

66 *Id* at 566.

67 (1992) 177 CLR 106 at 138.

68 (1994) 182 CLR 104.

69 *Id* at 171.

70 Above n64 at 230.

difficulties, the political and legal sovereignty of Australia now resides in the people of Australia.<sup>7</sup>

The consequences of recognising that ultimate sovereignty in Australia lies with the people has yet to be explored by the High Court. For example, does the concept mean that popular sovereignty has co-existed alongside British sovereignty as different but, together, effective sources of ultimate authority?<sup>71</sup> It might be that the advent of judicial recognition of popular sovereignty is a largely symbolic development that has little effect on the Australian system of government or in the interpretation of the Constitution. After all, the idea of popular sovereignty merely grants legal recognition to what is in any event the political reality.

The High Court's development of the concept of popular sovereignty does have implications for the related idea of Indigenous sovereignty. According to popular sovereignty Indigenous peoples, collectively and individually, are part of the constituting force of the Australian nation. The legitimacy of the nation's sovereignty depends upon Indigenous people's acceptance of the Constitution, as much as it does the acceptance by non-Indigenous people: 'the Australian Aborigines were, at least as a matter of legal theory, included among the people who, 'relying on the blessing of Almighty God', agreed to unite in an indissoluble Commonwealth of Australia'.<sup>72</sup> But can popular sovereignty be plausibly argued as the basis to the Constitution without belatedly providing some means for securing that legitimisation from Indigenous peoples, as first peoples with legal systems and property rights which preceded the British assertion of sovereignty?<sup>73</sup> Perhaps this particular form of sovereignty — the concept of popular sovereignty — can also be seen as pluralistic rather than monolithic and indivisible.

This concept of popular sovereignty is relevant for another reason. Section 128 of the Constitution illustrates that Australia's constitutional future rests in the hands of its people and their federal parliamentarians. It is possible to alter the Constitution by the process set out in s 128 to bring about a treaty, or even more profound changes to our public law system. Such changes might include the aspirations of Australia's Indigenous peoples and might reflect and recognise their own expressions of sovereignty or inherent authority. Of course, this does not mean that such reform is easy to achieve.<sup>74</sup>

The High Court has also addressed the issue of Indigenous sovereignty more directly. In *Coe v Commonwealth*,<sup>75</sup> the appellants applied for leave to amend their statement of claim to assert that the Aboriginal people were a sovereign nation,

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71 French, above n3 at 73 relying on the proposition to that effect made by Professor Leslie Zines.

72 *Mabo v Queensland (No 2)*, above n54 at 106 (Deane and Gaudron JJ) invoking words from the preamble to the *Commonwealth of Australia Constitution Act 1900* (Cth).

73 Indigenous people appear to have played no meaningful role in the drafting of the Australian Constitution (Frank Brennan, *Securing a Bountiful Place for Aborigines and Torres Strait Islanders in a Modern, Free and Tolerant Australia* (1994) at 6). This was reflected in s127 of the Constitution, which provided prior to its removal in 1967: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'.

that Britain had wrongly asserted sovereignty over Australia and that Australia was acquired by conquest, not settlement. In response, Gibbs J found:

it is not possible to say ... that the aboriginal people of Australia are organized as a 'distinct political society separated from others,' or that they have been uniformly treated as a state ... They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.<sup>76</sup>

He further stated that 'there is no aboriginal nation, if by that expression is meant a people organized as a separate state or exercising any degree of sovereignty'.<sup>77</sup> In any event, Gibbs J held that the legal premise under which Australia was colonised is not justiciable because '[i]t is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest'.<sup>78</sup> Jacobs J agreed that 'disputing the validity of the Crown's proclamations of sovereignty and sovereign possession ... are not matters of municipal law but of the law of nations and are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged'.<sup>79</sup> However (jointly dissenting with Murphy J on this point), he thought that the part of the statement of claim dealing with inherent rights to land was not based on a denial of Crown sovereignty and should be permitted to proceed. In the result, the Court by statutory majority<sup>80</sup> would not permit exploration beyond conceptions of the absolute sovereignty which it said rested with the Crown.<sup>81</sup>

Thirteen years later, in *Mabo v Queensland (No 2)*,<sup>82</sup> the High Court confirmed that the British acquisition of sovereignty could not be contested in domestic

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74 Of the 44 referendum proposals put to the Australian people over more than a century, only eight have been passed. For the results of the referendums, see Tony Blackshield & George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3<sup>rd</sup> ed, 2002) at 1303–1308. For the relevance of this history to the Australian treaty process, see George Williams, 'The Treaty Debate, Bills of Rights and the Republic: Strategies and Lessons for Reform' (2002) *5 Balayi: Culture, Law and Colonialism* 10.

75 *Coe v Commonwealth* (1979) 24 ALR 118.

76 *Id* at 129.

77 *Id* at 131.

78 *Id* at 129.

79 *Id* at 132.

80 The four member Court split 2:2 on the outcome. Applying s 23 of the *Judiciary Act 1903* (Cth), the decision of Mason J at first instance to dismiss the appellant's application for leave to amend his statement of claim was affirmed.

81 In *Coe v Commonwealth*, above n75 at 128–129, Gibbs J (with whom Aickin J agreed) noted that, in oral argument, the appellants argued for a subsidiary form of sovereignty based on American jurisprudence by asking the Court to recognise the Aboriginal people of Australia as a 'domestic dependent nation'. He rejected this, insisting that the circumstances were different in Australia and that Aboriginal people had 'no legislative, executive or judicial organs by which sovereignty might be exercised'.

82 Above n54.

courts. Several judges expressed reservations about Australia being characterised as ‘settled’ rather than conquered in light of historical facts.<sup>83</sup> However, despite exposing the fiction that underpins the settlement doctrine — ‘the hypothesis that there was no local law already in existence’<sup>84</sup> when the British arrived — the court left intact that theory for how Britain acquired authority over the Australian continent.<sup>85</sup> Therefore, the common law became the law of the new colony, adjusted as necessary for local circumstances.

In *Mabo (No 2)*, the majority did acknowledge some important propositions. They held that the courts do have jurisdiction to determine the *consequences* of the acquisition of sovereignty.<sup>86</sup> Secondly, the majority held that Crown sovereignty over a territory does not necessarily mean full Crown ownership of that territory.<sup>87</sup> Across the continent of Australia, the land rights of Indigenous peoples under their traditional systems of law survived the acquisition of British sovereignty. The Crown did, however, acquire a degree of sovereign power over land, specifically the right to create private interests in the land and extinguish them. This was expressed as the Crown’s ‘radical title’ to the land.<sup>88</sup> Finally, the Court said this recognition of existing Indigenous land rights ‘left room for the continued operation of some local laws or customs among the native people’.<sup>89</sup>

Although the Court in *Mabo (No 2)* said Crown sovereignty could not be challenged domestically (and the plaintiffs did not seek to do so), some important references were made to the notion of Indigenous sovereignty. For example, Brennan J noted a Select Committee report to the House of Commons in 1837 that the state of Australian Aborigines was ‘so entirely destitute... of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded’.<sup>90</sup> He also referred a number of times to the ‘change

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83 Id at 33, 38–39 (Brennan J, with Mason CJ & McHugh J agreeing), 78 (Deane and Gaudron JJ).

84 Id at 36 (Brennan J, with Mason CJ & McHugh J agreeing).

85 Gerry Simpson is one of several commentators who have questioned the logic of this juxtaposition: ‘The logic employed in *Western Sahara* [an International Court of Justice decision on *terra nullius*] permitted the High Court to declare that Australia was not *terra nullius* at the time of settlement, but thereby obliged the Court to reject that Australia had been occupied. In the absence of either a treaty (cession) or a determination that Australia was *terra nullius* (occupation), the only method of acquisition was conquest. The Court refused to consider this possibility and instead produced a new method of acquisition combining the symbolism of one (occupation) with the consequences of another (conquest).’ Gerry Simpson, ‘*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence’ (1993) 19 *MULR* 195 at 208.

86 *Mabo*, above n54 at 32 (Brennan J, with Mason CJ & McHugh J agreeing).

87 Id at 51 (Brennan J, with Mason CJ and McHugh J agreeing) referring to the ‘fallacy of equating sovereignty and beneficial ownership of land’.

88 Id at 48 (Brennan J, with Mason CJ and McHugh J agreeing). ‘The concept of radical title provides an explanation in legal theory of how the two concepts of sovereignty over land and existing native title rights and interests *co-exist*. To adopt the words of Brennan J in *Mabo (No 2)*, it explains *how* “[n]ative title to land survived the Crown’s acquisition of sovereignty” over a particular part of Australia.’ See *Yarmirr*, above n48 at 51 (Gleeson CJ, Gaudron, Gummow & Hayne JJ).

89 *Mabo*, above n54 at 79 (Deane and Gaudron JJ).

90 Id at 40.

in sovereignty'<sup>91</sup> that came with British colonisation, with the obvious implication that Indigenous sovereignty operated at least prior to 1788. Implication became express statement when Brennan J referred to 'fictions ... that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown'.<sup>92</sup>

Deane and Gaudron JJ described what others have referred to as Indigenous polities:

Under the laws or customs of the relevant locality, particular tribes or clans were, either on their own or with others, custodians of the areas of land from which they derived their sustenance and from which they often took their tribal names. Their laws or customs were elaborate and obligatory. The boundaries of their traditional lands were likely to be long-standing and defined. The special relationship between a particular tribe or clan and its land was recognized by other tribes or groups within the relevant local native system and was reflected in differences in dialect over relatively short distances. In different ways and to varying degrees of intensity, they used their homelands for all the purposes of their lives: social, ritual, economic. They identified with them in a way which transcended common law notions of property or possession. ...

Indeed, as a generalization, it is true to say that, where they existed, those established entitlements of the Australian Aboriginal tribes or clans in relation to traditional lands were no less clear, substantial and strong than were the interests of the Indian tribes and bands of North America, at least in relation to those parts of their traditional hunting grounds which remained uncultivated.<sup>93</sup>

*Mabo (No 2)* left the 'settlement' theory for the acquisition of Crown sovereignty undisturbed. But traditional law and custom — an additional source of law in Australia that does not derive from the Crown — was newly recognised as a coherent system, governing the inherent rights and interests of Indigenous people who are also citizens of the Commonwealth of Australia. Native title adjudication henceforth would become an 'examination of the way in which two radically different social and legal systems intersect'.<sup>94</sup>

In 1993, the plaintiffs in *Coe v Commonwealth (No 2)* launched a post-Mabo assertion of Indigenous sovereignty in the High Court. They argued that the Wiradjuri people are a sovereign nation in the external sense and, in the alternative, that they enjoy a subsidiary or internal form of sovereignty as a 'domestic

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91 Id at 57, 59, 63 (Brennan J, with Mason CJ & McHugh J agreeing). See also the reference to 'the change in sovereignty at settlement' by Gleeson CJ, Gaudron, Gummow & Hayne JJ in *Ward v Western Australia* (2002) 191 ALR 1 at 55 and below n210.

92 *Mabo*, above n54 at 58 (Brennan J, with Mason CJ & McHugh J agreeing).

93 Id at 99–100 (Deane and Gaudron JJ). For similar judicial observations in relation to 'sea country', see *Yarmirr*, above n48 at 142 (Kirby J). See also the dissenting judgment of Gaudron and Kirby JJ in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538 at 569.

94 *Yarmirr*, id at 37 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

dependent nation, entitled to self government and full rights over their traditional lands, save only the right to alienate them to whoever they please'.<sup>95</sup> Mason CJ, who had struck out the earlier Wiradjuri sovereignty claim at first instance in the 1979 case of *Coe v Commonwealth*, again gave the argument short shrift. Sitting as a single judge, he acknowledged that the legal assumption of terra nullius (the notion of land belonging to no one) had been displaced in 1992 by the recognition of ongoing Indigenous rights to land, stating 'what was said in *Coe* must be read subject to *Mabo (No 2)*'.<sup>96</sup> Nonetheless, he went on:

*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law. *Mabo (No 2)* denied that the Crown's acquisition of sovereignty over Australia can be challenged in the municipal courts of this country. *Mabo (No 2)* recognised that land in the Murray Islands was held by means of native title under the paramount sovereignty of the Crown.<sup>97</sup>

He repeated similar arguments when a defendant to criminal charges in *Walker v New South Wales*<sup>98</sup> argued that the Crown's legal authority over Aboriginal people was heavily qualified:

There is nothing in the recent decision in *Mabo v Queensland (No 2)* to support the notion that the Parliaments of the Commonwealth and New South Wales lack legislative competence to regulate or affect the rights of Aboriginal people, or the notion that the application of Commonwealth or State laws to Aboriginal people is in any way subject to their acceptance, adoption, request or consent. Such notions amount to the contention that a new source of sovereignty resides in the Aboriginal people. Indeed, *Mabo (No 2)* rejected that suggestion....

English criminal law did not, and Australian criminal law does not, accommodate an alternative body of law operating alongside it. There is nothing in *Mabo (No 2)* to provide any support at all for the proposition that criminal laws of general application do not apply to Aboriginal people.

In the 2001 decision of *Commonwealth v Yarmirr*,<sup>99</sup> a native title claim to the sea prompted different musings on the wider implications of native title recognition. McHugh J re-asserted the orthodox legal position when he said that the 'Aboriginal and Torres Strait Island peoples do not have any residual sovereignty over the territory of Australia or its territorial sea'.<sup>100</sup> In his separate

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95 *Coe v Commonwealth (No 2)* (1993) 68 ALJR 110 at 113.

96 *Id* at 114.

97 *Id* at 115.

98 (1994) 182 CLR 45 at 48, 50.

99 Above n48 at 99.

judgment, Kirby J reflected on the proclamations and flag-planting activities of British officials, stating the 'very claims to sovereignty in the Crown, made respectively by Captains Cook and Phillip, over the land mass of a huge continent, had a similar metaphorical quality [to the native title claimants' assertion of exclusive rights over 'sea country'], excluding all other claims to sovereignty.'<sup>101</sup> These assertions of Crown sovereignty 'had undoubted legal consequences which our courts uphold'<sup>102</sup> he said. In passing, however, he noted that unlike English law, Australia's legal system has to 'adjust the universal conception of a single legal sovereignty to a new legal idea affording special recognition to the legal claims of indigenous peoples both because their claims relate to rights and interests that preceded settlement and because their recognition is essential to reverse previously uncompensated dispossession.'<sup>103</sup>

Most recently, in *Members of the Yorta Yorta Aboriginal Community v Victoria*,<sup>104</sup> the High Court again explored the consequences of Britain's assertion of sovereignty over the Australian continent for Indigenous legal systems and societies, and its own understandings of those legal systems and societies. The joint judgment of Gleeson CJ, Gummow and Hayne JJ acknowledged that native title rights and interests 'owed their origin to a normative system other than the legal system of the new sovereign power ... the body of norms or normative system that existed before sovereignty'.<sup>105</sup> They said that it 'is only if the rich complexity of indigenous societies is denied that reference to traditional laws and customs as a normative system jars the ear of the listener'.<sup>106</sup> They analysed the advent of the British as a 'change in sovereignty',<sup>107</sup> implicitly acknowledging the existence of a prior Indigenous sovereignty. They also noted the potential for cross-cultural differences in the concept of sovereignty: 'A search for parallels between traditional law and traditional customs on the one hand and Austin's conception of a system of laws, as a body of commands or general orders backed by threats which are issued by a sovereign or subordinate in obedience to the sovereign, may or may not be fruitful.'<sup>108</sup>

For our purposes their most significant statement in *Yorta Yorta* concerned the ongoing operation of Indigenous legal systems after the acquisition of British sovereignty:

Upon the Crown acquiring sovereignty, the normative or law-making system which then existed could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of

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100 Ibid.

101 Id at 136.

102 Ibid.

103 Id at 133.

104 Above n93.

105 Id at 550.

106 Id at 551.

107 Id at 550, 555.

108 Id at 551.

the new sovereign power, would not and will not be given effect by the legal order of the new sovereign.<sup>109</sup>

The joint judgment recognised there may be some alterations and development in traditional law and custom after 1788, but insisted ‘what the assertion of sovereignty by the British Crown necessarily entailed was that *there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty*. To hold otherwise would be to deny the acquisition of sovereignty and as has been pointed out earlier, that is not permissible.’ [Emphasis added.]<sup>110</sup> They reached this holding despite also requiring that an Indigenous legal system must have ‘a continuous existence and vitality’<sup>111</sup> since the assertion of British sovereignty, to give rise to the rights in land and waters recognised as ‘native title’. These three High Court judges seem to have determined that Indigenous sovereignty does not continue to exist in Australia. However, given their recognition that sovereignty is a fluid concept dependent on context, that (implicitly) Indigenous people were sovereign prior to colonisation, and that Indigenous legal systems continue to operate, it is arguable that their position on Indigenous sovereignty is contradictory at best.

This section has attempted to show the spectrum of approaches to Indigenous sovereignty in Australia. Within Indigenous communities, sovereignty has been invoked in different ways. However, a common theme seems to be that Indigenous people seek to re-negotiate their place within the Australian nation-state based on their inherent rights and their identity as the first peoples of this continent. While the Federal Government does not generally engage the language of Indigenous sovereignty, it does recognise the need to share responsibility with Indigenous people in the policy areas affecting them. High Court jurisprudence on Indigenous sovereignty does not seem to get us any closer to bridging the gap between the different approaches to Indigenous sovereignty. To provide greater context to these debates regarding sovereignty, we now turn to Canadian, American and New Zealand approaches to Indigenous sovereignty.

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109 Id at 552.

110 Ibid.

111 Id at 553.



#### 4. *Comparative Approaches to Indigenous Sovereignty*

##### A. *Canada*

In Canada, debate amongst Aboriginal people over the concept of 'sovereignty' takes place within a broader political and intellectual context, including developments over the last 35 years in Aboriginal rights, title to land, treaty rights and self-government.<sup>112</sup> Again we see a diversity of voices and some striking similarities to the range of views we briefly depicted earlier in relation to Australia's Indigenous peoples.

Taiaiake Alfred, for example, surveys recent history and concludes that in Canada 'more than any other country, indigenous peoples have sought to transcend the colonial myths and restore the original relationships'.<sup>113</sup> He acknowledges that sovereignty has its rhetorical advantages,<sup>114</sup> but is wary of restrictive interpretations of what it means. Alfred insists that, at least in its statist Western conception, it obscures the expression of 'indigenous concepts of political relations — rooted in notions of freedom, respect and autonomy'.<sup>115</sup> He says that the:

challenge for indigenous peoples in building appropriate post-colonial governing systems is to disconnect the notion of sovereignty from its western, legal roots and to transform it. It is all too often taken for granted that what indigenous peoples are seeking in recognition of their nationhood is at its core the same as that which countries like Canada and the United States possess now...Until 'sovereignty' as a concept shifts from the dominant 'state sovereignty' construct and comes to reflect more of the sense embodied in western notions such as personal sovereignty or popular sovereignty, it will remain problematic if integrated within indigenous political struggles.<sup>116</sup>

Dale Turner notes that many Aboriginal peoples 'have viewed the Eurocentric legal-political discourse' around sovereignty with scepticism,<sup>117</sup> although he urges Aboriginal intellectuals to engage with the discourse, quoting Native American author Robert Allen Warrior who said 'the struggle for sovereignty is not a struggle to be free from the influence of anything outside ourselves, but a

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112 The release of the Trudeau Government's White Paper on Aboriginal policy in 1969 is widely regarded as a catalyst for high profile Aboriginal initiatives in the courts and in the political sphere.

113 Taiaiake Alfred, *From Sovereignty to Freedom. Toward an Indigenous Political Discourse 2000*: <<http://www.taiaiake.com/pdf/sfp.pdf>> (29 June 2004).

114 'Using the sovereignty paradigm, indigenous people have made significant legal and political gains toward reconstructing the autonomous aspects of their individual, collective and social identities.' Id at 8.

115 Id at 1.

116 Id at 11–12.

117 Dale A Turner, *'This is not a Peace Pipe': Towards An Understanding of Aboriginal Sovereignty* (D Phil Thesis, McGill University, 1997) at 189: <<http://www.collections.canada.ca/thesescanada/>> (30 June 2004).

process of asserting the power we possess as communities and individuals to make decisions that affect our lives'.<sup>118</sup>

The Royal Commission on Aboriginal Peoples, which reported to the Canadian government in November 1996, heard from many Aboriginal people on the issue of sovereignty. 'Sovereignty is difficult to define because it is intangible, it cannot be seen or touched. It is very much inherent, an awesome power, a strong feeling or the belief of a people. What can be seen, however, is the exercise of Aboriginal powers' said one First Nation leader.<sup>119</sup> Another said that as 'an inherent human quality, sovereignty finds its natural expression in the principle of self-determination. Self-determining peoples have the freedom to choose the pathways that best express their identity, their sense of themselves and the character of their relations with others. Self-determination is the power of choice in action.'<sup>120</sup> The Royal Commission itself said that there was a spiritual quality to many Indigenous submissions it received on the concept:

Sovereignty, in the words of one brief, is 'the original freedom conferred to our people by the Creator rather than a temporal power.' As a gift from the Creator, sovereignty can neither be given nor taken away, nor can its basic terms be negotiated. This view is shared by many Aboriginal people, whose political traditions are infused with a deep sense of spirituality and a sense of the interconnectedness of all things. Such concepts as sovereignty, self-government and the land, which for some Canadians have largely secular definitions, all retain a spiritual dimension in contemporary Aboriginal thinking.<sup>121</sup>

But the Royal Commission report noted a material basis to sovereignty claims as well:

While Aboriginal sovereignty is inherent, it also has an historical basis in the extensive diplomatic relations between Aboriginal peoples and European powers from the early period of contact onward. In the eyes of many treaty peoples, the fact that the French and British Crowns concluded alliances and treaties with First Nations demonstrates that these nations were sovereign peoples capable of conducting international relations.<sup>122</sup>

It found that 'while Aboriginal people use a variety of terms to describe their fundamental rights, they are unanimous in asserting that they have an inherent right of self-determination arising from their status as distinct or sovereign peoples. This right entitles them to determine their own governmental arrangements and the character of their relations with other people in Canada.'<sup>123</sup>

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118 Robert Warrior, *Tribal Secrets: Recovering Indian Intellectual Traditions* (1993) at 124; cited in *id* at 190.

119 Roger Jones, Councillor and Elder of the Shawanaga First Nation, quoted in *Report of the Royal Commission on Aboriginal Peoples*: <[http://www.ainc-inac.gc.ca/ch/rcap/sg/ch3a\\_e.pdf](http://www.ainc-inac.gc.ca/ch/rcap/sg/ch3a_e.pdf)> Volume 2 — Restructuring the Relationship, Part 1, Chapter 3, Section 1.1 (29 June 2004).

120 René Tenasco, Councillor of the Kitigan Zibi Anishinabeg Council, quoted in *ibid*.

121 *Ibid*.

122 *Ibid*.

In the end the Royal Commission, while respecting different views on sovereignty, was sceptical that agreement on its meaning could be reached and was inclined to set it to one side when resolving the practical issues of co-existence:

In extensive presentations to the Commission, treaty nation leaders said their nations were sovereign at the time of contact and continue to be so. Such positions are often perceived as a threat to Canada as we know it. The Commission has considered the various views of sovereignty expressed to us and has found no rational way to bridge the gap between those who assert and those who deny the continuing sovereignty of Aboriginal nations.

The Commission concludes that any detailed examination of sovereignty is ultimately a distraction from the issues our mandate requires us to address. Differences in deep political beliefs are best dealt with by fashioning a mutually satisfactory and peaceful coexistence rather than attempting to persuade the adherents of opposing positions that their beliefs are misguided.<sup>124</sup>

Moving from Indigenous perspectives to official ones, we must begin by noting that Canada, like Australia, possesses a written Constitution that was originally enacted by the United Kingdom Parliament.<sup>125</sup> Many of its legal traditions, including a Westminster system of government, also derive from that historical connection. However, unlike the Australian Constitution, the 1982 amendments to the Canadian Constitution provide some protection for the interests of Indigenous peoples.<sup>126</sup> Section 35(1) of the *Constitution Act 1982* states that 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed'. The Aboriginal people of Canada are defined in s 35(2) to include the 'Indian, Inuit, and Métis peoples of Canada'.

The *Federal Policy Guide: Aboriginal Self-Government*<sup>127</sup> recognises the right of self-government as a protected right under s35 of the Constitution:

Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.

However, the Federal Policy states that this right does not confer sovereignty upon Aboriginal peoples in the external, international law sense. The Government

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123 Ibid.

124 *Report of the Royal Commission on Aboriginal Peoples*: <[http://www.ainc-inac.gc.ca/ch/rcap/sg/ch2\\_e.pdf](http://www.ainc-inac.gc.ca/ch/rcap/sg/ch2_e.pdf)> Volume 2 — Restructuring the Relationship, Part 1, Chapter 2, Section 1.3 (29 June 2004).

125 The original *British North America Act 1867* (Imp) was re-enacted as the *Constitution Act 1867*. It sits alongside the *Constitution Act 1982*, which includes in s35 protection of the rights of Canada's aboriginal peoples.

126 The Royal Proclamation of 1763 provided an earlier legal basis for recognition of Aboriginal people and their rights, with its acknowledgment of Indian 'Nations' and their lands.

127 <[www.ainc-inac.gc.ca/pr/pub/sg/plcy\\_e.html](http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html)> 4: (1 July 2003).

does not recognise the existence of independent Aboriginal nation-states. Instead, Aboriginal people remain subject to Canadian laws, although Aboriginal and Canadian laws will co-exist.<sup>128</sup> This idea of the overarching sovereignty of the state, within which it is possible to recognise Aboriginal self-government, is reflected most powerfully in the Nisga'a Final Agreement of 1998. The first modern treaty in British Columbia recognised the legislative, executive and judicial power of the Nisga'a Nation and the responsibility of the Nisga'a Lisims Government for intergovernmental relations with the provincial and federal governments. An interesting comparison can be found in the creation in 1999 of the new self-governing Territory of Nunavut, where 85% of the population is Inuit, but a public model of government rather than exclusively Indigenous self-government was adopted by agreement.<sup>129</sup>

As stated in the Federal Policy, the Government's preference is to negotiate rather than litigate self-government issues. Treaties were entered into from when the British arrived in North America, and since the 1970s Canada has had a modern-day treaty process for resolving issues of land, resources, service delivery and self-government.<sup>130</sup> *Gathering Strength — Canada's Aboriginal Action Plan*, the 1998 response to the Royal Commission on Aboriginal Peoples by the Canadian Government, acknowledged the starting place for such negotiations as recognition by government of its role in past injustices. For example, the document states:

The Government of Canada acknowledges the role it played in the development and administration of [residential] schools ... To those of you who suffered this tragedy at residential schools, we are deeply sorry ... The Government of Canada recognizes that policies that sought to assimilate Aboriginal people ... were not the way to build a strong country.<sup>131</sup>

Matters subject to negotiation include adoption and child welfare, education, health, social services, policing, natural resources management and housing.

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128 *Id* at 8.

129 The commitment to establish the territory of Nunavut was part of the Nunavut Land Claim Agreement signed in 1993. This 'public model of governance rather than an Inuit-exclusive government structure...does not benefit from protection under section 35' of the Canadian Constitution. John J Borrows and Leonard I Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary* (2<sup>nd</sup> ed, 2003) at 710.

130 Brad Morse has written that while 'Canada went through a period of slumber in the mid-20<sup>th</sup> Century in which it thought that treaties were only of historic interest with no place in the modern world, First Nations used the courts, the media and the political process to remind everyone of the fallacy of those presumptions...[E]xisting Indian-Crown treaties are very much part of 21<sup>st</sup> Century Canada with their numbers growing and their scope expanding through dozens and dozens of negotiation tables in all parts of our country.' Bradford W Morse, 'Treaty Relationships, Fiduciary Obligations and Crown Negotiators', paper presented at the Ottawa Bar Association's Annual Institute of 2003, February 2003 at 7. For an overview of what he says are the four distinct eras of treaty-making in Canada, see Morse, above n55 at 53–64.

131 Indian and Northern Affairs Canada, *Gathering Strength — Canada's Aboriginal Action Plan*: <[www.ainc-inac.gc.ca/gs/chg\\_e.html](http://www.ainc-inac.gc.ca/gs/chg_e.html)> 3 (1 July 2003).

In 2002, the Federal Government introduced Bill C-7, the proposed *First Nations Governance Act*, as part of its policy on self-government. Among other things, the Bill would have created new governance structures for First Nations. The Government identified several goals of the new Bill: to strengthen the relationship between First Nations governments and their citizens; to give First Nations people a stronger voice in the way their communities are run; to make it easier for First Nations governments to respond to the needs of their citizens; to provide tools of good governance that can be adapted to individual bands' customs and traditions; to make it easier for First Nations to move towards self-government by building capacity; to reduce the power of the Minister and the Federal Government over First Nations communities; and to support First Nations in building stronger, healthier communities.<sup>132</sup>

Despite the claim that Bill C-7 would be a bridge to self-government,<sup>133</sup> many Aboriginal groups argued that the Bill infringed the inherent right to self-government. According to the Assembly of First Nations (AFN), which identifies as the national representative organisation for over 630 First Nations communities in Canada:

The Government of Canada has spent tens of millions of dollars on its First Nations Governance Act ... process, a process that will not build one more house or stop one more suicide, nor will it assist First Nations in realizing their long-standing goal of creating healthy, viable and self-governing communities based on the recognition of Aboriginal and Treaty rights. In fact, by ... dictating how First Nations must administer to the business of their communities, it infringes on Aboriginal rights as recognized in section 35 of Canada's *Constitution Act*, 1982.<sup>134</sup>

On 21 January 2004, the newly appointed Minister of Indian Affairs and Northern Development, the Honourable Andy Mitchell, announced he would not reinstate the Bill back to Parliament. The Minister indicated a desire to 'work with First Nations leaders and others on effective and practical ways to apply the principles of good governance into First Nations communities.'<sup>135</sup> AFN

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132 Minister of Indian Affairs and Northern Development, *A Guide to Understanding Bill C-7, the First Nations Governance Act* (July 2003): <[www.fng-gpn.gc.ca/PDF\\_files/crarevju\\_e.pdf](http://www.fng-gpn.gc.ca/PDF_files/crarevju_e.pdf)> 3: (17 December 2003). According to Robert Nault, then Minister of Indian Affairs and Northern Development: 'The objectives of this new legislation are to put in place provisions that reflect current realities, that would serve as an interim step towards self-government and put the power on reserves back where it belongs — in the hands of the people' ('Statement by Robert D Nault Minister of Indian Affairs and Northern Development' 19 March 2003: <[www.fng-gpn.gc.ca/NR\\_FctFctnM19\\_e.html](http://www.fng-gpn.gc.ca/NR_FctFctnM19_e.html)> (2 July 2003)).

133 Robert D Nault, Minister of Indian Affairs and Northern Development, *News Release Proposed First Nations Governance Act Moves Forward* 28 May 2003: <[www.ainc-inac.gc.ca/nr/prs/m-a2003/2-02324\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/m-a2003/2-02324_e.html)> (12 June 2003).

134 Assembly of First Nations, *The Assembly of First Nations' Position on Bill C-7: The First Nations Governance Act*: <[www.afn.ca/Legislation%20Info/The%20Assembly%20of%20First%20Nations%E2%80%99%20Position%20on%20Bill%20C-7.htm](http://www.afn.ca/Legislation%20Info/The%20Assembly%20of%20First%20Nations%E2%80%99%20Position%20on%20Bill%20C-7.htm)> (12 June 2003).

135 <[http://www.ainc-inac.gc.ca/nr/prs/j-a2004/2-02462\\_e.html](http://www.ainc-inac.gc.ca/nr/prs/j-a2004/2-02462_e.html)> (16 February 2004).

recognised some positive aspects to the government's legislative agenda. However, they remain concerned about the future of Aboriginal governance as the Minister indicated an intention to proceed with Bill C-19, the proposed *Fiscal and Statistical Management Act*. This Bill has been rejected by AFN because 'A legislative package without options and without the opportunity for a full national dialogue make this legislation unsupportable for the majority of First Nations and the AFN.'<sup>136</sup> At the time of writing the Liberal Party led by incumbent Prime Minister Paul Martin continues in power after national elections, but as a minority government. The implications of this for Aboriginal governance are unclear.

The courts in Canada have been called upon to interpret the legal significance of both historical and modern treaties with Aboriginal peoples. They have treated them as *sui generis* agreements, and have adopted reconciliation as an interpretive theme. For example, the Chief Justice of the Supreme Court of Canada, the Right Honourable Beverley McLachlin, recently told an Australian audience that 'Canadian jurisprudence on Aboriginal rights has emphasised the twin tasks of recognition and reconciliation. The goal of reconciliation requires us to abandon an all-or-nothing perspective, and to seek principled compromises based on a shared will to live together in a modern, multicultural society.' A key concern of Canadian jurisprudence in this area, she said, is 'the idea of reconciling Crown sovereignty with the history of prior occupation by indigenous peoples.'<sup>137</sup>

The Canadian courts have also examined Aboriginal peoples' right to self-government. While the Supreme Court of Canada is yet to make a final determination whether this right falls under s 35(1) of the Constitution, it has begun to develop a legal framework for the right. In 1990 the Supreme Court said that in early colonial dealings Britain and France recognised Aboriginal peoples as independent nations.<sup>138</sup> It refrained, however, from clarifying the effect of European colonisation on their status under the common law. In 1996 in *R v Pamajewon*,<sup>139</sup> the Court assumed, without deciding, that if s 35 includes the right

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136 Statement by National Chief Fontaine: <[http://www.afn.ca/Assembly\\_of\\_First\\_Nations.htm](http://www.afn.ca/Assembly_of_First_Nations.htm)> (16 February 2004).

137 The Rt Hon Beverley McLachlin, 'Reconciling Sovereignty: Canada and Australia's Dialogue on Aboriginal Rights' delivered at the High Court Centenary Conference, Canberra, 10 October 2003 at 2.

138 *R v Sioui* [1990] 1 SCR 1025. Kent McNeil has noted that in *Simon v The Queen* [1985] 2 SCR 387 at 404 the Court denied international status to Indian treaties but that in the *Sioui* decision it did say 'that, until 1760 at least when the treaty in question was made with the Hurons of Lorette, Britain and France maintained relations with the Indian nations "very close to those maintained between sovereign nations." Nonetheless, the Supreme Court in *Sioui* did not question that the British Crown's sovereignty over that part of Canada was derived from the French, regardless of Indian treaties.' Kent McNeil, 'The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments' (1994) 7 *Western Legal History* 113 at 115 n7. McNeil points out that many Indigenous people have found no difficulty seeing these treaties as 'entailing peer relations between equal sovereigns' (at 115). See, for example, Mary Ellen Turpel, 'Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences' (1989-1990) *Canadian Human Rights Yearbook* 3 at 36: 'There is no compelling reason, according to international law, not to view treaties between Aboriginal peoples and the Crown as treaties between sovereigns, that is, as *international* treaties.'

to self-government, the *Van der Peet* test applies to determine that right. In *R v Van der Peet*,<sup>140</sup> the Court held that 'in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right'.<sup>141</sup> In 1997, the Court again briefly discussed the question of self-government in *Delgamuukw v British Columbia*,<sup>142</sup> but sent the issue back for re-consideration due to errors made by the judge during the trial. Despite the limited nature of the findings in *Delgamuukw v British Columbia* and *R v Pamajewon*, Patrick Macklem has argued that these cases suggest that:

the Constitution of Canada recognizes and affirms an inherent Aboriginal right of self-government — specifically, a right to make laws in relation to customs, practices and traditions integral to the distinctive culture of the Aboriginal nation and in relation to the use of reserve lands and lands subject to Aboriginal title.<sup>143</sup>

Macklem's conclusion is supported by the British Columbia Supreme Court's 2000 decision in *Campbell v British Columbia (Attorney General)*.<sup>144</sup> In that case, the Court was asked to review the constitutional validity of self-government provisions in the Nisga'a Final Agreement, a modern treaty signed in 1998 by the Nisga'a people, the British Columbia government and the Federal government. The Court held that self-government is a constitutionally protected right under s 35, stating that 'the assertion of Crown sovereignty and the ability of the Crown to legislate in relation to lands held by Aboriginal groups does not lead to the conclusion that powers of self-government held by those groups were eliminated'.<sup>145</sup> The Court also found that 'after the assertion of sovereignty by the British Crown ... the right of aboriginal people to govern themselves was diminished, it was not extinguished',<sup>146</sup> and that 'a right to self-government akin to a legislative power to make laws, survived as one of the unwritten "underlying values" of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867'.<sup>147</sup>

In *Campbell*, the Court did not view the right of self-government as an absolute right. The Court made it clear that the right exists today within a framework of the Crown's sovereignty, including the Canadian Constitution. Within that framework, the Nisga'a government's legislative power and authority is limited to specific

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139 *R v Jones (sub nom R v Pamajewon)* [1996] 2 SCR 821 at [24].

140 [1996] 2 SCR 507 at [46] quoted in *R v Jones*, id at [25].

141 The Court in *R v Jones* (id at [27]) provided additional guidance by stating that 'Aboriginal rights, including any asserted right to self-government, must be looked at in light of the specific circumstances of each case and, in particular, in light of the specific history and culture of the aboriginal group claiming the right'.

142 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

143 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (2001) 174. Compare *Mitchell v MNR* [2001] 1 SCR 911 (Major and Binnie JJ).

144 *Campbell v British Columbia (Attorney General)* (2000) 189 DLR (4th) 333.

145 Id at [124].

146 Id at [179].

147 Id at [81].

areas. Moreover: 'In circumstances where exercise of an aboriginal right to self-government is inconsistent with the overall good of the polity, Parliament may intervene subject only to its ability to justify such interference in a manner consistent with the honour of the Crown'.<sup>148</sup>

By developing this public law framework, the British Columbia Supreme Court indicated at least some judicial acceptance of the place of Indigenous self-government within the Canadian nation. The Court worked from the notion that, although the British Crown successfully asserted sovereignty, this does not exclude self-government by the Aboriginal peoples of Canada. Thus, the treaty between the Nisga'a, the provincial government and the federal government confirmed that power and authority resides in the Nisga'a people, even though there was no recognition by the Court of a new and independent Nisga'a nation-state.

### **B. United States of America**

At different times over almost two centuries, federal governments and the United States Supreme Court have in turn eroded and re-asserted the importance of tribal sovereignty. According to the Bureau of Indian Affairs in President George W Bush's current Administration, there are '562 federally recognized American Indian Tribes and Alaska Native villages in the United States. Each possesses inherent governmental authority deriving from its original sovereignty'.<sup>149</sup> Treaties with Indian (Native American) nations were commonplace in American history both before and after independence from the British.<sup>150</sup> The often brutal treatment of Indian nations and the repeated violation of treaty provisions that occurred across the country are well documented, but nonetheless the United States has a long history of Indian tribes maintaining a significant level of power and authority over their own communities. Like Canada, the United States has given some effect to Indigenous peoples' right to self-government. However, the United States has also gone further, at least in its use of language, in expressly recognising the sovereignty of the Indian tribes. For example, the Department of the Interior's *Fiscal Year 1996 Interior Accountability Report* states:

Indian self-determination is the cornerstone of the Federal relationship with sovereign tribal governments. Self-determination contracts, grants, cooperative agreements and self-governance compact agreements between the Federal government and Indian tribes and tribal organizations allow the tribes, rather than Federal employees, to operate the Federal programs.<sup>151</sup>

148 Id at [121]. See John Borrows, 'Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*' (1999) 37 *Osgoode Hall LJ* 537 at 574.

149 Department of Interior, *Fiscal Year 2003 Annual Report on Performance and Accountability* (2003) at 43: <[http://www.doi.gov/pfm/par2003/par03\\_mda\\_goal5.pdf](http://www.doi.gov/pfm/par2003/par03_mda_goal5.pdf)> (29 June 2004).

150 On the difference between the North American and Australian approaches see Morse, above n55 at 50–51: 'One of the critical historical, political and legal elements that distinguishes the North American experience from that of Australia is that there was a recognition from the early points of contact that pre-existing societies were completely sovereign'.



More recently, the Bureau of Indian Affairs released its *Government-to-Government Consultation Policy*<sup>152</sup> pursuant to President Bill Clinton's Executive Order 13175 on 'Consultation and Coordination With Indian Tribal Governments'.<sup>153</sup> That Policy confirms the commitment to dealing with Indian tribes on a government-to-government basis. It recognises that this government-to-government 'relationship is not new, but has strong roots that took hold with the very earliest contact between the American Indians and the first European settlers'.<sup>154</sup> One of the Policy's guiding principles is that the government 'recognizes the ongoing right of Indian tribes to self-government and supports tribal sovereignty and self-determination'.<sup>155</sup> The Policy also requires government to consult Indian tribes before taking any actions that have 'substantial direct effects on one or more Indian tribes',<sup>156</sup> demonstrating the considerable political and bureaucratic recognition of Indigenous sovereignty and self-government in the United States.<sup>157</sup>

Analysts who focus on social and economic development on Native American lands, such as the influential Harvard Project on American Indian Economic Development, say that tribal self-rule or 'sovereignty' is a critical ingredient to successful development of that kind, and that sovereignty has legal, political and cultural dimensions. Kalt and Singer, for example, say of their study on the law and economics of Indian self-rule:

What emerges is a picture in which tribes do exercise substantial, albeit limited, sovereignty. This sovereignty is not a set of 'special' rights. Rather, its roots lie in the fact that Indian nations pre-exist the United States and their sovereignty has been diminished but not terminated. Tribal sovereignty is recognized and protected by the US Constitution, legal precedent, and treaties, as well as applicable principles of human rights.

Tribal sovereignty is not just a legal fact; it is the life-blood of Indian nations. This is obviously true in the political sense: Without self-rule, tribes do not exist as distinct political entities within the US federal system. Moreover, economically and culturally, sovereignty is a key lever that provides American Indian

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151 Department of Interior, *Fiscal Year 1996 Interior Accountability Report* at 50: <[www.doi.gov/pfm/acct96/entire.pdf](http://www.doi.gov/pfm/acct96/entire.pdf)> (8 July 2003). See also Department of Interior, *Fiscal Year 2003 Annual Report on Performance and Accountability* (2003) at 43, 200: <<http://www.doi.gov/pfm/par2003>> (29 June 2004).

152 Bureau of Indian Affairs, *Government-to-Government Consultation Policy*: <[www.doi.gov/oait/docs/g2gpolicy.htm](http://www.doi.gov/oait/docs/g2gpolicy.htm)> (8 July 2003).

153 Federal Register, Volume 65, Number 218, 9 November 2000.

154 Bureau of Indian Affairs, *Government-to-Government Consultation Policy* at 1: <[www.doi.gov/oait/docs/g2gpolicy.htm](http://www.doi.gov/oait/docs/g2gpolicy.htm)> (8 July 2003).

155 Id at 3.

156 Id at 2. Another indication of the Federal Government's support of Indian sovereignty is the Office of Self-Governance, which administers Tribal Self-Governance in relation to Bureau of Indian Affairs programs. See Office of Self-Governance, <[www.doi.gov/oait/osgwww](http://www.doi.gov/oait/osgwww)> (8 July 2003).

157 See Joseph William Singer, 'Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty' (2003) 37 *New Eng LR* 641 at 648.

communities with institutions and practices that can protect and promote their citizens' interests and wellbeing. Without that lever, the social, cultural, and economic viability of American Indian communities and, perhaps, even identities is untenable over the long run.<sup>158</sup>

The United States Supreme Court has recognised Indigenous sovereignty since a trilogy of cases in the early 1800s.<sup>159</sup> In *Johnson v M'Intosh*<sup>160</sup> in 1823, Marshall CJ acknowledged that Indigenous people were sovereign prior to the assertion of British sovereignty. Marshall CJ held that the British assertion of sovereignty diminished the Indian tribes' sovereignty, in part because their power to alienate their land was limited to purchases by the British Crown.<sup>161</sup> However, the British assertion of sovereignty did not extinguish Indian sovereignty because the tribes 'were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion'.<sup>162</sup> In *Cherokee Nation v Georgia*<sup>163</sup> in 1831, Marshall CJ found that the signing of treaties was a clear recognition of the Cherokee's statehood.<sup>164</sup> Since in certain respects the Indian tribes were dependent upon the federal government, he also stated that 'they may, more correctly, perhaps, be denominated domestic dependent nations'.<sup>165</sup> In a third decision in 1832, *Worcester v Georgia*,<sup>166</sup> Marshall CJ strongly reiterated that prior to contact the Indian tribes were sovereign nations. He stated: 'America ... was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws'.<sup>167</sup> Looking to international law, he found that 'the settled doctrine of the law of nations is that a ... weak State, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State'.<sup>168</sup>

Chief Justice Marshall's position on Indigenous sovereignty has been followed in subsequent decisions of the United States Supreme Court, even those which have otherwise eroded the constitutional position of Native American peoples. In 1886 in *United States v Kagama*,<sup>169</sup> Miller J recognised that the Indian tribes were dependent upon the United States: 'From their very weakness and helplessness, so

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158 Joseph P Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule* (2003): <<http://www.ksg.harvard.edu/hpaied/docs/Kalt-Singer%20Final%2001-04.pdf>> (29 June 2004).

159 The Rehnquist Court has, however, been extensively criticised by Federal Indian scholars for its interpretative emasculation of Indian sovereignty. See Robert N Clinton, 'There is no Federal Supremacy Clause for Indian Tribes' (2002) 34 *Ariz St LJ* 113.

160 *Johnson v M'Intosh*, 21 US 543 (1823).

161 *Id* at 586.

162 *Id* at 574.

163 *The Cherokee Nation v Georgia*, 30 US 1 (1831).

164 *Id* at 16.

165 *Id* at 17.

166 *Worcester v Georgia*, 31 US 515 (1832).

167 *Id* at 542–543.

168 *Id* at 560–561.

169 *United States v Kagama* 118 US 375 (1886).

largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection'.<sup>170</sup> However, he still found that the Indian tribes 'were, and always have been, regarded as ... a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided'.<sup>171</sup>

In 1978 in *United States v Wheeler*,<sup>172</sup> writing for the Court, Stewart J outlined the regulatory powers of Indigenous people and accepted that 'The powers of Indian tribes are in general, "inherent powers of a limited sovereignty which has never been extinguished"'.<sup>173</sup> He specified that, unless limited by a treaty or statute, the Indian tribes have the power 'to determine tribe membership ... to regulate domestic relations among tribe members ... and to prescribe rules for the inheritance of property'.<sup>174</sup> However, he did treat Indian sovereignty as diminished through '[t]heir incorporation within the territory of the United States, and their acceptance of its protection ... By specific treaty provisions they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others'.<sup>175</sup> Hence, the sovereignty of Indian tribes exists at 'the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers'.<sup>176</sup> Despite the vulnerability of Indian sovereignty to extinguishment, Stewart J found that Indian sovereignty is an inherent right: 'That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power ... [T]ribal self-government is a matter of retained sovereignty rather than congressional grant'.<sup>177</sup> During the past quarter century the Rehnquist Court has 'created a number of new federal common law limitations on tribal sovereignty',<sup>178</sup> but the concept itself remains part of the American legal landscape.

In summary, even though the Indian tribes have no specific constitutional protection of their right to self-government,<sup>179</sup> there are similarities between the Canadian and American positions. While the power and authority of Indigenous people in both countries are not identical, governments and courts in the two nations recognise Indigenous peoples' right to self-government. Significantly, both nations recognise this right as an inherent right not extinguished by the assertion of British sovereignty.

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170 Id at 384.

171 Id at 381–382.

172 *United States v Wheeler* 435 US 313 (1978).

173 Id at 322.

174 Ibid.

175 Id at 323.

176 Ibid.

177 Id at 328.

178 Catherine T Struve, 'Tribal Immunity and Tribal Courts' (2004) 36 *Ariz St LJ* 137 at 146. See also Singer, above n157.

179 The United States Constitution is not, however, silent on the Indian tribes. Article 8, for example, confers power upon Congress, among other things, 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes'.

### C. *New Zealand*

The New Zealand constitutional system has some important similarities as well as some significant differences from Australia. Originally a British colony, New Zealand has a Westminster system of parliamentary government in which most of the institutional ties to Britain were severed by 1986. However, unlike the federal systems with written constitutions in Australia, Canada and the United States, New Zealand is a unitary system and its constitution is largely unwritten. Its unicameral legislature enjoys considerably greater power because it is restrained neither by federalism nor by judicial enforcement of a constitutional text. This system also means that New Zealand can produce very strong executive governments, although the 1993 adoption of mixed-member proportional representation can now temper executive dominance.<sup>180</sup>

The legal relationship between the Crown and Indigenous people in New Zealand provides an interesting comparison with Australia. New Zealanders never laboured under the fiction of terra nullius. After some debate in the 1830s, the Colonial Office instructed the would-be first Governor of New Zealand to enter into a treaty with the Maori. The Treaty of Waitangi, signed by over 500 chiefs over an eight-month period from February to September 1840, deals with fundamental issues of government authority, property rights and the application of British law. Subsequently, New Zealand built a system of land titling based on the assumption of original Maori ownership, while the Australian system was premised on the non-existence of Indigenous rights to land.

Yet the contrast between the nations is not as stark as this difference might suggest. While New Zealand was never presumed to be terra nullius, early judicial thinking revealed the same cross-cultural inability to recognise a different but valid form of governance and society. In the 1879 decision in *Wi Parata v The Bishop of Wellington*,<sup>181</sup> Prendergast CJ found the Treaty of Waitangi to be a legal nullity because ‘no body politic existed capable of making a cession of sovereignty’. In official circles, that conclusion consigned the Treaty to near-irrelevance for almost a century. In addition, it was eleven years after the Australian High Court decision in *Mabo (No 2)* that New Zealand’s highest domestic court unequivocally affirmed the basic principle that jurisdiction and property rights are separate issues and that, at common law, customary property rights survived the Crown’s assertion of sovereignty.<sup>182</sup>

The Treaty of Waitangi warrants closer attention. There are two versions of the Treaty, one in English and one in Maori, both of which contain three sections. Both versions are official, recognised statements of the Treaty’s terms. A third version, which translates the Maori text back into English, is also treated with authority and

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180 See Matthew Palmer & Geoffrey Palmer, *Bridled Power: New Zealand’s Constitution and Government* (4th ed, 2004) 22-38.

181 (1877) 3 NZ Jur (NS) SC 72.

182 *Ngati Apa v Attorney-General (NZ)* (NZ Court of Appeal, Elias CJ, Gault P, Keith, Tipping and Anderson JJ, CA173/01, 19 June 2003).

is 'commonly used in the Courts'.<sup>183</sup> That third version illustrates how, from the time of its signing, different views have existed on what the Treaty says about sovereignty. The English version provides that Maori yielded to the Crown absolute sovereignty without reservation, with the Maori guaranteed undisturbed possession of their lands and estates, forests, fisheries and other properties (subject to the sole right of purchase by the Crown). On the other hand, the Maori text, translated back into English, grants the Crown the power of government (*kawanatanga*) in the context of Crown protection for the unqualified exercise of Maori chieftainship (*rangatiratanga*) over their lands, villages and all their treasures (subject to the Crown's sole right of purchase). Given this discrepancy, debates exist regarding whether the Maori chiefs handed over absolute sovereignty, agreed to share it, deliberately withheld it, or granted some lesser degree of authority while holding onto the power of self-government. This debate about what the treaty actually says appears likely to continue.<sup>184</sup>

New Zealand governments have tended not to refer directly to the sovereignty of Indigenous people. While the current Government of Prime Minister Helen Clark has stated its commitment to 'upholding and promoting the role of the Treaty in contemporary New Zealand',<sup>185</sup> the government uses the language of self-determination. Te Puni Kokiri (Ministry of Maori Development) is the branch of government with an exclusively Maori focus. Its current Strategic Plan states that 'in order to make self-determination a reality, cultural development must underpin all other forms of development .... This work concentrates on helping to build capacity of Maori groups and individuals in order for them to become economically and socially independent'.<sup>186</sup> Despite no mention of Maori sovereignty, the plan indicates the government's desire for Maori to have greater power and control over the matters that affect their lives. Maori lawyer and academic Claire Charters has said that the government's refusal to negotiate over

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183 Id at [139] (Keith and Anderson JJ).

184 Joe Williams, 'Not Ceded but Redistributed' in William Renwick (ed), *Sovereignty and Indigenous Rights. The Treaty of Waitangi in International Contexts* (1991) at 190. See also Claire Charters, 'Report on the Treaty of Waitangi 1840 Between Maori and the British Crown', Background Paper for Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, Geneva, 15–17 December 2003 at 6: <<http://www.unhchr.ch/indigenous/charters-BP15.doc>> (29 June 2004). Martinez notes that in Canada Indigenous parties to the so-called numbered treaties, officially regarded as 'land surrenders', insist rather that these agreements fall into the same category as earlier treaties of peace and friendship and 'that they did not cede either their territories or their original juridical status as sovereigns'. Miguel Alfonso Martinez, 'Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations', Final Report, E/CN.4/Sub.2/1999/20, 22 June 1999 at [122]: <<http://ods-dds-ny.un.org/doc/UNDOC/GEN/G99/137/73/PDF/G9913773.pdf?OpenElement>> (30 June 2004).

185 Te Puni Kokiri (Ministry of Maori Development), *Statement of Intent* (2003) at 15: <[www.tpk.govt.nz/publications/soi/eng\\_july03.pdf](http://www.tpk.govt.nz/publications/soi/eng_july03.pdf)> (23 December 2003).

186 Te Puni Kokiri (Ministry of Maori Development), *Strategic Plan 2001/02-2003/04* at 13: <[www.tpk.govt.nz/publications/docs/SP\\_2001-04eng.pdf](http://www.tpk.govt.nz/publications/docs/SP_2001-04eng.pdf)> (9 July 2003).

self-government in Treaty settlements has, however, diminished the political value of the process from the Maori point of view.<sup>187</sup>

The New Zealand courts have engaged more directly with the question of sovereignty. The orthodox perspective, based upon the notion of parliamentary sovereignty, was provided by Somers J in *New Zealand Maori Council v Attorney-General*.<sup>188</sup>

[T]he question of sovereignty in New Zealand is not in doubt. On 21 May 1840 Captain Hobson proclaimed the 'full sovereignty of the Queen over the whole of the North Island' by virtue of the rights and powers ceded to the Crown by the Treaty of Waitangi, and over the South Island and Stewart Island on the grounds of discovery. ... The sovereignty of the Crown was then beyond dispute and the subsequent legislative history of New Zealand clearly evidences that. Sovereignty in New Zealand resides in Parliament.

In 1990 in *Kaihau v Inland Revenue Department*,<sup>189</sup> Hillyer J followed this approach in finding: 'In my view it is abundantly clear that the New Zealand Parliament has the right to enact legislation applying to all persons in New Zealand, whether they had ancestors who lived here in 1840 or whether they have only recently arrived in New Zealand'. Further debates on the legal and constitutional significance of the Treaty continue to occur. In 2003 in *Ngati Apa v Attorney-General (NZ)*,<sup>190</sup> several of the nation's most senior judges adopted the view that the Treaty of Waitangi was indeed about the 'cession of sovereignty'.<sup>191</sup>

The nineteenth century position that the Treaty is 'a simple nullity' seems less certain today. The orthodox view is that a treaty between peoples has no domestic legal effect without an express act of incorporation, usually by legislation.<sup>192</sup> However, Sir Robin Cooke (later Lord Cooke of Thorndon in the House of Lords) has called the Treaty of Waitangi 'simply the most important document in New Zealand's history'<sup>193</sup> and in 1987 hinted that it might have independent legal force in the courts after all. More recently, in an extra-judicial setting, the current Chief Justice, Dame Sian Elias left open the question of whether Parliament's power and Crown sovereignty in New Zealand were 'qualified by the Treaty'.<sup>194</sup>

There is also difference between Maori and non-Maori views on the effect of the Treaty of Waitangi. Joe Williams, now Chief Judge of the Maori Land Court, has said that if the Treaty 'is truly a founding document, and was truly entered into

187 Charters, above n184 at 14.

188 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 690.

189 *Kaihau v Inland Revenue Department* [1990] 3 NZLR 344 at 345–346.

190 *Ngati Apa v Attorney-General (NZ)*, above n182.

191 See Keith and Anderson JJ at [139]–[140] and Elias CJ at [15] who quoted, without contradiction, the characterisation of the Treaty as one of cession of sovereignty by the Anglo-American Claims Tribunal. See also the trial judge's adoption of a cession of sovereignty view, noted by Elias CJ at [7].

192 *Hoani Te HeuHeu Tukino v Aotea District Maori Land Board* [1941] AC 308.

193 Sir Robin Cooke, 'Introduction' (1990) 14 NZULR 1.

in good faith as between the parties, then the Treaty itself was — is — *the Law*. Either orthodox (English) views of the law must change to accommodate its existence or it really was just a trick to pacify savages.<sup>195</sup>

While these debates about its terms and legal status continue, the Treaty itself exerts a strong influence on New Zealand law in many concrete ways.<sup>196</sup> The Waitangi Tribunal was established by statute in 1975 and its jurisdiction was enhanced in the 1980s. It investigates Treaty breaches and makes recommendations to the government that then has the power to implement them or not. The government has established a process for resolving disputes over the Treaty of Waitangi by agreement, managed by its Office of Treaty Settlements. Such agreements are committed to a deed of settlement that is usually given legal effect by legislation. Statutes have been made expressly subject to Treaty principles.<sup>197</sup> Parliament instructs decision-makers to take the Treaty into account, and judges feel constrained by it in shaping the common law.<sup>198</sup>

The Treaty is not fully implemented by domestic legislation and, by comparison with Canada, it does not enjoy constitutional protection under New Zealand's largely unwritten Constitution. However, while the Treaty might occupy a 'legal shadowland', half outside the law and half inside the law,<sup>199</sup> its impact on legislation and administration is now so widespread that it is difficult to dispute that it has at least a 'quasi-constitutional' operation.<sup>200</sup>

Much like the legal assertions of the Australian High Court in *Coe (No 2)* and *Yorta Yorta*, discussed above, the Treaty of Waitangi (in English) supplies a 'working definition' of Crown sovereignty. For the moment, the New Zealand courts treat that definition as a sufficient basis upon which the apparatus of the state can operate, without looking too closely into how convincing the story is,

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194 The Rt Hon Dame Sian Elias GNZM, 'Sovereignty in the 21<sup>st</sup> Century: Another Spin on the Merry-Go-Round' (2003) 14(3) *PLR* 148 at 153. McHugh says that in 1995 the New Zealand Court of Appeal 'reaffirmed the orthodoxy that treaty rights, including those associated with the one concluded at Waitangi in 1840, required statutory incorporation and took effect only and subject to that manner of recognition'. Paul McHugh, 'What a Difference a Treaty Makes — The Pathway of Aboriginal Rights Jurisprudence in New Zealand Public Law' (2004) 15(2) *PLR* 87 at 91–92.

195 Williams, above n184 at 193.

196 See Charters, above n184 at 6.

197 According to McHugh, 'These statutes laid the platform for legal development into the new century. Indeed this activity was becoming so regular there was a suggestion at the time that the insertion of such clauses was becoming a constitutional convention. In any event, this statutory housing of "Treaty principles" facilitated their permeation into the institutional culture of public administration, as Government departments audited themselves for sensitivity and compliance.' McHugh, above n194 at 91.

198 Matthew Palmer, 'The Treaty of Waitangi in Legislation' [2001] *NZLJ* 207. McHugh said that 'Treaty principles motored legal development in New Zealand during the 1990s (the first half in particular) as claims negotiation and resolution dominated, and substantially dictated the direction of, Crown-Maori relations.' McHugh, above n194 at 92.

199 Palmer, *id* at 207.

200 *Ibid*.

while at the same time perhaps keeping the door open to evolving understandings of New Zealand constitutionalism. This approach explains how, in constitutional terms, the role of the Treaty has been more about shaping the relationship between Maori and the Crown, or providing a framework for the ongoing negotiation of that relationship, than it has been about clearly defining the question of sovereignty.

These English-speaking countries with common law systems similar to Australia — Canada, New Zealand and the United States — have taken different approaches to Indigenous sovereignty. Although two of them may not explicitly recognise Indigenous sovereignty, they all recognise the power and authority of Indigenous people to make decisions affecting their lives. These different approaches provide a useful context for the current debates and concerns regarding treaty making in Australia.

## 5. *Some Related Objections to Treaty-Making in Australia*

### A. *Too Late in the Day?*

For those opposed to a treaty or treaties in Australia, perhaps the most difficult idea to accept is that more than two hundred years later, a society can do something that is normally thought to occur at the outset of settlement or colonisation. There is a simple factual answer to that concern: Canada took the step in the mid-1970s to recognise the capacity of its Indigenous peoples to enter into modern day treaties with its national and provincial governments. It was a *political* decision by the democratically elected government of the day. Treaty-making has been policy and practice in Canada for more than a generation and Morse suggests that the ‘process of treaty making is a long way from being finished’.<sup>201</sup> Certainly there have been issues, setbacks and problems with the process. Indeed, the same can be said of most political processes that address serious issues affecting the lives of ordinary people. However, Canadians can also point to many benefits from the recognition, from the commitment to negotiation and from the outcomes of the modern treaty era.

While Canada and Australia differ in some important respects, they share many of the same fundamental features. Both inhabit a large continent, originally occupied by many separate peoples whose society and culture are living contemporary realities. Both are also former British colonies with a parliamentary and common law tradition, modified by a federal structure. Both are also making belated attempts to come to terms with their history and to start down the path towards greater inclusion of Indigenous people within the nation, after their exclusion by law and government action for many decades.

Embarking on treaty-making now would mean Australia is making ‘a late start’. But societal values are constantly evolving. There is often a gap or lag between the values espoused by a political community and the degree to which

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<sup>201</sup> Morse, above n55.



those values are given practical effect. An example is the position of the ordinary individual elector in Britain or Australia. It was more than 400 years ago that the first hint of 'popular sovereignty' emerged with the idea that the legitimacy of government authority derived not from the divine right of a king to rule, but from the 'consent of the governed'.<sup>202</sup> This idea, that the government continues to enjoy legitimate political and legal authority because in some way the people consent to that authority, came to dominate English theories of government. It took hundreds of years for the institutions and processes of government to move more into line with that most fundamental of ideas. Major reform to give people the right to vote in periodic elections, to actually give concrete effect to that idea of consent, did not begin until the 1800s. The universal franchise is really a product of the 20th Century. In other words, it can take decades, even centuries, for a society to bring its institutions, its theory of government and its *realpolitik* into some kind of genuine alignment. The process of arguing out the terms of that political settlement is a work-in-progress inside Western liberal democracies.

As political landscapes constantly change, the concern regarding the 'lateness in the day' has less weight. It is true that Australia was taken without treaty or consent. It is also true today that many Australians view that event very differently from how we once did. Times have moved on and perceptions have changed. Australia's most basic legal assumptions have been recently revised. The High Court has all but explicitly recognised that, before the British arrived, sovereign authority over the continent was exercised by the separate Indigenous societies that occupied it. That Court, Australia's parliaments and its governments have all recognised the rights Indigenous peoples had over the lands and waters they occupied, and that those rights survived the acquisition of sovereignty by Britain. Inevitably the recognition of these basic facts, that Indigenous societies hold land and govern their societies according to their law, strengthens calls for sovereignty to be re-examined in order to re-evaluate how legitimate political and legal authority comes to be exercised over this continent.

### ***B. Obsessed by the Past?***

There is another common objection to re-visiting the legitimacy of Crown authority over *all* the people of the Australian continent, including the Indigenous peoples descended from its original occupiers. Some people say that a treaty is backward-looking, travelling over old ground and that it fixes on the past when the real problems confronting Indigenous communities are in the present and the future. Again, behind this objection is a frame of mind that sees sovereignty as a once-and-for-all-issue, rather than the continuous working out of agreed principles and values for the legitimate exercise of authority by government over people.

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202 This section of the paper draws on the analysis of Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (1991).

The example of ‘popular sovereignty’ is again relevant. In the early 19th Century, supporters of the Westminster system acknowledged that ‘consent’ had replaced ‘divine right’ as the source of legitimate authority. However, some would have opposed electoral reform on the basis that consent was sufficiently secured by the ‘limited democracy’ of the time. To accept that compromised system as the last word would have been to accept political institutions and *realpolitik* permanently out-of-synch with the underlying theory of government. To retain for all time the political ‘settlement’ between people and government as it existed then would mean the theory and the practice would fall more and more out of alignment with each other, and popular grievance would grow amongst those locked out of the settlement. Women and the un-propertied would have been excluded from participating in institutional politics not just then but on an ongoing basis. The consequences of their disenfranchisement, of this disparity between the principle of consent and the practical reality, would be continuously visited upon them.

In other words, the terms of the political ‘settlement’ in a society at a given moment in time (for example, at the planting of the flag at Sydney Cove by Governor Arthur Phillip or the Federation of the nation in 1901) are not only about the past, they are also about the present and the future. History shows that exclusion from the ‘settlement’ gives rise to grievance, but political choices can be made to address that grievance by revising the terms of the earlier settlement and bringing them into closer alignment with fundamental assumptions and values. When societies make that choice, a new and more inclusive settlement may lay the foundations for future social and economic development.

The recognition of native title is another example of how structural and legal change can be about both the past *and the future* at the same time. To clear the way for recognition of Indigenous rights to land, the High Court had to address past understandings. In particular, it had to re-examine assumptions behind Britain’s acquisition of sovereignty. The key assumption was the idea of Australia in 1788 as *terra nullius* — land belonging to no one. The High Court identified the discriminatory world-view at the heart of *terra nullius* and said it was no longer an acceptable assumption upon which to base ownership of the Australian continent. The merits of the Court’s reasoning and the outcomes achievable within the legal parameters of Australian native title law can be debated. Nevertheless, the outcome was that Indigenous groups who lodge a native title claim can pursue recognition of their rights today in order to build a future for their families and the generations to come. To get to that point, Australia as a nation, through its highest court, had to return to the events of 1788 when the British asserted sovereign control of the continent. Those events had to be re-examined in light of contemporary knowledge of the facts, and contemporary standards of political morality.

Raising the objection that a treaty is backward-looking ignores the connection between the current problems of Indigenous communities and the process by which Australia was colonised. The ‘change in sovereignty’ imposed a new set of laws and system of governance on Aboriginal people without their consent. This

change has had devastating effects on Aboriginal communities. To adequately address the problems facing Aboriginal communities, the root of the problem may need to be acknowledged. A possible first step could be recognition of the power and authority of Indigenous peoples to enter into treaties that re-negotiate their relationship with the Australian government.

### ***C. Australian Law Forbids It?***

In New Zealand, some of the nation's most senior judges have shown a willingness to wrestle with the concept of Indigenous sovereignty in court and in other forums.<sup>203</sup> In Australia, the High Court has been less inclined to explore the issue, despite occasional invitations. Asking the Court an international law question of whether the Crown in Australia validly holds sovereignty over the continent in the external sense of the word does raise difficulties. The authority of the High Court is derived from the Australian Constitution. Asking the Court to question Crown sovereignty requires it to question its own legitimacy.<sup>204</sup> Therefore, it is not surprising that the Court has refused to examine the question, stating it is a 'non-justiciable' issue for Australia's domestic courts.

The legal position regarding internal sovereignty is less obvious. History demonstrates that courts can deal rationally with the idea that internally, power and authority are shared between 'polities'. Disputes about federalism, for example, commonly raise questions about the internal allocation of authority between the national government and the states. These are disputes where the language of sovereignty is used in the courts.<sup>205</sup> In the United States, the Supreme Court has maintained for 170 years that Indian nations enjoy a subsidiary degree of sovereign authority, inside the American nation-state.

When the High Court of Australia recognised the prior ownership of land by Indigenous peoples in *Mabo (No 2)*, it raised new possibilities for the formal recognition of Indigenous forms of governance and authority. To some extent those questions have been pursued in the political sphere through agreement-

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203 See text at nn191, 193–194.

204 As Simpson puts it, 'The one element that could not be discarded, of course, was the sovereignty upon which the Court's jurisdiction rested. In discussing the issue of sovereignty the Court followed the *Coe* judgment and that in the *Seas and Submerged Lands* case, warning that the acquisition of sovereignty itself was an unchallengeable act of state. In other words, the existence of Crown sovereignty over the Australian land mass was not a justiciable matter. Despite the reservations of many Aboriginal groups, *this may be the only possible finding a court in Australia can make without undermining the very basis of its jurisdiction to hear the issue.*' [Emphasis added.] Simpson, above n85 at 206.

205 See, for example, *Seas and Submerged Lands Case*, above n48. See also, for example, in the United States the following comment in the dissent of Justices Ginsburg, Stevens, Souter & Breyer in the 2000 election case of *Bush v Gore*, 531 US 98 (2000): 'Federal courts defer to state high courts' interpretations of their state's own law. This principle reflects the core of federalism, on which all agree. "The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."'

making over land, resource use and service delivery. Yet when the issue has been put to the High Court, its response has been firm and negative:

*Mabo (No 2)* is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty.<sup>206</sup>

In hastening to this answer, preserving the perceived status quo about this most fundamental question, the Court arguably overlooked or underplayed two key aspects of the decision in *Mabo (No 2)*. First, the systems of traditional law and custom survived the acquisition of Crown sovereignty, presently operating to regulate the rights enjoyed by native title holders and governing their decision-making.<sup>207</sup> Secondly, '[a]lthough the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.'<sup>208</sup> In other words, the High Court may abstain from dealing with arguments about whether the Crown's assertion of sovereignty over Australia was legal or not, but it can still talk about what effect that assertion of sovereignty has on the existing systems of law within the nation.

In its more recent decision in *Yorta Yorta*, the Court returned to some of these questions. Gleeson CJ, Gummow and Hayne JJ refrained from using the word 'sovereign' to describe the 'normative or law-making system' that existed before British colonisation in many places across the continent.<sup>209</sup> However, it was there implicitly, for example, in their acknowledgement of the 'change in sovereignty' in 1788.<sup>210</sup> Despite this, the Court in *Yorta Yorta* closed the door even more tightly against some quite logical implications from the two propositions in *Mabo (No 2)* set out above. They insisted that after 1788 'there could be no parallel law-making system'.<sup>211</sup> This assertion was sufficient to freeze the state of traditional law and custom in its 'ancient' state.<sup>212</sup>

206 *Coe v Commonwealth (No 2)*, above n95 at 115.

207 See for example *Native Title Act 1993* (Cth), ss251A and 251B, and *Native Title (Prescribed Bodies Corporate) Regulations 1999*, reg 8(4).

208 *Mabo*, above n54 at 32 (Brennan J, with Mason CJ & McHugh J agreeing).

209 *Yorta Yorta*, above n93 at 552.

210 Id at 555. Six judges of the High Court had already categorised British colonisation as a *change in sovereignty* in the earlier native title case of *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 422–423 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ): 'At common law, a mere change in sovereignty over a territory does not extinguish pre-existing rights and interests in land in that territory. Although an acquiring Sovereign can extinguish such rights and interests in the course of the act of State acquiring the territory, the presumption in the case of the Crown is that no extinguishment is intended. That presumption is applicable by the municipal courts of this country in determining whether the acquisition of the several parts of Australia by the British Crown extinguished the antecedent title of the Aboriginal inhabitants.'

211 *Yorta Yorta*, above n93 at 552 (Gleeson CJ, Gummow and Hayne JJ).

In the short term, *Yorta Yorta* appears to close down any judicial exploration of a more nuanced, internal view of sovereignty. It did so only by opening up new flaws in the Court's logic. In particular, a legal system as 'a normative system of traditional laws and customs', cannot simultaneously stand still and yet exhibit 'continuous existence and vitality since sovereignty'. Legal systems simply do not work that way: 'the culture and laws of indigenous peoples adapt to modern ways of life and evolve in the manner that the cultures and laws of all societies do. They do this best, by being frozen and completely unchangeable, they are rendered irrelevant and consequently atrophy and disappear.'<sup>213</sup> As was said in *Yorta Yorta* itself, laws and customs 'do not exist in a vacuum', they 'owe their ... life' to the society within which they operate,<sup>214</sup> and society surely changes as it adapts to new circumstances.<sup>215</sup> The Court insisted, however, that 'one of the uncontested consequences of the change in sovereignty'<sup>216</sup> was that after 1788 traditional legal development ceased, remaining operative yet frozen at the same time.

The High Court has developed its own 'working definition' of sovereignty, and Australia's system of public law continues to operate accordingly. The problem is that the formal judicial position on the relationship between Crown and Indigenous sovereignty contains logical flaws and provides, for many, an unconvincing answer to basic questions. However, the judiciary is only one arm of government and questions of settlement and legitimacy continue to be agitated in parliament and in discussion with government and in the public arena. As Langton and Palmer said, in describing 'the resilience of customary polities': 'A people do not desist from their political aspirations merely on the grounds of doctrinal denial of their existence or their capacity to engage politically with external entities'.<sup>217</sup>

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212 At least for the purposes of its recognition by Western law. The joint judgment contains a qualification that account may need to be taken 'of developments at least of a kind contemplated by that traditional law and custom' but elsewhere it is quite insistent that the only rights eligible for recognition are 'those that find their origin in pre-sovereignty law and custom'. [Id at 552.]

213 *Yarmirr*, above n48 at 132 (Kirby J). Similarly, in 1992, Deane and Gaudron JJ pointed out: 'The traditional law or custom is not ... frozen as at the moment of establishment of a Colony': *Mabo*, above n54 at 110.

214 *Yorta Yorta*, above n93 at 553–554 (Gleeson CJ, Gummow and Hayne JJ).

215 *Ward v Western Australia* (2002) 191 ALR 1 at 160 (Kirby J): 'When evaluating native title rights and interests, a court should start by accepting the pressures that existed in relation to Aboriginal laws and customs to adjust and change after British sovereignty was asserted over Australia. In my opinion, it would be a mistake to ignore the possibility of new aspects of traditional rights and interests developing as part of Aboriginal customs not envisaged, or even imagined, in the times preceding settlement.'

216 *Yorta Yorta*, above n93 at 555 (Gleeson CJ, Gummow and Hayne JJ).

## 6. *Conclusion*

There are no easy answers and few clear legal propositions that can be determined when addressing basic questions about Indigenous peoples and sovereignty in nations like Australia, Canada, the United States and New Zealand. So where does this uncertainty leave us? As the Chief Justice of New Zealand, Dame Sian Elias, recently suggested (when talking about changing conceptions of parliamentary sovereignty) ‘pretty much where we have always been. But, freed from a theory that does not fit, we are better able to confront directly the difficult issues thrown up at the edges of law. We can consider them on the basis of reason and principle, through the processes of democracy and under the security of law.’<sup>218</sup>

In Australia, we can do the same. The concept of sovereignty will remain a central part of ongoing debate about Australia’s history and future. However, it does not pose a roadblock to moving forward with innovative new settlements, including the idea of a treaty or treaties. Using Australia’s democratic processes and law as an anchor, the following aspects of the Australian public law system collectively demonstrate how issues of unfinished business can be tackled with reason and principle:

1. **The acquisition of external or State sovereignty over the Australian continent appears to be a matter for international law.** It is up to Indigenous peoples and Australian governments to make their decisions about where they go in that regard. There are limits to what can be asked of each of our domestic public law institutions (courts, parliament and government) and it is always important to consider which questions we appropriately address to which institutions.
2. **The consequences of that acquisition of sovereignty, for the internal distribution of authority and rights, is a matter for the domestic legal and political sphere.** This much is established by the High Court’s decision in *Mabo (No 2)*.
3. **Whether popular sovereignty is now the intellectual underpinning to Australian constitutionalism or not, there is one undeniable fact: the**

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217 Langton & Palmer, above n31 at 43. Later (at 48–49), after surveying a range of modern agreement making processes in Australia, they conclude that ‘the assertion of national sovereignty is contested by the assertion and exercise of Indigenous governance and customary authority. Indigenous forms of political legitimacy or jurisdiction compete both symbolically and politically with the declared nation-state sovereignty, which is often weakly exercised in the territory of the people, especially in remote areas. Some agreements in Australia today, while not treaties in the conventional sense of the term used in current international law, have effected mutual recognition of the respective jurisdictions of the Indigenous and settler parties, with the express purpose of constituting jural, political and economic relationships based in an agreed distribution of public and private rights in land.’

218 Elias, above n194 at 162.

**Constitution can be changed by a referendum of the people.** The Court can have its say on Indigenous sovereignty (and to some extent it has, though many would say without the necessary detailed justification). Despite this, s 128 of the Constitution ultimately puts the terms of the Australian settlement into the hands of its politicians and people. This shifts our focus from a legal conception of sovereignty towards a political one.<sup>219</sup>

4. **Canada and New Zealand show that in countries like Australia debates over sovereignty can go on (and given its elusive nature, they will go on) and in the meantime the choice can be made to re-negotiate or revisit the fundamental settlement between peoples.** Australia can get on with tackling unfinished business and the terms and conditions of co-existence. Sovereignty in the statist external sense of the word need not be seen as an impediment to treaty-making in modern-day Australia.

With these principles in mind, it is possible to move forward to consider other questions. These might include whether a treaty or like instrument is an appropriate way of achieving reconciliation between Indigenous and other Australians, and, if that is the case, the form any such treaty should take. As in Canada and New Zealand, Indigenous people in Australia can continue to develop their own conceptions of sovereignty or self-determination, while these and other questions are addressed. This process will include how peoples organise themselves, how they explain themselves to the rest of the world, how they develop strategies for community development in the short, medium and long-term and how they work internally on developing their own systems of good governance.

If Indigenous peoples in Australia do decide to go down the treaty path, they will make their own choices about the legal and political basis upon which they want to negotiate a fundamental agreement or agreements with the rest of the Australian community. Australian governments also have a range of options in deciding on what basis, if any, to conclude such agreements. As political decisions for the would-be negotiating parties, they are beyond the scope of this article. Instead, we have sought to explain the public law context in which these choices can be made and to explore sovereignty as an alleged constitutional impediment to that choice being made.

The treaty debate is about political agreements which have legal consequences. What these agreements are called and how they are conceptualised are some of the issues for debate. Indigenous peoples and governments need to define for themselves the respective bases upon which they negotiate. Treaties or like agreements can be reached even if the parties might agree to disagree on the

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219 William Jonas, 'Recognising Aboriginal Sovereignty — Implications for the Treaty Process' (Paper presented at the ATSIC National Treaty Conference, Canberra, 27 August 2002). See <[www.treatynow.org/docs/jonas.doc](http://www.treatynow.org/docs/jonas.doc)> (23 December 2003).

conceptual basis of their discussions.<sup>220</sup> Indeed, the parties might decide to undertake treaty discussions by putting to one side any questions of sovereignty.<sup>221</sup> Whether sovereignty is addressed or not, any settlements, treaties or agreements resulting from a negotiating process can be given legal effect, in very explicit terms if necessary. On our analysis, Australian public law, and specifically the notion of sovereignty, puts few, if any, constraints on the outcomes that can be reached. The greater challenge lies in the ability of Australians to imagine new paths for moving forward and in our willingness to overcome any political obstacles.

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220 See also Oliver's comments on MacCormick's analysis of the relationship between Member States and the European Union at above n7. In the same passage he continues: 'Even if both parties to the relationship have come out and staked claims to having the last word, it may be that the closest we can come to describing the situation accurately is to say, as MacCormick does regarding Member States and the European Union, that from the perspective of the UK (or Germany) sovereignty (or supremacy) of Parliament (or the Constitution) is claimed, whereas from a European perspective supremacy of European law is taken for granted.' See also the comments of the Canadian Royal Commission on Aboriginal Peoples, above n124.

221 Michael Mansell has advocated a compromise solution of this kind: 'While the past spells out the basis of current and future entitlements, it has to be recognised that the nature of a treaty involves compromise. The past rights we had opens up the possibilities for our future, provides relevant information on which to base decisions and creates a political base from which a treaty can be entered into. The past is not a yoke around our neck: it opens our minds to the possibilities and gives our cause a focus. This point applies equally to governments, not just Aborigines. The competing claims and positions on sovereignty could be dealt with in a way that enables both sides to maintain their high moral positions while advancing an agreement.' Michael Mansell, 'A Treaty as a Final Settlement?', speech delivered at Murdoch University Treaty — Advancing Reconciliation Conference, Perth, 27 June 2002: <[www.treaty.murdoch.edu.au/Conference%20Papers/Michael%20Mansell.htm](http://www.treaty.murdoch.edu.au/Conference%20Papers/Michael%20Mansell.htm)> (16 August 2004).



# *History, Memory and Judgment: Holocaust Denial, The History Wars and Law's Problems with the Past*

LAWRENCE MCNAMARA\*

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## *Abstract*

Australia's current 'History Wars' raise difficult historiographical questions about establishing what happened in the past. In light of the courts' often important engagements with history, these questions have special significance for the law. Using the *Irving v Lipstadt* libel case regarding Holocaust denial and the possibility of a defamation action in the History Wars — both allege deliberate fabrication and distortion — this article explores how history and historians are subjected to legal judgment. It identifies as key considerations the methodological differences between and within law and history; the use and misuse of postmodernism and relativism; and the role of law and legal judgment in the transmission and construction of national memory.

## **1. Introduction**

*Remembering the past and writing about it no longer seem the innocent activities they once were taken to be.*

PETER BURKE<sup>1</sup>

Since the election of the conservative Howard government in 1996 and the Prime Minister's rejection soon after of the 'black armband' view of history, public intellectual life in Australia has seen the emergence of what have become known

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<sup>1</sup> Peter Burke, 'History as Social Memory' in Thomas Butler (ed), *Memory: History, Culture and the Mind* (1989) 97 at 98.

as the ‘History Wars’.<sup>2</sup> These have especially centred on the nature of the British colonial project and the place of indigenous peoples in the past and present of the nation. The protagonist historians do not shy away from the battles: the claims are not about nuances of interpretation but concern frankly stated allegations that, driven by self-interest and political agendas, academics have variously suppressed, manipulated, distorted and fabricated the historical record.

The disputes between historians raise difficult questions regarding how one goes about establishing what happened in the past, both as it pertains to colonialism and as it concerns historical scholarship more generally. These questions pervade not only the discipline and practice of history but often extend their reach into law. One of Australia’s leading genocide scholars, Professor Colin Tatz, recently argued that, in the absence of a prosecution for genocide, the best way to settle the disputes of the History Wars and to find out about the past was to use the laws of defamation.<sup>3</sup> This view is not shared by one key player in the History Wars — Henry Reynolds has expressed his unwillingness to proceed to court, arguing that it ‘is not the place where ideas should be fought out’.<sup>4</sup> Tatz, however, saw parallels and merit in the English libel action where David Irving, a Briton whose historical research on the Third Reich had been widely published and well-received for over 30 years, unsuccessfully sued American academic Deborah Lipstadt and her publishers over her claims that he was a Holocaust denier.<sup>5</sup>

Certainly Australians should engage with their history. But they should do it in an appropriate place: if not a criminal court, then in the next best venue, a civil court, under strict but somewhat more flexible forensic rules, à la the David Irving trial.<sup>6</sup>

The *Irving* case has been among the most recent matters to attract widespread attention, but the intersections of law and history have been dealt with in the courts in many other circumstances. They have been at the heart of prosecutions for

2 See generally, Stuart Macintyre & Anna Clark, *The History Wars* (2003). Dirk Moses uses the term ‘culture wars’: ‘Revisionism and Denial’ in Robert Manne (ed), *Whitewash: On Keith Windschuttle’s Fabrication of Aboriginal History* (2003) at 337.

3 Colin Tatz, *With Intent to Destroy: Reflecting on Genocide* (2003) at 136; see also Tatz’s letter to the editor, *Sydney Morning Herald* (27 November 2002) at page 14. A relentless advocate for the recognition and redress of historical injustice, Tatz appears to take the position that a court would find the latest historical attacks to be without foundation.

4 Quoted in Bernard Lane, ‘History Breakers’ *The Weekend Australian* (28 December 2002) at 11.

5 *Irving v Penguin Books Ltd & Deborah Lipstadt* [2000] EWHC QB 115 (hereinafter *Irving* or *Irving v Lipstadt*). For a comprehensive and very readable discussion of the case, see DD Guttenplan, *The Holocaust on Trial: History, Justice and the David Irving Libel Case* (2001). Lipstadt recounts and reflects on her experiences in Deborah Lipstadt, ‘Perspectives from a British Courtroom: My Struggle with Deception, Lies and David Irving’ in John K Roth & Elisabeth Maxwell (eds), *Remembering for the Future: The Holocaust in an Age of Genocide, Vol 1* (2001) 769; Deborah Lipstadt, ‘Irving v Penguin UK and Deborah Lipstadt: Building a Defense Strategy’ (2002) 27 *Nova Law Review* 243. Two of the five expert witnesses for the defence have written books in English, though these predominantly go to their refutation of Irving’s position: Richard Evans, *Telling Lies About Hitler: The Holocaust, History and the David Irving Trial* (2002); Robert Jan van Pelt, *The Case for Auschwitz: Evidence from the Irving Trial* (2002). The decision was upheld on appeal: *Irving v Penguin Books Ltd & Deborah Lipstadt* [2001] EWCA Civ 1197.

6 Tatz, above n3.

genocidal or mass murder in numerous countries.<sup>7</sup> In Canada and the United States, disputes over indigenous land and treaty rights have involved extensive historical analysis.<sup>8</sup> Australian courts considered war crimes in the prosecution of Ivan Polyukovich and matters relating to genocide in *Nulyarimma v Thompson*.<sup>9</sup> In *Cubillo v The Commonwealth* the Federal Court adjudicated civil claims regarding the Stolen Generations.<sup>10</sup> It is, however, native title litigation that has in this jurisdiction most often seen the courts address historical evidence and the colonial past.<sup>11</sup> It is in the native title context that the law been most criticised for its shortcomings in dealing with history. As Christine Choo has argued, 'It appears that the legal profession has much to learn about history as a professional discipline, and the value of the processes, method and analysis techniques of professional historians ....'<sup>12</sup> A key criticism has been the inability of the courts

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- 7 See generally, Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997); this is a revised version of Osiel's, 'Ever Again: Legal Remembrance of Administrative Massacre' (1995) 144 *University of Pennsylvania Law Review* 463.
- 8 For example, *Delgamuukw v The Queen* [1997] 3 SCR 1010; *Mille Lacs Band of Chippewa Indians v Minnesota* 861 F Supp 784 (1994). Jonathon D Martin provides a short review of the range of matters where historians have appeared as expert witnesses in the United States: 'Historians at the Gate: Accommodating Expert Historical Testimony in Federal Courts' (2003) 78 *New York University Law Review* 1518 at 1519–20.
- 9 *Nulyarimma v Thompson* (1999) 96 FCR 153; *Re Thompson; Ex parte Nulyarimma* (1998) 148 FLR 285. *R v Polyukovich* (SA Supreme Court, Cox J, 18 May 1993) is chronicled by David Bevan, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution* (1994). The High Court's decision in *Polyukovich v The Commonwealth* (1991) 172 CLR 501 dismissed a challenge to the validity of the war crimes legislation.
- 10 This article will not address the *Cubillo* cases or the Stolen Generations more generally, primarily because they are concerned with a later period than the 19<sup>th</sup> century colonialism that is the subject of the History Wars. I would, however, think that the arguments advanced in this article would be consistent with the inquiry, litigation and debates related to the Stolen Generations. If pursuing that thesis, useful starting points would include: Human Rights and Equal Opportunity Commission, *Bringing Them Home : Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997); the decisions in the action by Lorna Cubillo and Peter Gunner: *Cubillo v Commonwealth* (1999) 89 FCR 528; *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1; *Cubillo v Commonwealth* (2001) 112 FCR 455; Peter Read, 'The Stolen Generations, the Historian and the Court Room' (2002) 26 *Aboriginal History* 51; Anna Haebich, '"Between Knowing and Not Knowing": Public Knowledge of the Stolen Generations' (2001) 25 *Aboriginal History* 70; and Roseanne Kennedy, 'Stolen Generations Testimony: Trauma, Historiography and the Question of "Truth"' (2001) 25 *Aboriginal History* 116.
- 11 See most notably *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (hereinafter *Mabo*); *Wik Peoples v Queensland; Thayorre People v Queensland* (1996) 187 CLR 1 (hereinafter *Wik*); the different proceedings in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538; (2001) 110 FCR 244; [1998] FCA 1606.
- 12 Christine Choo, 'Historians and Native Title: The Question of Evidence' in Diane Kirkby & Catharine Coleborne (eds), *Law, History, Colonialism: The Reach of Empire* (2001) 261 at 272. For a critique of the use of evidence in particular cases see, for example, Alexander Reilly, 'The Ghost of Truganini: Use of Historical Evidence as Proof of Native Title' (2000) 28 *Federal Law Review* 453; Simon Young, 'The Trouble with "Tradition": Native Title and the Yorta Yorta Decision' (2001) 30 *University of Western Australia Law Review* 28; Roderic Pitty, 'A Poverty of Evidence: Abusing Law and History in Yorta Yorta v Victoria' (1999) 5 *Australian Journal of Legal History* 41; Jonathon Fulcher, 'Sui Generis History? The Use of History in Wik' in Graham Hiley (ed), *The Wik Case: Issues and Implications* (1997) 51.

to grasp the necessarily interpretive dimension to historical scholarship, which is perhaps what prompted Reilly to emphasise the responsibility and care owed by the courts to ‘pay attention to the power and apparent conclusiveness of historical narratives’.<sup>13</sup> And beyond an awareness of interpretation lies the difficult terrain of the postmodern methodological challenge to both law and history that in its strongest form arguably denies the possibility of truth and objectivity in either discipline and dictates instead an anti-foundationalist relativism.<sup>14</sup>

While engagements between law and history may be fraught with difficulties, the often substantial consequences of litigation (if nothing else) point to the need for lawyers to develop a richer appreciation of the disciplines’ interactions. It is to this end, and with Tatz’s invocation of legal action between the Australian historians in mind, that my aim in this article is to examine the relationships at play between law and history in circumstances where historians might commence a defamation action. The History Wars, viewed against the background of the *Irving* case, provide an occasion for exploring what happens when historians are subjected to legal judgment. The defamation possibilities warrant inquiry not simply on their own terms, in light of *Irving*, but also for the ways they might inform the much-needed conversations about law and its often important dealings with the past.

The inquiry begins in Part Two by sketching the context, the content, and the stakes in the History Wars. As well as explaining the Australian disputes at issue and the material that could be the subject of a defamation action, this Part outlines

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13 Reilly, above n12 at 474. The interpretive issue has been the focus of much attention and criticisms have also been made regarding the courts’ use of history in Canadian litigation: Patricia Wallace, ‘Grave-Digging: The Misuse of History in Aboriginal Rights Litigation’ (1999) 30 *University of Miami Inter-American Law Review* 489; John G Reid, William C Wicken, Stephen E Patterson & DG Bell ‘History, Native Issues and the Courts: A Forum’ (1998) 28 *Acadiensis* 3; GM Dickinson & RD Gidney, ‘History and Advocacy: Some Reflections on the Historian’s Role in Litigation’ (1987) 68 *Canadian Historical Review* 576; Donald Bourgeois, ‘The Role of the Historian in the Litigation Process’ (1986) 67 *Canadian Historical Review* 202; Robin Fisher, ‘Judging History: Reflections on the reasons for judgment in *Delgamuukw v BC*’ (1992) 95 *BC Studies* 43. Heather Goodall provides the inverse to the criticism of lawyers’ poor grasp of history, arguing that historians need to better understand the nature of legal proceedings and the limitations they place on historians’ representations of the past: ‘“The Whole Truth and Nothing But ...”: Some Intersections of Western Laws, Aboriginal History and Community Memory’ in Bain Attwood & John Arnold (eds), *Power, Knowledge and Aborigines* (1992) 104. Richard Evans (in the context of war crimes trials) also makes a case for historians to better understand the law: ‘History, Memory, and the Law: The Historian as Expert Witness’ (2002) 41 *History and Theory* 326. On the role of historians in native title cases, see generally Ann Curthoys, ‘The Proof of Continuity of Native Title: An Historian’s Perspective’ in Anne Pyle (ed), *Land, Rights, Laws: Issues of Native Title*, Issues Paper No 18 (1997); David Ritter, ‘Whither the Historians? The Case of Historians in the Native Title Process’ (1998/1999) 4(17) *Indigenous Law Bulletin* 4. On interpretation as an essential aspect of history, see, for example, Edward H Carr, *What is History?* (1961) especially chapter one.

14 For a brief review of the issues in the context of law and history relationships, see Daniel Farber, ‘Advocacy and Expertise: The Role of the Expert Witness – Adjudication of Things Past: Reflections on History as Evidence’ (1998) 49 *Hastings Law Journal* 1009 at 1019–1027. The question of whether postmodernism is as strongly relativist as its critics would suggest is dealt with below: see Part 4(B)(i).

the conceptual framework that will be used to explore the connections between law, history and memory. It highlights especially the significance of historical narrative for national identity and how the acceptance of a history can be embodied as memory to legitimise legal, political, economic and social relations. Part Three turns to the operation of defamation laws, first explaining the *Irving* case before considering how an action between the Australian historians could play out. It will be argued here that defamation mediates a unique encounter between law and history because it focuses on the plausibility of alternative historical narratives, rather than the determination of a single historical narrative that is required by native title or genocide actions. It simultaneously exhibits perhaps the most important features of those more familiar actions — the authority of a legal narrative. Parts Four and Five critically examine that authorised narrative of plausibility. They identify as key considerations the methodological differences between and within law and history; the use and misuse of postmodernism and relativism; and the role of law and legal judgment in the transmission and construction of national memory. The key contention of the paper, and the core focus of the conclusion, is that while a defamation action is not an appropriate battlefield for the History Wars, defamation laws are amenable to an evaluation of history in a unique manner. In a comparative framework, their consideration might help to provide a richer understanding of how more familiar legal actions carry consequences far beyond the rights that are the immediate subject of dispute, and how history, memory and judgment play their parts when law encounters the past.

## 2. *The History Wars*

The British claimed sovereignty over Australia under the international law doctrine of terra nullius — the land, it was said, was empty and belonged to nobody. In spite of the presence of people, it was to be treated as if there was no-one there at all because the Aborigines were viewed as ‘so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society.’<sup>15</sup> It was not conquest of a peopled land but peaceful settlement of an empty place. Until the 1970s, this legal narrative was typically reflected in historical narrative; histories of Australia generally began with the arrival of the British and indigenous people played little role in the national story, except perhaps as a doomed and dying race.<sup>16</sup>

Historians Henry Reynolds and Lyndall Ryan were among those who challenged this view of colonisation.<sup>17</sup> Reynolds, in particular, argued that

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15 *In re Southern Rhodesia* [1919] AC 211 at 233–234, cited in *Mabo* (1992) 175 CLR 1 at 39 (Brennan J).

16 WEH Stanner, *After the Dreaming* (1969) at 22–24; Richard Broome, ‘Historians, Aborigines and Australia: Writing the National Past’ in Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (1996) 54.

17 See especially Henry Reynolds, *The Other Side of the Frontier* (first published 1981; republished 1982); *Fate of a Free People* (1995); Lyndall Ryan, *The Aboriginal Tasmanians* (first published 1981; 2<sup>nd</sup> ed, 1996). I will use Reynolds and Ryan throughout as representative of a number of historians.

‘settlement’ involved systematic violence against and retaliation by the Aboriginal population, with a resulting death toll of 20 000 across Australia.<sup>18</sup> This picture of conquest and violent dispossession underpinned the judgment of the High Court in the 1992 *Mabo* case when it was held that where indigenous rights to land had not yet been extinguished, those rights must still be recognised. Justices Deane & Gaudron drew on the work of Reynolds in reaching their conclusion:

[T]he conflagration of oppression and conflict ... was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a legacy of unutterable shame .... [T]he oppression and, in some areas of the continent, the obliteration or near obliteration of the Aborigines were the inevitable consequences of their being dispossessed of their traditional lands .... The acts and events by which that dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and retreat from, those past injustices.<sup>19</sup>

The Court’s recognition of native title and the disowning of the terra nullius doctrine was a watershed in Australian law and politics.

For much of the last eight years, however, there has been an effort to recharacterise the nation’s past and the way it should be viewed. Several months after his government took power in 1996, the Prime Minister stated to the House of Representatives that while in a personal capacity he regretted ‘the appalling way in which members of the indigenous community have been treated in the past and [believed] the truth about what occurred in our history should be taught in an unvarnished fashion’, he ‘strongly rejected notions of intergenerational guilt’.<sup>20</sup> The contemporary historical narrative did not itself seem to be under fire as a matter of record and would seem to be at least part of what Mr Howard had in mind when he referred to and accepted the ‘appalling’ treatment of the indigenous community in the past and the ‘black marks upon our history’.<sup>21</sup> However, the Prime Minister did not see that version of the past as problematic for the present:

I profoundly reject ... the black armband view of Australian history. I believe the balance sheet of Australian history is a very generous and very benign one. I think we have been too apologetic about our history in the past.<sup>22</sup>

18 Reynolds, *Other Side of the Frontier*, above n17 at 122: ‘For the continent as a whole it is reasonable to suppose that at least 20 000 Aborigines were killed as a direct result of conflict with the settlers.’ See also Richard Broome, *Aboriginal Australians: Black Response to White Dominance 1788–1980* (1982) at 51 where he makes the same estimate relying in part upon some of Reynolds’ earlier work.

19 *Mabo*, above n11 at 104, 106, 109.

20 Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)*, 30 October 1996 at 6158.

21 *Ibid.*

22 *Ibid.* Labor’s Gareth Evans, MHR, responded critically to the ‘Black Armband’ argument: at 6166. Howard drew the ‘balance sheet’ idea from Geoffrey Blainey: Macintyre & Clark, above n2 at 128–132. See also Howard’s comments on the ABC’s *Four Corners* program in 1996 that ‘he would “like to see [Australians] comfortable and relaxed about their history”, and insisted that it was “very important” that Australians did not “spend [their] lives apologising for the past”’: quoted in Bain Attwood & SG Foster, ‘Introduction’ in Bain Attwood & SG Foster (eds), *Frontier Conflict: The Australian Experience* (2003) 1 at 13.

This is the background against which the current debates should be seen, though now, some years on, the ground has shifted quite fundamentally. The core questions have for some time been about how the nation should consider the events of the past, weighing up the good against the bad, and considering whether guilt, shame, responsibility or sorrow should attach to those events. But, very recently, this has changed. In the disputes of the History Wars, it is suggested that some events have been wrongly accepted as true and, in fact, never happened at all.

#### A. *Windschuttle: The Fabrication of Aboriginal History*

These new debates have been played out in the disputes between former journalist and academic Keith Windschuttle and, especially, historians Reynolds and Ryan. In November, 2002, Windschuttle published *The Fabrication of Aboriginal History, Volume 1* where he vociferously criticised what he saw as a popular version of Australian history that portrayed ‘widespread mass killings on the frontiers of the pastoral industry that not only went unpunished but had covert public support’ and constitutes genocide.<sup>23</sup> This, he argues, is incorrect: ‘the story the historians have constructed does not have the empirical foundations they claim.’<sup>24</sup>

Windschuttle does not stop at critique; he also offers a ‘counter-history’.<sup>25</sup>

The British colonization of this continent was the least violent of all Europe’s encounters with the new world. It did not meet any organised resistance .... The notion of sustained ‘frontier warfare’ is fictional.<sup>26</sup>

There were no great numbers of killings in Tasmania, said Windschuttle. Ryan’s estimate of 700<sup>27</sup> is wrong, as are Reynolds’ claims about the inherent uncertainty in calculating the original indigenous population and the deaths from violence<sup>28</sup> and later writing that Windschuttle claims (arguably inappropriately) ‘implies the total was more than a thousand’.<sup>29</sup> Instead, there is little uncertainty and it is not a

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23 Keith Windschuttle, *The Fabrication of Aboriginal History, Volume 1* (2002) at 2. This work expanded substantially the arguments he had run in separate pieces in the conservative journal *Quadrant*: Keith Windschuttle, ‘The Myths of Frontier Massacres in Australian History: Part 1 – The Invention of Massacre Stories’ (2000) 44(10) *Quadrant* 8; ‘The Myths of Frontier Massacres in Australian History: Part 2 – The Fabrication of the Aboriginal Death Toll’ (2000) 44(10) *Quadrant* 17; ‘The Myths of Frontier Massacres in Australian History: Part 3 – Massacre Stories and the Policy of Separatism’ (2000) 44(10) *Quadrant* 6. The tone of the criticism was described by Attwood as ‘irrationally bellicose’, while Bolton said that Windschuttle ‘writes with the belligerence of one who believes himself in combat with a monstrous orthodoxy that is stifling debate’: Bain Attwood, ‘Behind the Historian’s Sigh’ *The Australian Financial Review* (22 February 2002) at page 6 of *Weekend Review*; Geoffrey Bolton, ‘Black Lives Lost ... And Found’ *Sydney Morning Herald* (14 December 2002) at page 10 of *Spectrum*. Windschuttle is not alone in criticising popular historians; Reynolds, *Fate of a Free People*, above n17 at 77, is also critical of the misuse of academic historians’ work.

24 Windschuttle, *Fabrication*, above n23 at 3.

25 Id at 3.

26 Id at 4.

27 Ryan, above n17 at 174.

28 Reynolds, *Fate of a Free People*, above n17 at 75–76.

29 Windschuttle, *Fabrication*, above n23 at 351–353, 358–359.

matter of estimation: there are, he claims, 118 ‘plausible killings’.<sup>30</sup> The indigenous population was certainly decimated but if blame is to rest anywhere, it is with the indigenous people themselves: ‘It was a tragedy the Aborigines adopted such senseless violence. Their principal victims were themselves.’<sup>31</sup> The aims of colonial military actions were ‘to impose law and order’ and ‘to save the Aborigines from the consequences of their own actions’.<sup>32</sup> Moreover, by virtue of their ‘abuse and neglect’ of their women, ‘we should see them as active agents in their own demise’.<sup>33</sup>

But the History Wars are not about interpretation alone. They are about the strategies and motives of the protagonists. Windschuttle claims the historians have been deliberately deceptive, ‘only select[ing] evidence that supports their cause and [they] either omit, suppress or falsify the rest’; examples that do not support their theses are ‘simply airbrushed ... out of history’.<sup>34</sup> Windschuttle also perceives a systemic element to the contemporary scholarship. He describes an ‘orthodoxy’ among a large group of authors, though that ‘is not to say that they agree on every point’ and ‘nor is it to allege a conspiracy’.<sup>35</sup> However, he does claim that there is an inappropriate and highly political dimension to the development and purveying of the history that has been written: ‘There is a world of difference between historians who go to the past to *investigate* the evidence they have about their subject and those who go to *vindicate* a stand they have already taken.’<sup>36</sup> As evidence of the latter stance and politicisation of history, he points to Reynolds’ statement in *The Other Side of the Frontier* that ‘the book was not conceived, researched or written in a mood of detached scholarship’ and that the issues it deals with mean that ‘it is inescapably political’.<sup>37</sup> Windschuttle argues that such an approach has had far-reaching effects:

While the existence of a particular interpretation is not uncommon, what makes the Tasmanian orthodoxy more unusual than most is that it has overt political objectives. Rather than adopt the traditional stance of the academic historian and profess at least a modicum of detachment from their subject, [they] quite openly state that their objectives are to serve the interests of the descendants of the Tasmanian Aborigines. In particular, they seek to justify “land rights” and the transfer of large tracts of land to the descendants .... The orthodoxy has [succeeded] because people have accepted its account of Tasmanian history as largely true.<sup>38</sup>

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30 Id at 397; see 387–397 for his table of the analysis. In response to some criticisms of his work he has revised the table slightly. At 1 March 2003 he placed the figure at 120: <<http://www.sydneyline.com/Table%20Ten%20revised.htm>> (13 April 2004).

31 Windschuttle, *Fabrication*, above n23 at 130.

32 Id at 195.

33 Id at 386.

34 Id at 403, 114; see also 178, 367.

35 Id at 26–28.

36 Id at 402.

37 Reynolds, *Other Side of the Frontier*, above n17 at 1; see also Windschuttle, *Fabrication*, above n23 at 5–7.

38 Windschuttle, *Fabrication*, above n23 at 28.



This systemic element extends beyond the uniformity of the project to the motives underlying it. The reasons behind this ‘widespread corruption of Aboriginal history’ are found in the historians’ self-interest; either as the interests of ‘those academics and politicians, black and white, who have built their careers from [these] shoddy materials’, or as a religious struggle between sin and redemption, where the ‘historians have set themselves up as prophets’ and ‘will withhold their blessing until the nation recognises and confesses its mortal sin’.<sup>39</sup> In the end, the historians’ orthodoxy has intentionally misled the nation, building ‘mythologies designed to create an edifice of black victimhood and white guilt’.<sup>40</sup>

### **B. The Response to Windschuttle**

Windschuttle’s position attracted attention when first published in the conservative journal *Quadrant* in 2000.<sup>41</sup> A forum at the National Museum of Australia in December 2001 produced a major collection of the issues and included a paper by Windschuttle.<sup>42</sup> After *Fabrication* was launched, the public profile of the debates was remarkable.<sup>43</sup> In the seven weeks that followed there were over 25 editorial or op-ed pieces in the three broadsheet newspapers in Sydney and Melbourne, along with countless letters to the editors, numerous interviews in the broadcast media, and several public debates around the country. Within a year, two books were published that aimed at a popular, rather than academic, audience. Macintyre and Clark’s *The History Wars* sought to frame the current debates in light of earlier disputes about Australian history and historians.<sup>44</sup> Robert Manne’s edited collection, *Whitewash: On Keith Windschuttle’s Fabrication of Aboriginal History*, brought together scholars from history and other disciplines with the aim of devoting enough space to the issues that there might be some resolution of the arguments in ‘a thorough, expert discussion of Windschuttle’s case’.<sup>45</sup>

The responses in *Whitewash* ranged from more general considerations of the context and significance of Windschuttle’s arguments to systematic treatment of discrete parts of his thesis and analysis. The contributions from Reynolds and Ryan were very much concerned with his attacks on them and in parts were arguably as vitriolic as the attack they were responding to, alleging to various degrees that Windschuttle himself had engaged in distortion, manipulation and fabrication in his writing.<sup>46</sup> The subtitle of the book — *On Keith Windschuttle’s Fabrication of Aboriginal History* — has no inverted commas around the last four words and, whether intentionally or otherwise, it appears, in light of the book’s content, as a

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39 Id at 403, 404, 414–415.

40 Id at 10.

41 Windschuttle, *Quadrant* articles, above n23.

42 Attwood & Foster (eds), *Frontier Conflict*, above n22.

43 For a discussion of why the book received the attention it did, see Manne’s introduction to *Whitewash*, above n2 at 10–11, where he argues that *The Australian* newspaper was especially responsible (or culpable).

44 Macintyre & Clark, above n2.

45 Manne, above n2 at 11.

46 See for example Henry Reynolds, ‘Terra Nullius Reborn’ in Manne (ed), *Whitewash*, above n2 at 109, 113, 122, and arguably 127 and 133; Lyndall Ryan, ‘Who is the Fabricator?’ in Manne (ed), *Whitewash*, above n2 at 230, 233.

cleverly worded allegation against Windschuttle. Further, among the issues that regularly arose was Windschuttle's status as a writer on Tasmanian or Aboriginal history. He had published academic work on the media but, some of the combatants maintained, he was 'a freelance writer' or a journalist and not a historian.<sup>47</sup>

The revisionist nature of Windschuttle's work was called into question. Was this an exercise in denialism characterised by either an unconscious psychological defence or a conscious bad faith (both more familiar to analyses of Holocaust denial), or was it a genuine exercise in historical scholarship and appropriately labelled as revisionism? Reynolds and Ryan are themselves viewed as revisionists in the literature, and a number of contributors to the debate accord Windschuttle the same status, though not necessarily the same success.<sup>48</sup> But the labels are not so simply applied. Dirk Moses examines carefully the ideas of revisionism and denialism, arguing that:

[r]evisionism of the denialist variety occurs when conservatives convince themselves that their cherished ideas and beliefs remain viable and credible despite being unmasked as morally and factually compromised legends.<sup>49</sup>

The denialist perspective can persist because,

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47 On Windschuttle's historian status, see Macintyre & Clark, above n2 at 15–16. Macintyre rejects the status criticism as an unpersuasive and inappropriate way to respond to Windschuttle's critique: 'On "Fabricating" History: History, Politics and the Philosophy of History', Paper presented to Blackheath Philosophy Forum: *History, Politics and the Philosophy of History* (1 March 2003) <<http://evatt.labor.net/au/publications/papers/92.html>> (20 June 2004). On Windschuttle being described as a journalist, see generally Attwood & Foster, above n22 at 18, or for examples, see Bain Attwood, 'Historiography on the Australian Frontier' in Attwood & Foster (eds), *Frontier Conflict*, above n22, 169 at 175; Dirk Moses, 'Rendering the Past Less Unpalatable', *The Australian* (13 January 2003) at page 9. Lyndall Ryan describes him as a journalist in 'Waterloo Creek, Northern New South Wales, 1838' in Attwood & Foster (eds), *Frontier Conflict*, above n22, 33 at 34, but as a historian in her later piece in *Whitewash*, above n46 at 234. Windschuttle's supporters among the opinion columnists tend (unsurprisingly) to describe him as a historian — for instance: Paul Sheehan, 'Our History, Not Rewritten but Put Right', *Sydney Morning Herald* (25 November 2002) at page 11; Miranda Devine, 'The Book Launch, Bluster and Backdowns', *Sydney Morning Herald* (19 December 2002) at page 17; and, not quite as supportive, Gerard Henderson, 'Where Are the True Blue Conservatives in this Country?', *Sydney Morning Herald* (24 December 2002) at page 9. Of the historians, Geoffrey Bolton, 'Black Lives Lost ... and Found', *Sydney Morning Herald* (14 December 2002) at page 10 of *Spectrum*, refers to him by implication as a historian, as does Shayne Breen, somewhat deprecatingly, in 'Reinventing Social Evolution' in Manne (ed), *Whitewash*, above n2 at 155: 'as every historian except Windschuttle knows ...'. Windschuttle has responded to these criticisms, stating that he was a postgraduate history student at Sydney University for six years: 'Letter to the Editor', *The Australian* (15 January 2003) at page 10. The issue of status is paralleled in *Irving v Lipstadt* where Richard Evans' argued in his expert witness report that Irving did not deserve to be called a historian: *Irving v Lipstadt* at [5.8].

48 On Reynolds and Ryan as revisionists, see Attwood & Foster, 'Introduction' to *Frontier Conflict*, above n22 at 4; Bain Attwood, 'Historiography on the Australian Frontier', above n47 at 172. On Windschuttle as a revisionist, see Alan Atkinson, 'Historians and Moral Disgust' in Attwood & Foster (eds), *Frontier Conflict*, above n22, 113 at 113; Robert Manne, 'Blind to Truth, and Blind to History' *Sydney Morning Herald* (16 December 2002) at page 13; Mark Finnane, 'Counting the Cost of the "Nun's Picnic"' in Manne (ed), *Whitewash*, above n2, 299 at 308; Martin Krygier & Robert Van Krieken, 'The Character of the Nation' in Manne (ed), *Whitewash*, above n2 at 83.

of the operation of a psychic defence mechanism with which denialists protect themselves from the traumatic consequences of having to incorporate uncomfortable facts into a closed and rigid ideological framework .... The denier is unaware of his or her own repression, yet the uncomfortable facts will not go away.<sup>50</sup>

Alternative analyses of denial do not rely on a repression-style analysis but argue that it is a more consciously deceptive practice.<sup>51</sup> Moses is reluctant at this stage to call Windschuttle a denier, though says that his approach has so many parallels with denialism that 'the signs are not good'.<sup>52</sup>

### C. *What is at Stake*

The historians' disagreements are, most certainly, disputes about the past. But, just as much, these debates are also about the present. They directly concern legal and moral claims to political and economic justice for Aboriginal people. Implicit in Windschuttle's position is the disconnection between past and present: because there was no wrong done in the past there can be no historical foundation for claims to justice in the present.<sup>53</sup> This is the inverse of the implications in the Reynolds/Ryan position. However, a historical narrative as an explanation or representation of the past will not of itself resolve such claims. The Prime

49 Moses, above n2 at 342. The terms 'denial' and 'denialism' are used in this paper, though the terms 'negation' and 'negationism' are also used in the literature to consider these phenomena and strategies: see, for example, Alain Finkielkraut, *The Future of a Negation: Reflections on the Question of Genocide* (1998) [Trans: Mary Byrd Kelley; Introduction by Richard Golsan; First published as: *L'avenir d'une négation: Réflexion sur la question du génocide* (1982)]; Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001) uses both denial and negation.

50 Moses, above n2 at 340.

51 Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (1993) at 2: 'They aim to confuse the matter by making it appear as if they are engaged in a genuine scholarly effort when, of course, they are not.' Pierre Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust* (1992) constantly characterises denial with the terms mendacity, lies and dishonesty. David Fraser argues that deniers have a conscious strategy and a clear awareness of what they are doing: 'Memory, Murder and Justice: Holocaust Denial and the "Scholarship" of Hate' in Chris Cunneen, David Fraser & Stephen Tomsen, *Faces of Hate: Hate Crime in Australia* (1997) 162. Lawrence Douglas, above n49, refers to denial as, for example, 'hateful lies' (at 3) and 'hateful distortion' (at 256). See further, below, at Part 4(B)(ii).

52 Moses, above n2 at 363. See also Tatz, *With Intent to Destroy*, above n3 at 122–141. For Windschuttle's comment on *Whitewash*, see Keith Windschuttle, 'Whitewash confirms the Fabrication of Aboriginal History' (2003) 47(10) *Quadrant* 8.

53 This point is widely acknowledged: see, for example, Henry Reynolds, 'Historians at War (Book Review)', *The Weekend Australian*, 14 December 2002; James Boyce, 'Fantasy Island' in Manne (ed), *Whitewash*, above n2 at 64. This aspect of the dispute needs more and careful attention. Even if Windschuttle's version of history was agreed to be the correct one, this does not necessarily mean that there are no indigenous grounds for grievance: by some means or other, dispossession occurred. Indigenous people had sovereignty over and exclusive possession and use of the land. And then they did not. Were Windschuttle's version of events to prevail, it should not carry the consequence that there is no claim to justice in the present. For an eloquent articulation of this kind of position, see the comments made by Tim Rowse at the National Museum forum, quoted in Attwood & Foster, 'Introduction', above n22 at 22–23. More generally, the relationship between past injustice and present claims for reparations is explored in John Torpey (ed), *Politics and the Past: On Repairing Historical Injustices* (2003).

Minister's rejection of the 'black armband' view of history did not necessarily require a denial of the events of the past. Rather, events were placed into a different framework which might be thought of not as an historical narrative, but as a national narrative within which the past is embodied.<sup>54</sup>

By 'national narrative', I mean the ways the nation interprets and explains its identity. It includes the stories the nation tells about its values, about its past, and about the relationships between its citizens. It is national narrative that makes sense of and legitimises our legal, political, social and economic relationships. Accordingly, it can be mobilised or appealed to in support of a particular stance regarding those relationships. For example, Macintyre and Clark discuss how history has formed a part of this narrative and how different interpretations suggest different consequences:

The rewards for coming to terms with the past that [former Prime Minister] Paul Keating offered in his Big Picture included greater tolerance, increased autonomy, a deeper understanding of the land and its original inhabitants, an outward-looking, productive and self-confident nation. The risks of a Black Armband view of Australian history that [historian] Geoffrey Blainey identified included intolerance of old Australia, loss of sovereignty, the tying up of productive resources, disunity, pessimism and guilt. Both analyses of the options for Australia invested remarkable significance in the proper interpretation of its past.<sup>55</sup>

By framing and then rejecting the post-*Mabo* interpretation of the past as a 'black armband' view of history, the Howard Government sought first to identify negatively the national consequences of that legal watershed and then claimed it was remedying them through measures such as the amendment of the *Native Title Act* 1993 (Cth), winding back the recognition of indigenous claims to land and nullifying the protective effects of the *Racial Discrimination Act* 1975 (Cth) to do so.<sup>56</sup>

There is little disagreement among the warriors that the national narrative, embodying the past as it does, is also inherently tied to the History Wars in a moral sense. Windschuttle argues that 'the debate over Aboriginal history goes far beyond its ostensible subject: it is about the character of the nation and, ultimately, the calibre of the civilization Britain brought to these shores in 1788.'<sup>57</sup> Ann Curthoys describes it as 'a debate about the moral basis of Australian society.'<sup>58</sup> Krygier and Van Krieken restate the stakes in Windschuttle's terms, but distinguish their argument by noting the engagement that goes with it:

These are matters on which members of any nation are generally not detached, and rightly so. Most of us *care* deeply about both the character of the nation to which we belong and the calibre of the civilisation we embody. It is because we

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54 Bain Attwood (ed), *In the Age of Mabo*, above n16, explores the themes of history and nation as they relate to the place of indigenous peoples in Australia.

55 Macintyre & Clark, above n2 at 14–15.

56 *Native Title Amendment Act* 1998 (Cth).

57 Windschuttle, *Fabrication*, above n23 at 3.

58 Ann Curthoys, 'Constructing National Histories' in Attwood & Foster (eds), *Frontier Conflict*, above n22 at 185–186.

care that discussions of Aboriginal history under settler-colonisation have evoked the attention, not to mention the passions, sometimes hatreds, often pain, which they have in this country.<sup>59</sup>

This sense of moral engagement with history and its national significance has been addressed in both legal and historical literature through the concept of memory, and provides a useful bridge between the disciplines.

Collective memory was the phrase used by French sociologist Maurice Halbwachs in the 1920s when he argued that memories are constructed by social groups. Not all events move from the individual to the collective memory, but there are on occasions events that are 'imbued with the concerns, interests, passions of a nation' such that they become landmarks for individual and collective self-understanding.<sup>60</sup> As Osiel explains it, these affect the nation because they are events 'of such moral magnitude'.<sup>61</sup> The Holocaust has been a key site for examining the concept of collective memory. There, Henry Rousso says it

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59 Krygier & Van Krieken, above n48 at 82 (emphasis in original).

60 Maurice Halbwachs, *The Collective Memory* (1980) [Trans: Francis J Ditter Jr and Vida Yazdi Ditter; first published as *La Mémoire Collective* (1950)] at 58, 77.

61 Osiel, above n7 at 76. Osiel's identification of the moral element in the process seems quite right; even though Halbwachs, above n60 at 77, describes the events as 'temporal landmarks', it seems clear that he is also concerned with a moral sense of understanding. Similarly, Henry Rousso, *The Haunting Past: History, Memory and Justice in Contemporary France* (2001) [Trans: Ralph Schoolcraft; first published as *La Hantise du Passé* (1998)] at 3 highlights the 'system of moral references' that characterises memory. However, in saying that events have a moral magnitude and *thus* fire the nation's concern, Osiel's reading of Halbwachs should not be seen as suggesting some kind of causal precision. It may be better to see the relationship between memory and morality as a more interdependent one, which would be consistent with Osiel's own discussion of the complexities of the concept (see his n 28 at 18–19). That is, it may be that events occur but are not seen in a moral light (or a particular moral light) until much later, once the nation has a dominant moral framework to apply to them that supplants the views that prevailed at the time of the events. For example, indigenous dispossession was not necessarily widely seen in the Australian colonies at the time as a moral problem. There was most definitely an identifiable moral concern, evident for example from the 1837 Select Committee Report to the House of Commons that criticised the treatment of Aborigines, quoted in *Mabo* at 40 (Brennan J), or Blackstone's qualms about the acquisition of occupied lands, quoted in *Mabo* at 33 (Brennan J): 'But how far the seising on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.' But it was perhaps not until at least post-World War II that an ethic of racial equality became ascendant with judicial and legislative recognition of civil rights in the United States. This occurred later still in Australia with the amendment to the *Constitution's* s51(xxvi) race power in 1967 and the enactment of the *Racial Discrimination Act* (Cth) in 1975. Stanner, above n16 at 17, argued that until at least in 1945 one could live in Australia with a 19<sup>th</sup> century sense of racial structure, see it as natural and unalterable, and be quite comfortable as it went largely unchallenged. Hence, even though events may have been of moral note or moral debate at the time, the colonialist project is only recently one that could be characterised as having a socially dominant apprehension 'of moral magnitude'. If one is looking for an event that brought this about, the decision in *Mabo* perhaps serves as the relevant moral and temporal landmark: see, for example, Bain Attwood, 'Mabo, Australia and the End of History' in Bain Attwood (ed), *In the Age of Mabo*, above n16 at 100, where he discusses 'the sense of national crisis' brought on by the decision.

‘designates the living presence of the past’ or, to use Peter Novick’s explanation, it is about ‘the ways in which present concerns determine what of the past we remember, and how we remember it.’<sup>62</sup> It is transmitted, argues Burke, through oral traditions, written records, images, actions (such as the ANZAC Day holiday and the dawn service), and spaces (such as the national war memorial in Canberra) which attempt ‘to impose interpretations of the past, to shape memory’.<sup>63</sup> In Pierre Nora’s words, these are ‘*lieux de mémoire*’: ‘roots’ or ‘sites’ of memory.<sup>64</sup> In this way, writings of history become in western societies (that rely on written rather than oral histories) a source of transmission and struggle for our collective memory.

While it is the idea of ‘nation’ rather than ‘memory’ that has been at the conceptual core of Australian writings, Hamilton points out that national formation ‘always necessitates a dual process of inclusion and exclusion and remembering the past is a central mechanism of that process.’<sup>65</sup> In a nation not so long ago admonished by Stanner for its ‘cult of disremembering’ and ‘forgetfulness practised on a national scale’ where indigenous issues were concerned, history — as the basis for remembering — is exceptionally important.<sup>66</sup> The interdependent relationships between history and memory are

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62 Rousso, *The Haunting Past*, above n61 at 6; Peter Novick, *The Holocaust in American Life* (1999) at 3. In Germany, the history and memory of the Holocaust were confronted in an extended academic debate conducted in the media that was referred to as the *Historikerstreit*: see generally Dominick La Capra, ‘Revisiting the Historians’ Debate’ (1997) 9 *History & Memory* 80.

63 Peter Burke, above n1 at 100; see also Paula Hamilton, ‘The Knife Edge: Debates about Memory and History’ in Kate Darian-Smith & Paula Hamilton (eds), *Memory and History in Twentieth-Century Australia* (1994) 9 at 17. These are similar to the sorts of processes through which Robert Bellah et al suggest that a community is constituted; as a ‘community of memory’, the group ‘is involved in retelling its story, its constitutive narrative’ and its ‘practices of commitment’ sustain the community by ‘defin[ing] the patterns of loyalty and obligation that keep the community alive’: Robert Bellah, Richard Madsen, William M Sullivan, Ann Swidler & Steven M Tipton, *Habits of the Heart: Individualism and Commitment in American Life* (Revd Ed 1996) at 153–154. For a critical discussion of Bellah’s notion of communities of memory and the nation, see Daniel Bell, *Communitarianism and its Critics* (1993) at 129–155. For a critique of the place of ‘objective history’ within the framework of Bellah’s ‘community of memory’, see Bruce Frohnen, ‘Does Robert Bellah Care About History?’ in Peter Augustine Lawler & Dale McConkey (eds), *Community and Political Thought Today* (1998) 71.

64 Pierre Nora, *Realms of Memory: Rethinking the French Past, Vols 1–3* (1996) [Trans: Arthur Goldhammer; First published as *Les Lieux de Mémoire* (1992)] at xvi.

65 Hamilton, ‘The Knife Edge’, above n63 at 23; Halbwachs, above n60 at 51, 76–77. As Halbwachs explains it (at 86), memory ‘provides the group a self-portrait that unfolds through time ... and allows the group to recognise itself. For the landmark study of memory in constituting the nation, see Nora, above n64. Ann Curthoys has observed that ‘the nation’ has tended to be the predominant conceptual tool for analysis in the last two decades: ‘Cultural History and the Nation’ in Hsu-Ming Teo & Richard White (eds), *Cultural History in Australia* (2003) 22. Perhaps the absence of memory as a focus in Australian scholarship work is due to the long-pervasive presence of terra nullius in the legal and historical consciousness and the relatively recent portrayal of the past as being one that might trouble the national memory. Memory has, however, recently begun to play a more substantial role in the literature in so far as events within living memory are concerned: Paula Hamilton, ‘Memory Studies and Cultural History’ in Hsu-Ming Teo & Richard White (eds), *Cultural History in Australia* (2003) 81.

characterised by tension and conflict.<sup>67</sup> Burke eloquently describes historians as ‘the guardians of awkward facts, the skeletons in the cupboard of social memory.’<sup>68</sup> Their task, he says, is that of the remembrancer — ‘to remind people of what they would have liked to forget.’<sup>69</sup> When law deals with history, it occupies an important place in this framework. A trial is an action that informs and is mediated by memory, and the judgment constitutes an authorised record of the history it examines.

The stakes in the History Wars are high. At issue is the self-understanding of the nation and its past within which indigenous and non-indigenous relations will make moral sense. And so it is that this article looks at how defamation law might serve to inform an understanding of matters that are so close to home.

### 3. *Defamation, Truth and History*

The laws of defamation provide the legal foundation for Colin Tatz’s call for an Australian action along the lines of that in *Irving v Lipstadt*. Defamation is relevant to the disputes between the historians because the tort protects reputation, and the allegations in the History Wars go to the reputation of the individuals involved.

For the purposes at hand, the relevant laws can be stated quite simply: to be defamatory a statement must have a tendency to lower a person in the estimation of ‘ordinary decent folk’ or ‘right-thinking persons’ in the community.<sup>70</sup> Allegations of wrongdoing or dishonesty which typify defamation actions clearly have the requisite tendency. Although there has been no defamation action launched by any of the historians, there is little doubt that there would be grounds for it. Windschuttle’s accusations that Reynolds and Ryan have fabricated and distorted data would, given their status as historians, be defamatory of them, as would the allegation that they have done this in order to further their personal and political agendas.<sup>71</sup> The responses by Reynolds and Ryan make similar allegations and would arguably provide Windschuttle with adequate grounds to commence proceedings.<sup>72</sup>

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66 Stanner, above n16 at 25.

67 Hamilton, ‘The Knife Edge’, above n63 at 12.

68 Burke, above n1 at 110.

69 Ibid. For a discussion of how history writing might inform memory and the ways the past is viewed, see Alan Cairns, ‘Coming to Terms with the Past’ in Torpey (ed), above n53 at 63.

70 *Gardiner v John Fairfax & Sons Pty Ltd* (1942) SR(NSW) 171 at 172; *Boyd v Mirror Newspapers* [1980] 2 NSWLR 449 at 452; *Sim v Stretch* [1936] 2 All ER 1237 at 1240. The ‘lowering the estimation’ test is the principal criteria for defamation. The two alternative tests for what is defamatory – ‘hatred, ridicule and contempt’ and ‘shun and avoid’ – are not relevant here.

71 There may be a lesser position in some of Windschuttle’s writing that is more appropriately characterised as comment on accurately stated facts, and comment is a defence to a defamation action. For example, it might be argued that, having identified apparently inaccurate footnotes by Reynolds and Ryan, it is comment to say that, ‘Most of the story is myth piled upon myth, including some of the most hair-raising breaches of historical practice ever recorded’: Keith Windschuttle, ‘History as a Tragedy of Truth’ *The Australian* (9 December 2002). However, it is plain enough from the book that the accusations of intentional fabrication convey a statement about what Reynolds and Ryan have done, rather than simply being comment upon their work.

Once a plaintiff has established their case — that is, that they have been defamed — then the person who wrote and published the allegations can only avoid legal responsibility if they can establish a defence. The most relevant defence here will be justification.<sup>73</sup> The defence of justification requires that the publisher prove that what they wrote is true.<sup>74</sup> This would be at the core of any defamation action involving historians and, as will become apparent, it is not a straightforward issue to resolve.<sup>75</sup> The *Irving* case helps in exploring how a defence of truth might play out, illustrating the issues to be resolved and how the relevant laws have been applied.

#### A. *Irving v Penguin & Deborah Lipstadt*

In *Denying the Holocaust: The Growing Assault on Truth and Memory*, Deborah Lipstadt accused David Irving of deliberately distorting, falsifying and misstating evidence in his historical research, arguing that Irving could be appropriately labelled a ‘Holocaust denier’.<sup>76</sup> When Irving sued for defamation, Lipstadt and her publishers had to prove the truth of what had been written. For the purposes at hand, there were two key aspects to this: there was the need to prove the allegations regarding historical scholarship and also a requirement that the intent to deceive be proved.<sup>77</sup>

72 This position may be more difficult to establish, especially as the responsive nature of their comments may afford them some defence. However, if their statements are characterised as going beyond response then they would lose any such protection. See Milmo & Rogers, *Galley on Libel & Slander* (9<sup>th</sup> ed, 1998) at [14.49], [16.10]; Des Butler & Sharon Rodrick, *Australian Media Law* (1999) at [2.565].

73 It might also be possible to argue that qualified privilege would offer a defence so that the publisher would not be liable even though what they had written was untrue. This would require a finding that the nation at large has a legally recognisable interest in knowing about its history and about those who write it. That would seem difficult to establish in the traditional common law form because the concept of interest is unsuited to mass communication and, moreover, the reciprocal duty of the publisher is not clearly apparent: *Adam v Ward* [1917] AC 309. The expanded qualified privilege of *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 or the statutory qualified privilege under section 22 of the *Defamation Act* 1974 (NSW) have a more malleable notion of interest and do not require the reciprocal duty. However, it would still be a hard task to apply the defences here; they have rarely succeeded even in the circumstances of media publications for which they were designed. Finally, the defence would be defeated by malice and an evaluation of that in the History Wars may not be a simple exercise. The History Wars may provide an interesting context for the examination of the law of qualified privilege but that is not the purpose at hand and the avenue will be not be pursued here.

74 At common law, truth alone is a defence. In some jurisdictions there is a requirement that the publication was also in the public interest (eg, *Defamation Act* 1974 (NSW) s15(2)(b)), or for the public benefit (eg, *Defamation Act* 1889 (Qld) s15). The history disputes will clearly satisfy this qualification and truth is the key issue at play.

75 It should be noted that the action would not be able to run in the United States where the law protects to a far greater extent the discussion of public figures. For a discussion of how *Irving* would have been placed in the US, see Dennise Mulvihill, ‘*Irving v Penguin*: Historians on Trial and the Determination of Truth Under English Libel Law’ (2000) 11 *Fordham Intellectual Property, Media and Entertainment Law Journal* 217 at 244–253. However, the ‘objective, fair-minded historian’ standard it utilises may still be of interest in the US: Wendie Ellen Schneider, ‘Past Imperfect: *Irving v Penguin Books Ltd*’ (2001) 110 *Yale Law Journal* 1531.

76 For the imputations, see *Irving v Lipstadt* at [2.15]



*(i) Distortion of the Evidence*

When trying to prove the truth of what was written about Irving's scholarship, there was a need to distinguish between proving on the one hand the truth of the Holocaust and, on the other, proving the truth of the allegation that Irving had distorted, falsified or misrepresented the evidence. Justice Gray tried to avoid the former:

I do not regard it as being any part of my function as the trial judge to make findings of fact as to what did and what did not occur during the Nazi regime in Germany. It will be necessary for me to rehearse, at some length, certain historical data. The need for this arises because I must evaluate the criticisms or (as Irving would put it) the attack upon his conduct as an historian in the light of the available historical evidence. But it is not for me to form, still less to express, a judgment about what happened. That is a task for historians.<sup>78</sup>

Justice Gray held that the standard by which Irving should be judged was that of the 'objective, fair-minded historian'.<sup>79</sup> Thus, in examining Irving's conclusions, the judge was not required to ask whether the events did in fact occur as Irving claimed they did, but, instead, whether Irving's version of events was one of any number of conclusions that an objective, fair minded historian might have reached given the available evidence. Or, to put it another way, Lipstadt had to establish that no objective, fair-minded historian could have reached the conclusions Irving reached. The effect of this was that although Justice Gray was not making definitive factual conclusions about what happened during the Nazi regime, he was ascertaining a range of possible conclusions. He was effectively spelling out some of the limits of what may or may not have happened.<sup>80</sup>

*(ii) Motivation*

Were Irving's falsifications and distortions deliberate 'in the sense that Irving was motivated by a desire borne of his own ideological beliefs to present Hitler in a favourable light'?<sup>81</sup> His Honour held that a range of evidence might be relevant in making a determination about this:

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77 In addition to these matters, there also stood separately the somewhat distinct allegation that Irving was a 'Holocaust denier'. This was defined in a particular way in the case, primarily focusing on the content of what he said, such as denying the existence of gas chambers at Auschwitz: see *Irving v Lipstadt* at [8.1]–[8.5], [13.92]–[13.99]. Denialism as an approach to the past is discussed in more detail below in Part 4(B)(ii).

78 *Irving v Lipstadt* at [1.3]; see also his reiteration of this: at [13.3].

79 *Id* at [13.91].

80 Of some concern here is the justiciability of historical scholarship and the way that may impact on freedom of speech and academic debate. However, the use of defamation law to resolve an attack on reputation leaves the courts with no alternative but to evaluate the parameters of historical possibility (though the US position limits that justiciability: see above n75). On the different question of motivation and free speech arguments, see below nn 122–130 and accompanying text.

81 *Irving v Lipstadt* at [13.138].

[T]he nature and extent of the misrepresentations of the evidence together with Irving's explanation or excuses for them .... Irving's conduct and attitudes outwith (*sic*) the immediate context of his work as a professional historian, including the evidence of his political or ideological beliefs as derived from his speeches, his diaries and his associates.<sup>82</sup>

On the facts, Gray J found that Irving's motivations were improper and the distortion was intentional. He focused in particular on 'the convergence of the historiographical misrepresentations':

I have seen no instance where Irving has misinterpreted the evidence or misstated the facts in a manner which is detrimental to Hitler. Irving appears to take every opportunity to exculpate Hitler .... If indeed they were genuine errors or mistakes, one would not expect to find this consistency .... [T]here are occasions where Irving's treatment of the historical evidence is so perverse and egregious that it is difficult to accept that it is inadvertence on his part.

Mistakes and misconceptions such as these appear to me by their nature unlikely to have been innocent. They are more consistent with a willingness on Irving's part knowingly to misrepresent or manipulate or put a "spin" on the evidence so as to make it conform with his own preconceptions. In my judgment the nature of these misstatements and misjudgments by Irving is a further pointer towards the conclusion that he has deliberately skewed the evidence to bring it into line with his political beliefs.<sup>83</sup>

The final outcome of the case was a comprehensive finding against Irving, with Penguin and Lipstadt having proved the substantial truth of the allegations they had published about the quality of Irving's scholarship (the distortion question) and his honesty as an historian (the motivation/intention, question). The case is not binding authority on Australian courts as precedent but it would certainly provide the legal background against which a defamation action between historians would run in Australian jurisdictions. There are substantial parallels with the issues of distortion and motivation, and there would be a strong case to adopt and apply the test of the 'objective fair-minded historian'.<sup>84</sup>

## ***B. Defamation and the History Wars***

### *(i) The Possible Scenarios*

Were a defamation action to be run on the basis of some of the published material in the Australian disputes, there could be a range of possible actions, and for each action a range of possible outcomes. Table 1 sets out the core options using the Reynolds & Ryan position and the Windschuttle position as representative of the

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82 Id at [13.139].

83 Id at [13.141]–[13.144].

84 This would arguably be consistent with the statement of Dixon J in the High Court that courts may use the works of 'serious historians': *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 196.

opposing parties and points of view. It then shows the main possible finding for each action, and a brief description of what each outcome might mean. It is important to note that the table greatly simplifies things. It does not factor in matters of uncertainty relating to establishing the plaintiff's case, defences other than justification, or the possibility of adverse comments from a judge regardless of which party prevails in the action. The discussion is based on the decision being rendered by a judge (as it was in *Irving*) and not a jury. A jury would consider the same questions but would not provide a reason for their findings.<sup>85</sup> However, the table does allude to the place of 'substantial truth' in the defence of justification and this requires some explanation.

The defence of justification does not require that a defendant prove the truth of everything they have written. Instead, they need only prove that the publication is substantially true; the substance of the allegations must be proved to be true in the sense that what has been proved true means that the plaintiff's reputation has been justifiably damaged to such an extent that it makes no real difference whether the remaining allegations are true or untrue.<sup>86</sup> This means that although a defendant might have made some allegations they cannot prove are true, that may not prevent them proving the substance of their case. For example, a court may accept that of a dozen allegations of fabrication, perhaps only some are justified and the other allegations are unfounded. Or perhaps there may be a finding for the defendant on the grounds that the evidence has been distorted and falsified, but the defendant may not be able to establish that the plaintiff was deliberately and politically motivated to do so. This means that a decision in favour of one party may be heavily complicated by adverse findings against that party on some issues.<sup>87</sup>

In this light, Table 1 and the accompanying discussion should be seen as an analytical framework rather than a comprehensive picture of the possibilities. As the first two columns show, the possible actions and outcomes are fairly straightforward. The third column of the table shows that even though all the findings turn on the defence of justification, and the standard required (using *Irving*) would be that of the 'objective, fair-minded historian', the meaning of each of the four possible findings is quite different.

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85 Lipstadt, 'Building a Defense Strategy', above n5 at 257, saw the judicial role and the written opinion as central to the victory in *Irving*.

86 For example, *Defamation Act* 1974 (NSW) s15(2)(a); *Defamation Act* 1952 (UK) s5; *Irving v Lipstadt* at [4.7]–[4.8].

87 The issue arose to a minor degree in *Irving v Lipstadt*. In spite of some allegations not being established, the finding was still in favour of the defendant: at [13.166]–[13.167].

**Table 1**

<b>Action</b> <i>(Plaintiff v defendant)</i>	<b>Finding for</b>	<b>Nature of finding</b> <b>(ie, This means ...)</b>
<p><b>Reynolds/Ryan v Windschuttle</b></p> <p>RR argue that KW has defamed them with his accusations in <i>Fabrication</i> that they have deliberately falsified and distorted the evidence.</p> <p>KW must prove the truth of his claims.</p>	Reynolds/Ryan	<p>The court finds that <i>RR have not (or at least not substantially) deliberately falsified or distorted the evidence.</i> Their version of the past is one which an objective, fair-minded historian could agree with.</p> <p>This finding says nothing at all about whether KW's counter-history is or is not a plausible version of events. It says only that <i>RR's version of events is plausible.</i></p>
	Windschuttle	<p>The court finds that, as KW claimed, <i>RR have falsified and distorted the evidence.</i> No objective, fair-minded historian could write the history as they have done.</p> <p>This finding says nothing at all about whether KW's counter-history is or is not a plausible version of events. It does, however, suggest that <i>RR's version is implausible.</i></p>
<p><b>Windschuttle v Reynolds/Ryan</b></p> <p>KW argues that RR have defamed him in <i>Whitewash</i> when they allege that he is the one who distorted the evidence.</p> <p>RR must prove the truth of their claims.</p>	Windschuttle	<p>The court finds that <i>KW has not (or at least not substantially) deliberately falsified and distorted the evidence.</i> His version of the past is one which an objective, fair-minded historian could agree with.</p> <p>This finding says nothing at all about whether RR's version of history is or is not a plausible version of events. It says only that <i>KW's version is plausible.</i></p>
	Reynolds/Ryan*	<p>The court finds that, as RR have claimed, <i>KW has indeed deliberately falsified and distorted the evidence.</i> His version of the past is one which an objective, fair-minded historian could not agree with.</p> <p>This finding says nothing at all about whether RR's version of history is or is not a plausible version of events. It does, however, suggest that <i>KW's version is implausible.</i></p>

\* This action and outcome is the closest parallel to the *Irving* case, where Irving as the self-proclaimed revisionist was the plaintiff, Lipstadt the defendant, and the court found in Lipstadt's favour.

The top half of the table shows the position if Reynolds and Ryan were to be plaintiffs in an action against Windschuttle. It would be Windschuttle's task to prove the truth of what he had written: viz, that Reynolds and Ryan had falsified and distorted the evidence, and that they had done so deliberately. This means that, first, Windschuttle would have to establish that even though there may be a number of possible versions of the events of the past, the histories written by Reynolds and Ryan were beyond the realm of plausibility. For example, he would have to persuade the court that no objective, fair-minded historian could have concluded that there was frontier warfare in Tasmania, or that the Aboriginal death toll reached into the several hundreds or over a thousand. Second, Windschuttle would have to prove the deliberate nature of the falsification and distortion that he claims have occurred. Here, the convergence of errors that was the focus in *Irving* would be at the heart of Windschuttle's arguments, just as it is a key contention in his book. This issue would be complicated by the differences of methodological opinion regarding the (im)possibility and/or (in)appropriateness of detached scholarship that fuel the disputes.

The lower half of the table shows the reverse position. If Windschuttle were to sue Reynolds and Ryan then the latter two would as defendants have to establish that Windschuttle's version of history was not one which an objective, fair-minded historian could reach. Both the distortion and motivation questions would be in issue, and this time the convergence questions would focus on Windschuttle with regard to motivation.

(ii) *The Operation of the Action*

A number of significant points emerge in considering how the action works. First, a party will be in a fundamentally different position depending on whether they are a plaintiff or a defendant. In particular, it will always be the plaintiff's work which is under the microscope; one cannot put an opponent's thesis to the test by commencing legal action against them. For example, if Reynolds and Ryan commenced a defamation action then the court would consider whether their theses are plausible. In doing so, it will consider Windschuttle's criticisms of their scholarship but it will not consider the merits of his counter-history. Even if they were to prevail, there is no certain opportunity for a finding that discredits Windschuttle, except perhaps to the extent that a judgment *may* indicate his criticisms are unwarranted and perhaps that Windschuttle's thesis is inconsistent with the findings of fact. Thus, regardless of the outcome, there is no formal determination about the merits or otherwise of a defendant's version of the past. The Irving trial was in this sense remarkable as it was only because Irving commenced the action that his work was subjected to scrutiny.

Second, a court's determination will not present a statement of what happened in the past. Rather, it is only a finding of plausibility or implausibility. Consider, for instance, the position where the court finds the defendants are unable to prove their claims. This would be a finding that the plaintiff's thesis is plausible. That is, the court thinks an objective fair-minded historian could have reached the same conclusion the plaintiff did about the events of the past. Compare this with the

opposite outcome (as happened in *Irving*) where the finding is that an objective, fair-minded historian could not have concluded as the plaintiff did. Here, the plaintiff's version of the past is implausible. The former finding does not exclude any versions of the past, and the latter finding will exclude only certain versions of the past, but neither conclusion presents a finding about how things were. As Part Four will discuss, this makes a defamation action quite distinct from other legal actions that look at history.

Thirdly, the court's finding will depend on the evidence available, and that will in turn depend on the type of historical inquiry at issue. In the History Wars, a defendant's task would seem to be more difficult than Lipstadt's was in *Irving* because the events occurred in the early 19<sup>th</sup> century. The documentary evidence associated with them — which will always be appealing to legal standards — is far less extensive than that surrounding World War II. On that basis, it might be thought that it would be more difficult to exclude some versions of the past and hence a finding that the plaintiff's work is implausible would be more difficult for a defendant to secure. Without drawing a conclusion about the merits of the positions, it seems most likely that the empirical work in *Whitewash* that critiques Windschuttle's use and interpretation of sources would provide the basis for a finding that an objective fair-minded historian could indeed reach the same conclusions that Reynolds and Ryan have and that their theses are plausible. It is difficult to tell how a court would view those same materials in determining the plausibility of Windschuttle's position.<sup>88</sup>

Fourthly, a combination of the nature of the evidence, the need to prove only substantial truth and the possibility of adverse judicial comment on the successful plaintiff's scholarship mean a finding may not be comprehensively in favour of one party or the other. Consequently, a finding in favour of or against a party may not necessarily be a complete or even an accurate indicator of the court's view of the history presented by that party.

Finally, the strategic value of commencing an action will differ for the parties. In either of the actions, there is more to be gained by the defendant because if you can prove the truth of your allegations about the plaintiff then you can obtain a finding that your opponent's version of history is implausible. If as a defendant you do not succeed then your own position is not necessarily discredited and, strictly speaking, the worst result is that your opponent's version of history is a plausible one. Of course, that result could indeed be damaging: for instance, if Lipstadt (the defendant) had not prevailed in the English case, then the court would have been accepting as plausible the proposition that the Holocaust did not occur. However unattractive the possibility of such an outcome may have been, it is the existence of different possible outcomes that gives such weight and authority to legal

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88 In *Irving*, close to 2000 pages of expert witness reports were considered and one of those experts was prompted to express a concern that it was likely even very senior historians' work 'would not stand up ... to this kind of examination.' See *Irving v Lipstadt* at [4.17]; Professor Donald (Cameron) Watt was the expert, quoted from the transcripts by another of the experts, Richard Evans, *Telling Lies About Hitler*, above n5 at 252.

adjudication.<sup>89</sup> In the circumstances here, Reynolds & Ryan would perhaps have little to gain from commencing an action. A finding that their work is plausible entrenches their existing position but they cannot put Windschuttle's thesis to the test. Moreover, even if successful, there is the possibility of adverse judicial comment on their own work and that would potentially be highly damaging, especially to the extent that they suggested the High Court's acceptance of the historical work in *Mabo* was unwise. For Windschuttle, on the other hand, there is a great deal to gain by commencing an action. A favourable finding would cast a legal legitimacy to his place in the debates, regardless of any adverse judicial comment that accompanied it. Conversely, a great deal more is at risk for Windschuttle: at its most devastating, a finding that his version of the past is implausible would discredit his work so greatly that it would probably exclude him from the mainstream debate.

In the end, even looking at just the basics of a defamation action, it would be an inherently complex proceeding. It would not come to conclusive determinations about the events of the past, but would instead make determinations about the plausibility or implausibility of possible versions of history, neither of which would necessarily be clear. That should not of itself dictate a conclusion that there is no merit in Tatz's suggestion that a defamation action is appropriate. The problems, however, increase exponentially when the findings are considered in their theoretical and political contexts. These are the subject of Parts Four and Five which look at law's comprehension and mediation of history, and the relationships between law, history and memory. In an attempt to illuminate more clearly the complexities of these relationships in the context of defamation actions between historians, I hope to provide a point of comparison that might help make a little clearer how law and history interact in the processes and outcomes of other types of litigation.

#### **4. *History, Truth and Law***

The introduction to this article noted that among the most persistent criticisms of the way law deals with history has been the former's inability to comprehend the way the latter inquires about the past.<sup>90</sup> These criticisms have much to do with the different methodological frameworks of legal and historical inquiries.

A legal inquiry relies on the ascertaining of evidence so that an inference can be drawn about a particular state of affairs. It operates within an epistemic paradigm that assumes (in its stronger and more traditional positivist form) there is an objectively knowable truth 'out there' that can be revealed by research or (in the less strident and what might be seen as an interpretive form) that there are different versions of history which might each be appropriately seen as 'true' interpretations of the past but there are other versions which are definitely not true.<sup>91</sup> There is, however, a further shift in the literature. Like many other

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89 Lawrence Douglas considers this in terms of criminal trials and quotes Kirchheimer's view that the "irreducible risk" [is] the sine qua non of the just trial': above n49 at 5 and see also 210.

90 See nn 12–14 and accompanying text.

disciplines, history has been subjected to the influences of postmodernism and poststructuralism. Contemporary historiography is characterised by the exploration of tensions between traditional methodologies and more perspectivist, anti-foundationalist orientations.<sup>92</sup> Law as an academic discipline has similar conflicts, but as a matter of practice it requires at least some element of what Fay terms the ‘scientific attitude’ within which the past is knowable independently of the perspectives and interests of investigators.<sup>93</sup> To what extent and in what ways might defamation be any more accommodating of methodological diversity than other legal inquiries?

### A. *Disjunctures Between Law and History*

In actions related to native title or the prosecution of individuals for their participation in wartime atrocities, the courts are required to form a view on what happened in the past. That view will be taken from a selection of alternatives that are shaped by the strictures of legal procedure and evidence; it will be limited by the answers that must and can be given to the questions the law requires and permits to be asked. Bell claims that ‘the most profound disjuncture between the culture of historians and the culture of the courts is the different way the two pursue the search for truth,’ and the evidentiary presumptions skew that search.<sup>94</sup> The court’s view will be shaped by its ‘preoccupation ... with the finality of determination, as opposed to the historian’s acceptance of ambiguity and conflicting interpretations’.<sup>95</sup>

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91 Almost all perspectives on history now accept that there is an important interpretive dimension. Stephen Garton, ‘On The Defensive: Poststructuralism and Australian Cultural History’ in Teo & White (eds), above n65, 52 at 61, identifies RG Collingwood’s work of the 1940s as the turning point for the general consideration ‘of the relationship between the historian and the past as one of interpretation and imaginative reconstruction’. See generally RG Collingwood, *The Idea of History* (1946); Carr, above n13.

92 Such tensions were at the heart of Windschuttle’s earlier work where he heavily criticised anti-foundational positions: Keith Windschuttle, *The Killing of History* (1994). For less polemical critiques, see Joyce Appleby, Lynn Hunt & Margaret Jacob, *Telling the Truth About History* (1994) or Richard Evans, *In Defence of History* (1997; 2<sup>nd</sup> ed 2000). Postmodern perspectives are advocated by Keith Jenkins, *Re-thinking History* (1991). The possibility of balancing the tensions is addressed in an extended analysis by Robert F Berkhofer Jr, *Beyond the Great Story: History as Text and Discourse* (1995). For a shorter discussion, see Brian Fay, ‘The Linguistic Turn and Beyond in Contemporary Theory of History’ in Brian Fay, Philip Pomper & Richard Vann (eds), *History and Theory: Contemporary Readings* (1998) 1. In the High Court of Australia there has been at least one judicial comment that demonstrates confusion regarding the place of interpretation in more traditional historiography and in the postmodern critique – Callinan J seems to simplistically conflate interpretation and postmodernism: ‘[R]esort by me to the very recent and very short history of postmodernism would, if I were uncritically to accept its tenets, lead me to hold that there is no such thing as true history: history itself is not more than a series of subjective interpretations by different historians’: *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460 at 511.

93 Fay, above n92.

94 Reid et al, above n13 at 25.

95 Id at 5, referring to Dickinson & Gidney, above n13.



In France, the prosecutions in the 1990s of Paul Touvier and then later Maurice Papon for crimes against humanity committed during their service in the collaborationist Vichy government has been engulfed by controversies over historical and legal narrative. Henry Rousso, a leading historian of the period, refused to give evidence as an expert on the grounds that:

the [historian's] expertise is poorly suited to the rules and objectives of a judicial proceedings. It is one thing to attempt to understand history in the context of one's research or teaching, with the intellectual freedom those activities presuppose, and quite another to pursue the same aim, under oath, when the fate of a particular individual is being determined . . . I greatly fear that my "testimony" will merely serve as a pretext to exploit historical research and interpretations that were elaborated and formulated in a context entirely alien to the Assizes Court.<sup>96</sup>

Nancy Wood explains that Rousso and fellow historian Éric Conan saw a fundamental opposition between what was required by the court and what their discipline engaged in:

They maintained that the historian could not describe "what had happened", but only attempt, on the basis of available traces and navigating "between islands of established truths in an ocean of uncertainty", to reconstitute a plausible account of events. By contrast, justice demanded to know exactly "what had happened" in order to make judgments based on the balance of the evidence.<sup>97</sup>

The sentiment is echoed in Goodall's critique as it concerns indigenous history where she argues that law holds 'a commitment to a simple view of the past, of the possibility of learning the "facts" and making judgments of guilt and responsibility'.<sup>98</sup> Recent historical scholarship, she argues, demands 'a more sophisticated appreciation of the fragmentary nature of our evidence and understanding of the past, and so a questioning of the aspirations . . . to tell a single, simple "true" story.'<sup>99</sup>

The first problem here is, as the historians argue it, that the incommensurability of the courtroom and historical discourses means they cannot talk in court about history as history. Second and consequently, the historical narrative that emerges in court is not, it might be argued, a historical narrative at all; that is, the history

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96 Henry Rousso, 'Letter from Henry Rousso to the Presiding Chief Justice, Bordeaux' in Rousso, *The Haunting Past*, above n61 at 85–86. He discusses his views more expansively in his interviews with journalist Philippe Petite: *The Haunting Past* at 56–74 especially. See also Henry Rousso, 'Justice, History and Memory in France: Reflections on the Papon Trial' in Torpey (ed), above n53 at 277.

97 Nancy Wood, 'Memory on Trial in Contemporary France: The Case of Maurice Papon' (1999) 11 *History & Memory* 41 at 54, discussing and quoting Éric Conan & Henry Rousso, 'Touvier: Le dernier procès de l'épuration?' in Conan & Rousso, *Vichy, un passé qui ne passe pas* (1994), 109, 159.

98 Goodall, above n13 at 109

99 Ibid. These difficulties seem to underpin the frustration of an expert historian who was limited by the judge in the evidence he was allowed present to the jury in the Australian war crimes trial of Polyukovich: Bevan, above n9 at 223–226.

that law produces isn't really history as such. The trial of Papon provides a good example where, in judging his role in the deportation of Jews, the question arose about his knowledge of the Final Solution.

Rouso argued that the question of knowledge could not be formulated in the legal manner required. To 'be in possession of the information and not assimilate it' might be to say that one 'knew' about the Final Solution, but that may not constitute the requisite legal certainty.<sup>100</sup> Richard Golsan explains that Jean de Maillard, a lawyer rather than historian, argued that the trial could not capture or convey history because in order to judge Papon:

it was necessary to posit that the Holocaust was a whole from which one could not extract a single piece — Papon — without compromising the significance and coherence of that whole. But at the same time, the court had to maintain that the Holocaust could include “detachable” actions, detachable in the sense that, like Papon’s deportation orders, they were committed completely outside an *intention* to exterminate.<sup>101</sup>

Nor could the question of Papon's knowledge 'grasp the inner logic of the event' where 'knowledge and cognition' were disconnected:

The Nazis' determination to ensure that there would be no witnesses to the extermination process and to this end to erase the traces of their crimes even as they committed them. Inasmuch as the Shoah could thus be defined as 'an event without a witness, an event whose scheme is, historically, the literal obliteration of its witnesses,' the question of what it meant to be 'a contemporary of the Shoah,' with knowledge of its unfolding, had to be posed in radically different terms.<sup>102</sup>

For the historians, any legal finding about Papon's state of mind would be inconsistent with a historical narrative because history could not be explained on the terms required by the court. Does a defamation action accommodate or narrate history any differently?

A defamation case like *Irving* or a possible action in the History Wars is amenable to the traditional positivist or interpretive forms of inquiry: evidence is adduced and the state of affairs to be determined is whether the plaintiff has deliberately fabricated and distorted their writing of history. Given the 'objective, fair-minded historian' test, the court has to effectively determine whether the version of history at issue constitutes a plausible version of events. This will require an examination of the past, but it is a fundamentally different consideration

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100 Wood, 'The Case of Maurice Papon', above n97 at 54, quoting Rouso from an interview in *Le Monde*, 7 April 1998. Haebich, above n10, has raised this distinction with regard to the Stolen Generations.

101 Richard Golsan, 'Maurice Papon and Crimes Against Humanity in France' in Richard Golsan (ed), *The Papon Affair: Memory and Justice on Trial* (2000) 1 at 28, explaining the position of Jean de Maillard, 'À quoi sert le procès Papon?' ['What Purpose Does the Trial Serve?'] (1998) *Le Debat* 101.

102 Wood, 'The Case of Maurice Papon', above n97 at 55 (her quotes are from Claude Lanzmann, interviewed by *Le Monde*, 1 April 1998).

of history than that which takes place in native title cases or criminal prosecutions. It is different because to a significant extent the debate about history takes place on the historians' terms.

The court does not need to arrive at a conclusion about what happened in the past. Rather, it need only arrive at a conclusion about what might have happened. The 'oceans of uncertainty' can be acknowledged because the search is for plausibility and not the certainty of a historical narrative. Although it might well be argued that the legal framework will be more comfortable with positivist interpretations in evaluating the evidence, a defamation action between historians is nevertheless significantly more accommodating of methodological diversity than the other legal inquiries.<sup>103</sup>

Within limits, this sort of action permits history to enter the court as history. Those limits are set down principally by the defence of justification because that requires a conclusive determination about falsification (i.e., the plaintiff either did or did not engage in fabrication and distortion). To make that determination the court must distinguish between plausible and implausible version of events. The nature and extent of the available evidence will, of course, impact upon the range of plausible possibilities, but within these limits of plausibility, the court can accept any number of versions of the past without needing to judge their persuasiveness any further. This accommodates both traditional positivist and interpretive methodologies of history. The defence of justification cannot, however, accommodate an "anything goes" methodology because in order to judge falsification it *must* be able to exclude as implausible some versions of events.

Defamation may be more accommodating of interpretive methodologies but to what extent and how, if at all, might the remaining limits be problematic? In particular, is it impossible for defamation law to accommodate postmodern historiography?

### ***B. Relativism, Revisionism and Denial***

The exploration of postmodern historiography occupies a curious place in the framework used here to examine the relationships between law and history. Postmodern views of historical scholarship did not arise overtly in *Irving v Lipstadt* because the parties were very much operating on the same methodological assumption that the past is objectively knowable. Similarly, postmodernist

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103 It is important to keep in mind that the discussion is concerned with a defamation action between historians about the nature of their work and their motivations. Most defamation actions against historians involve plaintiffs – typically political or military figures – who contest the allegations a historian has made in a publication: see Anton de Baets' review of European cases in 'Defamation Actions Against Historians' (2002) 41 *History and Theory* 346. Those actions are much like any ordinary defamation action against the press where a news outlet has broadcast a defamatory allegation. The cases would exhibit the same features as native title or criminal actions as the historian would be required to prove the truth of what they have written. That would require the court to evaluate, for instance, whether or not the plaintiff had committed some crime against humanity.

perspectives have not played a strong role in the History Wars.<sup>104</sup> Indeed, many of the contributors to Manne's *Whitewash* collection criticise Windschuttle on essentially empirical grounds, while in his earlier critique of postmodernism's influence on history, Windschuttle himself praised Reynolds as a historian who had not succumbed and who was producing valuable historical works.<sup>105</sup> It would, however, be a mistake to neglect postmodern historiography in the analysis.

Postmodernism warrants attention because, first, this article aims in part to use defamation law as a point of comparison for exploring how law copes with history in other circumstances and, as such, a full examination of how the different historiographical positions can and cannot be accommodated by the law paints a more complete picture of the relationships. Second, the attacks on Reynolds and Ryan take place against the background of a critique of the implications of postmodernism for contemporary history and politics. Windschuttle has argued that the postmodern politicisation of historical scholarship has led historians to 'indulge in the politics of their favoured minority groups' with Reynolds and Ryan among those who have taken the view 'that evidence can be treated in a cavalier fashion and that what matters is the "big picture" or the political ends served [which are] Aboriginal political interests, especially the justification of Aboriginal political sovereignty.'<sup>106</sup> Thirdly, attempts to revise history have exhibited a tension between the rejection and embrace of postmodern tenets. This has been especially noteworthy where the Holocaust is concerned and, in the search for good faith and motivation that underpins revisionist history, the operation of defamation law provides a point of contrast to other legal restrictions on speech.

(i) *Postmodernism and Relativism*

There is no reason why the legal need for a threshold of certainty in defamation law should be unsettled by postmodernism. On the contrary, there is much to suggest that these perspectivist insights rely upon the possibility of factual knowledge and are in this way entirely consistent with the legal framework of defamation. When one draws distinctions between postmodernism and relativism (rather than equating them), some criticisms of postmodernism appear misplaced on both theoretical and empirical grounds. The literature does not suggest that postmodernism (or poststructuralism) necessarily leads to what might be thought

104 See Attwood & Foster, 'Introduction' to *Frontier Conflict*, above n22 at 20–22, for a brief discussion of how postmodernism has influenced Australian history debates, but they note (at 20) that the historians 'have bypassed the concerns that have preoccupied the anxious critics of postmodernism'. In the responses to Windschuttle there have been at least two opinion pieces which have arguably tended to take a somewhat more relativist position: Katherine Biber, 'Many Shades of Grey in White Argument on Black Deaths' *Sydney Morning Herald* (23 December 2002); Lyndall Ryan, 'No Historian Enjoys a Monopoly Over the Truth' *The Australian* (17 December 2002).

105 Manne (ed), *Whitewash*, above n2, see mainly the chapters in the third part of the book headed 'In Particular', 187–333; Windschuttle, *The Killing of History*, above n92 at 95 at 117–118.

106 Keith Windschuttle, 'Social History, Aboriginal History and the Pursuit of Truth', Paper presented to Blackheath Philosophy Forum: *History, Politics and the Philosophy of History* (1 March 2003): <<http://www.sydneyline.com/Blackheath%20philosophy%20forum.htm>> (20 June 2004).

of as factual relativism. That is, it seems clear that one can adopt postmodernist/poststructuralist tenets and yet still accept the ‘facticity’ or ‘factuality’ of the events of the past.

Garton argues that critics have misunderstood and characterised the school of thought inappropriately, ‘creating a “straw poststructuralist” easily demolished’.<sup>107</sup> Windschuttle, for instance, argues that under postmodernism ‘the pursuit of something as objective as the truth becomes a mere pipe dream.’<sup>108</sup> This, he says, is:

A silly thing to say because we have very good knowledge about some things that happened in history ... For instance, we know all the names of all the leaders of all the nations for at least the past two hundred years and most of the leaders for many centuries before that as well. We know for certain the historical facts that John Howard has been Prime Minister since 1996 and that John Curtin was Australia’s Prime Minister for most of World War II.<sup>109</sup>

However, those who adopt postmodern positions do not apparently see themselves putting knowledge of the facts or events of the past beyond reach. For Garton, poststructuralism ‘is not so much a denial of a usable past as a caution about the difficulties of using it.’<sup>110</sup> Peter Burke clarifies his position carefully:

As for historical relativism, my argument is not that any account of the past is just as good (reliable, plausible, perceptive ...) as any other; some investigators are better-informed or more judicious than others. The point is that we have access to the past (like the present) only via the categories and schemata ... of our own culture.<sup>111</sup>

Kellner states that to understand history as being constructed ‘is not to reject those works which make claims to realistic representation based upon the authority of documentary sources’.<sup>112</sup> Stanley Fish’s anti-foundationalism does not prevent him accepting ‘as a matter of fact about which I have no doubt’ that the Holocaust occurred.<sup>113</sup> Berkhofer points out that the admission of interpretive diversity into history ‘is not to endorse the so-called revisionist denial of the acknowledged horrible facts.’<sup>114</sup> Critics such as Shermer and Grobman would not appear to see this as being at all unusual, arguing that when ‘historical relativism’ is confronted

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107 Garton, above n91 at 57. Appleby, Hunt & Jacob, above n92 at 246–247, make the reverse of this criticism: ‘When postmodernists mock the idea that ... historians write the past as it actually happened, they are knocking over the straw men of heroic science and its history clone’.

108 Windschuttle, above n106.

109 Ibid.

110 Garton, above n91 at 57.

111 Burke, above n1 at 99. The first elipsis in the quote is Burke’s.

112 Hans Kellner, ‘Language and Historical Representation’ in Keith Jenkins (ed), *The Postmodern History Reader* (1997) 127 at 137. For a critique of Kellner, see Beryl Lang, ‘Is it Possible to Misrepresent the Holocaust?’ in Fay, Pomper & Vann (eds), above n92 at 245.

113 Stanley Fish, ‘Holocaust Denial and Academic Freedom’ (2001) 35 *Valparaiso University Law Review* 499 at 500.

114 Berkhofer, above n 92 at 49.

with the Holocaust it just falls away: ‘Ask deconstructionists if they think that the belief the Holocaust happened is as valid as the belief that it did not happen, and the debate quickly screeches to a halt.’<sup>115</sup>

To categorise postmodernism under a blanket heading of relativism is inappropriate and unhelpful. It seems better to characterise postmodernist perspectives as strongly interpretive approaches that enrich history. This is consistent with the views of its advocates, and even its strongest critics see important and useful historiographical insights in postmodernism.

[P]ostmodernism raises arresting questions about truth, objectivity, and history that cannot simply be dismissed .... We are not, therefore, rejecting out of hand everything put forward by the postmodernists. The text analogy and aspects of postmodernist theories have some real political and epistemological attractions. The interest in culture was a way of disengaging from Marxism, or at least from the most unsatisfactory versions of economic and social reductionism. Cultural and linguistic approaches also helped in the ongoing task of puncturing the shield of science behind which reductionism often hid. By focusing on culture, one could challenge the virtually commonsensical assumption that there is a clear hierarchy of explanation in history ...<sup>116</sup>

None of this is to say that anti-foundationalism might not lay down potentially relativist challenges for history, and thus for law. It does — but they are not factual challenges. They are primarily interpretive and ethical challenges, and both are relevant in considering the implications of postmodernist historiography for the Holocaust. Berkhofer notes that even to describe the Holocaust as “the Holocaust” is a colligatory exercise, binding and labelling events in narrative form.<sup>117</sup> Some dilemmas regarding the ethical challenges emerge in the debate between Weisberg and Fish. Even though postmodernism does not compel, in Weisberg’s words, ‘the avoidance of central realities’, it significantly displaces the possibility of grounding a moral judgment that informs one’s evaluation of those realities, or of using or reflecting on those realities as part of a normative framework within which events can be judged.<sup>118</sup>

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115 Michael Shermer & Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?* (2000) at 29.

116 Appleby, Hunt & Jacob, above n92 at 207, 230.

117 Berkhofer, above n92 at 49.

118 Fish, above n113; Richard H Weisberg responds to and critiques Fish in: ‘Fish Takes the Bait: Holocaust Denial and Post-modernist Theory’ (2000) 14 *Law and Literature* 131 at 134. See also Kellner and Lang, above n112. Douglas, above n49 at 208–209, discusses a different process of relativising that occurred during the prosecution of Klaus Barbie in France in 1987. There, Barbie’s lawyer ‘globalized’ Nazi crimes in his argument that they were neither unique nor extraordinary, pointing particularly to atrocities committed by the French against Algerians. Although this is not so much an example of the post-modern tendency to ethical displacement as ‘strategy [that] was designed to unmask hypocrisy’, Douglas argues that it occupies a significant bridge to the distortive relativising of history that was to be more generally relied upon by Holocaust deniers.

Where does this leave an inquiry about defamation law? In so far as it requires the court to accept a threshold level of truth, defamation is quite clearly able to accommodate postmodernist historiography.

(ii) *Postmodernism and Denial*

There is a second reason why postmodernism should not raise factual problems for a defamation court dealing with history. Although different versions of the past may derive from postmodernist interpretive diversity, there is no reason to see that as the source of all different narratives put before the court. It is possible that spurious versions of events may have their roots in denialism. Lipstadt argued in *Denying the Holocaust*, which contained her attack on Irving, that Holocaust denial was a part of the ‘attacks on history and knowledge’ that were brought about, fostered and tolerated by postmodernism. But she does not argue that Holocaust denial is characterised by postmodern sensibilities — denial, she says, is ‘a movement with no scholarly, intellectual or rational validity.’<sup>119</sup> Instead, Lipstadt sees the problem as being that postmodern intellectual currents allowed denial to go unchallenged and be accepted as ideas rather than be seen as the bigotry that it is.<sup>120</sup> Lipstadt and Irving are both apparently working on the basis that history is knowable. Irving’s work is more appropriately characterised as attempting to disguise the truth rather than reveal it, but that is a strategy of denial and certainly not a postmodern methodology.<sup>121</sup>

It is clear from the *Irving* case that a defamation framework provides an opportunity to address denialism by looking at motivation. That is, although denialism is on the one hand concerned with challenging a historical narrative, it is the unmasking of motivation that distinguishes between denialism and genuine revisionist projects of interpretation. The distinction has arisen in other circumstances. The Canadian Supreme Court considered in *R v Zundel* whether the defendant’s distribution of a pamphlet that denied the Holocaust occurred constituted the criminal offence of spreading false news.<sup>122</sup> In the face of Zundel’s argument that ‘history is all interpretation’ and ‘there is no objective historical truth’, the split between the majority and dissent helps make visible the somewhat unique and important way that defamation law avoids the pitfalls of legitimising denial by compelling an examination of motivation and passing judgment on the plausibility or implausibility of historical narratives.<sup>123</sup>

The majority in *Zundel* adopted a line of reasoning which did not attempt to distinguish between the status of different factual claims. Rather, it treated any and every claim as potentially valid, afraid that a lack of protection might result in

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119 Lipstadt, above n51 at 18.

120 *Id* at 17–19.

121 See Fraser, above n51 at 171–172.

122 *R v Zundel* [1992] 2 SCR 731. Under s181 of the Canadian *Criminal Code* it is an offence if one ‘wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest’. Only the Supreme Court decision is discussed here. For a comprehensive analysis of the trial, see Douglas, above n49 at 212–253.

123 *R v Zundel* [1992] 2 SCR 731 at 835.

conviction for any statement that ‘does not accord with currently accepted “truths”, and [lend] force to the argument that the section could be used (or abused) in a circular fashion essentially to permit the prosecution of unpopular ideas.’<sup>124</sup> The majority were concerned that:

Particularly with regard to the historical fact — historical opinion dichotomy, we cannot be mindful enough both of the evolving concept of history and of its manipulation in the past to promote and perpetuate certain messages.<sup>125</sup>

The reasoning identifies the potential for manipulation of history by the state (and views free speech as a protection against that), but there is no search for any way to prevent the judgment allowing the harmful manipulation of history by non-state actors.

The dissentients were expressly critical of the majority. They acknowledged the significance of interpretation in history but did not see the interpretation argument as relevant in the circumstances.

[T]he appellant seeks to draw complex epistemological theory to the defence of what is really only, at best, the shoddiest of “scholarship” and, at worst pure charlatanism.<sup>126</sup>

The court did not leave room for debate about the facts of the Holocaust. It was, they found, plain and simple that Zundel had lied.<sup>127</sup> The deliberate distortion was a core factor in the reasoning:

The appellant has not been convicted for misinterpreting factual material but for entirely and deliberately misrepresenting its contents .... The deep-rooted criticism of “revisionism” [is] directed ... against its manipulation and fabrication of basic facts.<sup>128</sup>

Regarding the place of interpretation and relativism in history, two points might be taken from *Zundel* to inform a discussion of defamation. First, a defamation action does not allow for the misguided factual relativism supported by the majority. They failed to recognise the significance of this in spite of their express comparison with the need to determine the truth or falsity of a statement in defamation.

[T]he difficulties posed by this demand are arguably much less daunting in defamation than under [the “spreading false news” prohibition]. At issue in defamation is a statement made about a specific living individual. Direct evidence is usually available as to its truth or falsity. Complex social and historical facts are not at stake.<sup>129</sup>

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124 *Id* at 769.

125 *Ibid*.

126 *Id* at 836.

127 *Id* at 836–838.

128 *Id* at 836–837.

129 *Id* at 757.



A court that hears a defamation claim cannot take this position because whether or not ‘complex social and historical facts’ are at stake, the defence of justification requires an acceptance of some factual position in the form of the plausibility or implausibility of a version of history. The defence of justification is simply not vulnerable to the manipulation of free speech arguments such as those accepted by the *Zundel* majority. Second, as the dissenting opinion points out, there is a need and a way to distinguish between revisionism as historical scholarship and revisionism as denialism: the latter is characterised by the bad faith of deliberate misrepresentation, manipulation and fabrication. As the *Irving* case makes clear, a defamation action invites speculation about motives in a way that was excluded by the majority in *Zundel*.<sup>130</sup>

In sum, different types of legal actions accommodate history and historians in different ways. The prosecution of war crimes and actions relating to indigenous land rights are exemplary instances of the incommensurability of legal and historical discourse; the legal inquiry and its resolution cannot accommodate the inherent ambiguity and interpretation of historical inquiry. Consequently, it is inappropriate to see a version of the past generated in the courtroom as a form of history. A defamation action between historians is different, being able to accommodate history on history’s terms. It does not provide a version of events as a narrative (as native title or war crimes prosecutions do). Nor does it lapse into an unnecessary and inappropriate relativist framework within which all versions of history are equally valid or into an absolutist free speech position where nothing can be prohibited. Rather, it acknowledges the possibility of a knowable past and, by operating in terms of plausibility, it excludes or includes historical narratives under challenge, working with a threshold level of historical truth, but leaving room for a range of possible versions of the past within that scope of plausibility. In the case of the more pernicious use of historical evidence to misrepresent the past, defamation enables a dual function of testing the distortion of that evidence by judging its plausibility and examining the motives of the author in order to distinguish between revisionism and denialism. The laws of defamation thus enable the judgment of both history and of historians, but the way such judgment is cast raises questions that are more appropriately considered in the framework of memory.

## 5. *Law, Judgment and Les Lieux de Mémoire*

Memory, it was argued in Part Two, is central to the nation’s historical and moral self-understanding. When law encounters history in the courts, it takes an important place in the shaping of memory. The relationship between law and memory has been examined primarily in the context of prosecutions for war crimes, especially in France. That literature provides much of the basis for an exploration of memory as it concerns legal judgment and Australia’s colonial past.

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130 The Australian legislation on racial vilification is different from that which was used in *Zundel*. The 1995 amendments to the *Racial Discrimination Act* 1975 (Cth) prohibit under s18C racist acts or speech that are likely to offend, insult, humiliate or intimidate a person. In establishing a defence based on public debate and the like, it is for the respondent to prove that they acted in good faith (s 18D). The truth or falsity of speech is not relevant to liability. On Holocaust denial under this Act, see *Jones v Toben* (2002) 71 ALD 629. The respondent’s appeal was dismissed in *Toben v Jones* (2003) 199 ALR 1.

Henry Rousso expressed the link between the trial of Maurice Papon and the French national memory as being ‘a ritualized interpretation of the past that is dependent upon the expectations of the present [and its] objective is to inscribe this past in collective consciousness, with the full force of the law and the symbolism of the legal apparatus.’<sup>131</sup> The role of the law has become increasingly important in the incorporation of history into memory, especially with what has been described as the increasing ‘judicialisation of the past’.<sup>132</sup> Though it occurs most notably in prosecutions for crimes against humanity, Rousso also includes in this phenomenon trials relating to Holocaust denial.<sup>133</sup> A defamation action between the Australian historians could be seen in the same light.

In Mark Osiel’s discussion of law and remembrance, he articulates some of the ways that law informs memory. Though primarily concerned with prosecutions for war crimes that occurred in the course of events within living memory, the analysis seems to reflect more broadly the judicialised history to which Rousso refers. The court, argues Osiel,

will inevitably be viewed as providing a forum in which competing historical accounts of recent catastrophes will be promoted. These accounts search for authoritative recognition, and judgment likely will be viewed as endorsing one or another version of collective memory.<sup>134</sup>

This mediates the memory of the nation, judging the conflicting views of what memories should be preserved in circumstances where,

people differ radically on their judgments of recent history (that is, on what went wrong and who is responsible), and yet share the view that some resolution of the interpretive disagreement must be reached among themselves for the country to set itself back on track.<sup>135</sup>

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131 Rousso, *The Haunting Past*, above n61 at 57.

132 *Id* at 50. See also Evans, ‘History, Memory and the Law’, above n13 at 344.

133 Rousso, *The Haunting Past*, above n61 at 49.

134 Osiel, above n7 at 39–40.

135 *Id* at 41. In this context, ‘truth commissions’ are of special interest, providing a point of comparison from which to explore alternatives to trials as a legal means for engaging history and memory, especially in the context of national reconstruction, transitional justice and reconciliation following state terror. The South African experience of the post-apartheid *Truth and Reconciliation Commission* has generated a wealth of literature: see generally Alex Boraine, *A Country Unmasked* (2000); Kenneth Christie, *The South African Truth Commission* (2000); Wilmot James & Linda van de Vijver (eds), *After the TRC: Reflections on Truth and Reconciliation in South Africa* (2001); Martin Meredith, *Coming to Terms: South Africa’s Search for Truth* (1999); Charles Villa-Vilencio & Wilhelm Verwoerd (eds), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (2000). Truth commissions have also been a feature of the national landscapes in Central and South America, among other places: for a broad study, see Priscilla B Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001). For a discussion of the different ways that history and memory are understood and constructed by courts, truth commissions and historians, see Charles S Maier, ‘Overcoming the Past? Narrative and Negotiation, Remembering and Reparation: Issues at the Interface of History and the Law’ in Torpey (ed), above n53, 295.

Where they are dealing with matters of significant public concern, the courts are not unaware of the way they will be viewed. Justice Gray's disclaimer in *Irving* that it was not his role 'to form, still less to express, a judgment about what happened' indicates that, even if he does not like it, his judgment 'will inevitably be viewed as *making history*'.<sup>136</sup> A judicial disclaimer is of little effect because the court cannot control the way that judgment shapes memory.

Lawrence Douglas presents a much stronger thesis regarding the role of the courts when he looks at a selection of trials that he argues are 'paradigmatic of the range of efforts to solve [through the criminal law] the problems of representation and judgment posed by the Holocaust'.<sup>137</sup> In express contrast to Hannah Arendt's view that the criminal trial's sole purpose is to dispense justice to the accused, Douglas argues that such prosecutions have dual purposes of 'principled justice' and 'historical tutelage'.<sup>138</sup> It is through the 'didactic legality' of the latter that criminal law can shape history and memory, and serve as 'as a salve to traumatic history'.<sup>139</sup> Douglas provides compelling demonstrations of the didactic consciousness in the proceedings at Nuremberg, in the trial of Adolf Eichmann, and in the prosecutions of Klaus Barbie and John Demjanjuk (alleged but not found to be 'Ivan the Terrible' of Treblinka) as perpetrators and of Zundel as a denier.

One difficulty that is not necessarily raised by Douglas' critique, but which would be at issue in a defamation action, is whether the balance between didactics and justice should be the same in civil and criminal trials. The parties to a defamation action find themselves, ostensibly, in court over a dispute about an individual's reputation. Tatz, however, seems to propose that the action be commenced for what appears to be neither a dual nor even an ancillary didactic purpose, but for an entirely didactic purpose. I am not suggesting that a defamation action aimed at salvaging a reputation would be illegitimate or inappropriate. Nor am I suggesting that such an action could not be done in good faith. But there is perhaps good reason to pause before using the trial process for solely didactic ends.<sup>140</sup>

Douglas openly acknowledges that justice and pedagogy are not always comfortably balanced and that there is a strongly critical argument that suggests the responsibility to the accused must be paramount and should not be distorted by other aims. But, regardless of those matters, Douglas' illustration of the

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136 *Irving v Lipstadt* at [1.3]; see also above n78 and accompanying text; Osiel, above n7 at 82 (emphasis in original). Justice Gray's sentiment had parallels in, for example, Eichmann's trial in Israel and Osiel (at 80–81) quotes the opening parts of that judgment at some length where the court states that it does not see its purpose as being to provide 'a comprehensive and exhaustive historical account of the events' and not to cast judgments on 'questions of principle which are outside the realm of law'.

137 Douglas, above n49 at 6.

138 Id at 2. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (1963).

139 Id at 2, 260.

140 If undertaken for a solely didactic end, this raises questions about the suitability of law to resolve the matter at all: see generally Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353.

pedagogical element remains of special interest.<sup>141</sup> In particular, one does not have to accept the thesis that the didactic element is deliberate or conscious in order to accept the less strident position that trial and judgment serve a didactic function for history and memory where any legal adjudication of history is concerned.

The French prosecutions — which as a legal function were an exercise in meting out justice to the individuals on trial — saw a mass of debate about the role and significance of the trials and the verdicts. There were differences of opinion over whether these were essential or appropriate ways of judging not just individuals but France as a nation (both past and present), the Vichy regime, and the genocidal complicity and activity of both nation and state.<sup>142</sup> Tzvetan Todorov questioned the pedagogic value of a trial and wondered instead whether the prosecution and conviction allowed the nation to falsely reconstitute itself, allowing the contemporaneous mistreatment of immigrants to continue while forming a ‘retrospective heroism [that] simply exempted us from combating [present injustices]’.<sup>143</sup> Rousso saw its only purpose as being to ‘liberate a voice, organise it, put it into circulation, and thus to see to it that the suffering and responsibilities for this event are more widely shared within the community.’<sup>144</sup> Alain Finkielkraut saw in Papon’s trial an event with the power to disturb individual consciousness such that it would become ‘a little less easy for us, whatever we are — civil servants, but also photographers, technicians, researchers, executives or businessmen — to run from moral responsibility for our acts in the carrying out of our tasks’.<sup>145</sup> However disparate and conflicting these views are, Osiel’s general comment seems to apply equally to all: the stories of the past in the trials served to ‘aid our remembrance not only of the events themselves, but also of the moral judgments we ultimately reached about them’.<sup>146</sup> In Australia, this process is most clearly apparent in the different attempts by governments of the day to incorporate the High Court’s decisions on native title into the collective memory and the national narrative.

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141 Douglas, above n49 at 3–4. Douglas deals with those critical elements and argues that they do not necessarily present a problem for accepting didactic legality as a part of the legal process. Indeed, he suggests that in some respects it strengthens the pedagogical power of a prosecution.

142 The prosecutions of Barbie, Touvier, Bousquet (who was charged but murdered in 1993 shortly before his trial) and Papon raised many issues during the 15 year period over which they occurred. Each defendant played a different part in the Holocaust and each trial was set in the context of those which had preceded it. The nation was also faced with the contradiction of its own actions with regard to French atrocities against Algerians (see above n118). See generally Vidal-Naquet, above n51; Nancy Wood, ‘Crimes or Misdemeanours? Memory on Trial in Contemporary France’ (1994) 5 *French Cultural Studies* 1; Leila Wexler, ‘Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France’ (1995) 20 *Law & Social Inquiry* 191; Wood, ‘The Case of Maurice Papon’, above n97; Golsan (ed), *The Papon Affair*, above n101; Nancy Wood, *Vectors of Memory: Legacies of Trauma in Post-war Europe* (1999); Douglas, above n49, especially at 185–211.

143 Tzvetan Todorov, ‘Letter from Paris: The Papon Trial’ in Golsan (ed), above n101, 217 at 222 [Trans: John Anzalone; first published: (1999) 121–122 *Salmagundi* 3].

144 Rousso, *The Haunting Past*, above n61 at 20.

145 Alain Finkielkraut, ‘Papon: Too Late’ in Golsan (ed), above n101, 190 at 192 [Trans: Lucy Golsan; first published as ‘Papon, Trop Tard’ (1996) *Le Monde*]

Launching the Australian celebration of the 1993 International Year of the World's Indigenous People, Labor government Prime Minister Paul Keating used *Mabo* to present a vision of and for the nation.<sup>147</sup>

[This year] will be a year of great significance for Australia .... It is a test of our self-knowledge. Of how well we know the land we live in. How well we know our history. How well we recognise the fact that, complex as our contemporary identity is, it cannot be separated from Aboriginal Australia .... This is perhaps the point of this Year of the World's Indigenous People: to bring the dispossessed out of the shadows, to recognise that they are part of us, and that we cannot give indigenous Australians up without giving up many of our own most deeply held values, much of our own identity — and our own humanity .... It begins, I think, with the act of recognition. Recognition that it was we who did the dispossessing....

The *Mabo* judgment should be seen as [a building block of change]. By doing away with the bizarre conceit that this continent had no owners prior to the settlement of Europeans, *Mabo* establishes a fundamental truth and lays the basis for justice. It will be much easier to work from that basis than has ever been the case in the past .... *Mabo* is an historic decision — we can make it an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians .... The message should be that there is nothing to fear or to lose in the recognition of historical truth, or the extension of social justice, or the deepening of Australian social democracy to include indigenous Australians. There is everything to gain ....

There is one thing today we cannot imagine. We cannot imagine that the descendants of people whose genius and resilience maintained a culture here through 50 000 years or more, through cataclysmic changes to the climate and environment, and who then survived two centuries of dispossession and abuse, will be denied their place in the modern Australian nation.<sup>148</sup>

146 Osiel, above n7 at 73. There are also clear parallels between the matters discussed here and the Israeli courts' consideration of the relationships between law, history and moral judgment when examining the roles of Jews who were accused of complicity in the Holocaust: see generally Asher Maoz, 'Historical Adjudication: Courts of Law, Commissions of Inquiry, and "Historical Truth"' (2000) 18 *Law & History Review* 559, especially at 600–606; Douglas, above n49 at 154–156.

147 The perception of the decision as having overturned terra nullius is itself an example of how a complex judgment was reduced to a simplistic narrative. David Ritter provides a useful discussion of how the court dealt with the doctrine: 'The "Rejection of Terra Nullius" in *Mabo*: A Critical Analysis' (1996) 18 *Sydney Law Review* 5. For a critique of the High Court's legal steps to incorporate the historical re-reading in *Mabo* and *Wik* see Lee Godden, 'Wik: Legal Memory and History' (1997) 6 *Griffith Law Review* 122.

148 Paul Keating, 'Australian Launch of the International Year of the World's Indigenous People' (often referred to as his 'Redfern Park Speech'), 10 December 1992, reproduced as an appendix to Native Title and Aboriginal and Torres Strait Islander Land Fund Senate Committee, *Sixteenth Report: Consistency of the Native Title Amendment Act 1998 with Australia's International Obligations under the Convention on the Elimination of all Forms of Racial Discrimination (CERD)*, 28 June 2000, 270 at 270–274. [Original was in speech format of one sentence per paragraph; extracts set in paragraphs here by the author.] It is notable that Keating's speechwriter, Don Watson, was a historian; his reflections are recorded in Don Watson, *Recollections of a Bleeding Heart: A Portrait of Paul Keating PM* (2002).

In 1997, the Liberal-National coalition government set about undertaking legislative reform with a ‘Ten Point Plan’ to limit and negate the legal rights delivered under *Mabo*, Labor’s *Native Title Act 1993* (Cth) that had entrenched common law native title, and the extensions of the *Wik* decision which were said to seriously threaten the rights of farmers and, consequently, threaten the nation.<sup>149</sup> In a televised address to the nation, Prime Minister Howard set about presenting Australia with a vision of itself within which ‘the bush’ and its population of farmers held a defining place and where the proposed legal changes were sensible and legitimate:

Australia’s farmers, of course, have always occupied a very special place in our heart. They often endure the heart-break of drought, the disappointment of bad international prices after a hard worked season and quite frankly I find it impossible to imagine the Australia, I love, without a strong and vibrant farming sector.<sup>150</sup>

Howard expressed his belief that ‘we need to move forward’ and ‘take action as a nation’ and that the government’s Ten Point Plan would deliver an outcome ‘that [would] be seen by the entire Australian community as a fair and just solution to a very, very difficult national problem.’<sup>151</sup>

The Australian experience here is consistent with the analyses of Osiel and others with regard to criminal trials. Although they treated the judgments very differently, both Prime Ministers sought to use the decisions to explain to the nation how it should understand itself and its future. For Keating, the past as a story of dispossession had to become a part of the nation’s very being. Recognition was the basis for moving forward. For Howard, the past as a story of dispossession could not become a part of the nation’s being: such recognition would destroy the nation and needed to be ‘put behind us’ because it would be an obstacle to moving forward.<sup>152</sup>

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149 *Wik*, above n11. The threat to farmers was portrayed in spite of the High Court’s express statement (at 189–190) that where there was any inconsistency between the rights of pastoralists and the rights of native title holders, the rights of pastoralists would prevail. Howard said the operation of the Act was characterised by ‘ridiculous’ and ‘bogus claims’, and that the right to negotiate over land use was a ‘stupid property right’ that with the proposed reforms would be ‘completely abolished and removed for all time in relation to the activities of pastoralists’. John Howard, ‘Address to Participants at the Longreach Community Meeting to Discuss the *Wik* Ten Point Plan, Longreach, Queensland’ 17 May 1997, reproduced as an appendix to Native Title and Aboriginal and Torres Strait Islander Land Fund Senate Committee, *Sixteenth Report: Consistency of the Native Title Amendment Act 1998 with Australia’s International Obligations under the Convention on the Elimination of all Forms of Racial Discrimination (CERD)*, 28 June 2000, 276 at 276–279 (hereinafter ‘Longreach Speech’).

150 John Howard, ‘*Wik* Statement – Address to the Nation, ABC Television’, 30 November 1997, <[www.pm.gov.au/news/speeches/1997/wikadd.htm](http://www.pm.gov.au/news/speeches/1997/wikadd.htm)> (1 February 2004) (hereinafter ‘*Wik* Statement’). For a critical review of Howard’s position on the nation, race and history prior to his becoming Prime Minister, see Andrew Markus, *Race: John Howard and the Remaking of Australia* (2001) at 85–98.

151 Howard, ‘Longreach Speech’, above n149 at 276–279.

If the French experience and our own recent cases dealing with the colonial past are any guide, the courts' encounters with history — and, very importantly, the public perception and discussion of those encounters — suggest that Nancy Wood is quite correct in her view that the courts themselves have become *lieux de mémoire*.<sup>153</sup> What, then, might be the place of judgment in defamation litigation between Australian historians?

It was suggested earlier that one of the distinguishing features of a defamation action is that, unlike native title determinations or criminal prosecutions, it does not always rely on a particular version of history to support its conclusions. On some occasions, as in *Irving*, there will be a finding of implausibility and particular versions of the past will be excluded. On every occasion, including *Irving*, but especially when there is a finding of plausibility, the decision acknowledges a range of different plausible versions of the past. However, not all the possibilities are invested with equal status, for there is a connection between law and memory within which defamation law tends to validate some versions in favour of others. That connection relies not upon judging the plausibility of history, but upon judging the reputation of the historian. In the discussion of national pasts, Nora highlights 'the practice of history' as having become 'the repository of the secrets of the present' and argues that the historian plays a central role in how society understands itself historically. The historian, he argues, takes 'something lifeless and meaningless and invest[s] it with life and meaning ... [H]e has become, in his very being, a *lieu de memoire*.'<sup>154</sup> And so it is by judging the historian that a court impacts upon this very intimate link between on the one hand, the historian's writing of history and, on the other, the collective memory, or what we *think of as* our history. In this way, the casting of judgment upon a historian's reputation glides almost effortlessly into the depiction of a judgment cast upon history.

Judgment in any circumstances is vulnerable to manipulation and misinterpretation in public discussion. Here, the inherent complexity of the action is belied (or perhaps compounded) by the apparent simplicity of the finding in favour of the plaintiff or the defendant. As Osiel has noted, the fact of judgment is often 'mistakenly read as an authoritative endorsement' of the stories the successful parties have offered to the court.<sup>155</sup> These problems are magnified in debates about Aboriginal history which occur in a political and communicative context that is charged with race, especially as they move beyond the courts or the academy and into public life. The 'judicialisation of the past' in such circumstances renders collective memory — and the nation itself — dangerously vulnerable to the distortion of both law and history.

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152 On the phrase 'get the issues behind us' see Howard, 'Wik Statement, above n150, and, for example: Howard, 'Longreach Speech', above n149 at 279; Howard's speeches and media interviews on 7 Nov 1997; 30 Nov 1997; 6 Dec 1997; 8 Dec 1997; 8 Feb 1998; 25 Feb 1998; 4 April 1998; 9 July 1998; 10 July 1998: all available at <[www.pm.gov.au/news/interviews/index.cfm](http://www.pm.gov.au/news/interviews/index.cfm)> and <[www.pm.gov.au/news/media\\_releases/index.cfm](http://www.pm.gov.au/news/media_releases/index.cfm)> (1 February 2004).

153 Wood, 'The Case of Maurice Papon', above n97 at 44.

154 Nora, above n64 at 13–14.

155 Osiel, above n7 at 106. The observation was made in the criminal context but there seems little doubt it applies similarly to civil outcomes.

## 6. *Conclusion: History, Memory and Judgment*

Whatever the circumstance, the strands of history, memory and judgment are intertwined when law engages with the past. Different types of legal actions exhibit varied and interdependent relationships between the three. Defamation law should not be used as an avenue to resolve disputes between historians; there is much to be wary of in every respect.

There is no doubt that David Irving suffered a resounding loss in his libel action. The findings demolished the validity of his arguments and delivered a very public blow to his credibility. Tatz described Irving's loss as,

a dismal signpost for the Holocaust denialists. His demise — of reputation as historian, as “expert” on the Holocaust and of financial security — won't stop their activities but it will nullify whatever gains they believed they were making.<sup>156</sup>

Perhaps this puts it too strongly, especially as Holocaust denial and bigotry will not of themselves be defeated by rational argument, but undoubtedly the loss is significant.<sup>157</sup> However, the outcome of the *Irving* case is not an appropriate basis for advocating the use of defamation law to resolve historical disputes.

The ability of defamation law to accommodate the interpretive dimensions of historical scholarship means it provides a better legal framework for encounters between law and history than do most other actions because history can enter the court as history. But what makes a defamation judgment so troubling is this very same accommodation that necessarily allows for a plurality of legally valid historical possibilities. The *Irving* trial presents a façade of simplicity and certainty because there were such remarkably strong empirical grounds for finding Irving's version of history to be implausible, and because the court's finding was one of implausibility (rather than plausibility). Where the History Wars are concerned, there is far less documentary material that would empirically support a degree of factual certainty about the occurrence of particular events given the period under dispute is the early 19<sup>th</sup> century. This makes a finding of implausibility on either side far less likely and, consequently, the distortive impact of a judgment far more likely.

Despite these limits, defamation law might still inform the analysis of historical scholarship where allegations of denialism are in issue. The defence of truth demands an examination of historians' motives to the extent that it does not accommodate the inappropriate, open-ended relativism that underpinned the

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<sup>156</sup> Tatz, above n3 at 139.

<sup>157</sup> Evans, *Telling Lies About Hitler*, above n5 at 271, is perhaps closer to the mark when he notes that the decision ‘utterly destroyed Irving's reputation as a genuine historian of these events.’ Lipstadt, ‘Building a Defense Strategy’, above n5 at 243, quotes the *New York Times*’ assessment that the trial ‘put an end to the pretense that Mr Irving is anything but a self-promoting apologist for Hitler’. Yehuda Bauer argues that since the trial denial is no longer acceptable ‘in polite society, in other words, where there [is] democracy’: Yehuda Bauer, ‘Holocaust Denial: After the David Irving Trial’ (2003) 15 *Sydney Papers* 154 at 160–161.



majority reasoning in *Zundel*. At the least, it illustrates how one might prevent the misrepresentation and abuse of epistemological theory to defend deliberate fabrication whilst still acknowledging the inherently interpretive nature of historical scholarship. It demonstrates, if only to a limited extent, the possibility of the courts' judging historians without directly authorising one particular historical narrative.

The rejection of Tatz's suggestion is not an endorsement of Reynolds' position that courts are 'not the place where ideas should be fought out'.<sup>158</sup> It is not just in a defamation action that ideas would come before the courts. Rather, ideas are inevitably fought out in any legal encounter with the past. As both lawyers and historians have noted, it is vital for both disciplines to understand how this occurs. Of equal importance, the courts have indeed become *lieux de memoire*; judgments of either history or historians are in every instance enmeshed with the transmission of and struggle for the nation's collective memory and the consequent legitimation of legal, political, economic and social relations.

The discussion in this article has been primarily directed at understanding the relationships between history, memory and law. But understanding is not enough. The prospect of litigation obliges us also to tread with care because those who would have us remember them are not represented in the proceedings. In native title actions the dead must, amongst the myriad of procedural and conceptual limitations, rely on indigenous descendants to put before the court a case that does justice not only to the resolution of the present dispute but also to the recording of the past. In trials for crimes against humanity, the dead must rely on the state as a benevolent participant, determining who, if anybody, might be held responsible and for what.<sup>159</sup> And care is worth taking, for the legal process can be valuable for the production of and reflection on history and memory. Douglas uses the Eichmann prosecution to point out eloquently the role of the trial as a process to do justice and as a forum in which to bear witness and 'give tortured memory the force of legal evidence':

The unburdening of memory, the sharing of narrative, were means of doing justice, at the same time that doing justice served to preserve the memory of the catastrophe. Memory and justice, then, were ingredients in the normative reconstruction of a people once slated for extermination.<sup>160</sup>

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158 See above n4 and accompanying text.

159 See Golsan, 'Maurice Papon and Crimes Against Humanity in France', above n101 at 25, discussing Conan's criticism of the Papon trial in Éric Conan *Le Procès Papon: Un Journal d'audience* (1998) 313.

160 Douglas, above n49 at 173, and generally at 161–173. Douglas' comments give pause here for the ways that Australia's more recent past might be considered, especially with regard to the Stolen Generations and the different forums that heard testimony regarding the Stolen Generations: see, for example, above n10, the *Cubillo* cases and the *Bringing Them Home* report by the Human Rights and Equal Opportunities Commission. The role of truth commissions in this regard may also provide an interesting point of comparison: see above n135 and, in the Australian context, Richard Lyster, 'Why a Truth and Reconciliation Commission? Some Comments on the South African Model and Possible Lessons for Australia' (2000) 12 *Current Issues in Criminal Justice* 114.

A defamation action between the Australian historians is profoundly worrying with regard to its participants and their motivation for litigation. Argument is made and judgment is cast on a past that deeply concerns people — both living and dead — who are the object of inquiry but have no opportunity to present in the proceedings their version of how things were. There are no marginalised living, there is no prosecuting state, and there are no damaged survivors to lay claim to how the past should be remembered.

The issues at hand are concerns not only of the present, but also of the future. There will be other occasions in this country where law and history will meet in crisis. Those occasions will not be limited to the sins of 19<sup>th</sup> — or 20<sup>th</sup> — century colonialism. When acts or omissions of injustice that go to the nation's sense of itself acquire the requisite moral magnitude that prompts their re-examination, we will have to find answers to questions we will ask about ourselves. Those questions might be, in Osiel's words, 'what sort of place *is* this that such things could happen?'<sup>161</sup> Or, to paraphrase the question Habermas asked in the German historians' debate, can one continue the tradition of national culture without taking over the historical liability for the way of life in which terrible wrongs were possible?<sup>162</sup> When these times come, it is to be hoped that the discipline and the profession of law will adequately comprehend and take their places in providing some answers.

If history, memory and judgment are as interconnected as I have suggested, then Graeme Davison's observations about his discipline might with ease (and some unease) prompt reflections on law's problems with the past:

Active and ethical citizenship depends, among other things, upon the imaginative capacity to look at the world through the eyes of others. The past is a theatre of human experience. In attempting to understand the people of the past — for attempting is the best we can do — our imaginations are stretched, our moral sensibility strengthened. History is a rehearsal for responsibility.<sup>163</sup>

As law mediates and regulates claims to justice in the present, its grasp of how to deal with the past must be a central concern. There is too much at stake for things to be otherwise.

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161 Osiel, above n7 at 36 (emphasis in original).

162 Jürgen Habermas, 'On the Public Use of History' in James Knowlton & Truett Cates, *Forever in the Shadow of Hitler?* (1993) 167, quoted in La Capra, above n62 at 98. For at least the last two years there has been much disquiet and objection to mandatory detention in Australia. The continuing bi-partisan political support it has in the parliament suggests that it has not yet captured the national imagination as it might but there are always signs that it will. See, for example, Marc Purcell, 'Damaging Children, In Our Name' *The Age* (Melbourne) 17 February 2004; Julian Burnside QC, 'Speech to Melbourne Rotary Club in Debate with Senator Amanda Vanstone (Minister for Immigration and Multicultural and Indigenous Affairs)' 16 February 2004, < <http://www.users.bigpond.com/burnside/rotary.htm> > (19 February 2004).

163 Graeme Davison, *The Use and Abuse of Australian History* (2000) at 14.

# *Family-friendly Work Practices and The Law*

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## *Abstract*

Finding an acceptable and workable balance between paid work and family commitments 'is one of the central tasks for employment law.' For women, finding this balance is also fundamental to the quest for gender equality in work. In this paper, prompted by a number of recent cases, we examine how two alternative regulatory approaches in employment law can be — and have been — used to enforce or encourage work practices that are family-friendly and hence assist in achieving the two related goals of a more acceptable work-family balance and gender equality in work. On the one hand are public equality laws, and on the other private contract law.

The claimants in the cases we consider used these two approaches to make claims for particular family-friendly provisions, specifically unpaid maternity leave and the right to work part-time hours after maternity leave. These are only two particular benefits, but we consider these as examples of family-friendly practices more generally and attempt to draw implications for a wider range of practices. While Australian anti-discrimination legislation is primarily reactive and does not impose any positive duty on employers, by characterising practices that are contrary to work-family balance as discriminatory (on the basis of sex or pregnancy), workers in these cases had some success in compelling family-friendly practices. Further the cases show that human resource policies and manuals that express aspirations about commitments to work-life balance and family-friendly practices can be contractually enforceable.

## **1. Introduction**

In a chapter titled 'Work and Life' in his book *Employment Law*, Hugh Collins narrates the story of the Luddite rebellion in 1812 against the mill owners who threatened to impose a 'new geography of industrialisation' on the common people — a brutal separation between work time in the factory, and domestic life.<sup>1</sup> Contemporary life is a testimony to the mill owners' success. Many working people struggle to balance the competing demands of paid work away from home

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1 Hugh Collins, *Employment Law* (2003) at 77.

and their non-work commitments. Family caring responsibilities are the most common non-work commitments that compete with work demands. Finding an acceptable and workable balance between paid work and family commitments 'has been, and will continue to be, one of the central tasks for employment law'.<sup>2</sup>

For women, finding an acceptable balance between paid work and family commitments is also fundamental to the quest for gender equality in work. The biological role that women play in child bearing and the traditional role they play in caring for dependants in our society are undoubtedly significant factors in the disadvantage they continue to experience in the workplace.

In this paper, prompted by a number of recent cases, we examine how two alternative regulatory approaches in employment law can be — and have been — used to enforce or encourage work practices that are family-friendly and hence assist in achieving a more acceptable work-family balance. On the one hand are public equality laws, and on the other private contract law.

## 2. *Work-Family Balance & Family-Friendly Practices*

Family-friendly work practices form a central plank in strategies for achieving work-family balance, along with accessible and affordable dependant care services, supportive social structures and public income support. While 'family-friendly' is now a familiar term, what sort of practices does the term cover? On a pragmatic level, family-friendly practices are simply practices that help workers balance their family and employment responsibilities and aspirations. They include providing: parental leave and other family leave, the option of working part-time or job-sharing, support for or access to dependant care services, and flexible work hours and locations.<sup>3</sup>

On a deeper level, the aspiration for family-friendly workplaces challenges the structures that define the stereotypically 'ideal' worker<sup>4</sup> in a workplace. In most workplaces, the 'ideal' worker has been constructed as one who is able to work full-time and long hours, can cope with demands to work overtime on short notice (and often without further remuneration), and does not require any flexibility or

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2 Id at 78.

3 For a discussion of the range and development of family-friendly arrangements (including a typology) in Australian workplaces, see Glenda Strachan & John Burgess, 'The "Family Friendly" Workplace: Origins, Meaning and Application at Australian Workplaces' (1998) 19(4) *Int'l J of Manpower* 250. Strachan and Burgess rightly point out that a broad categorisation of family-friendly arrangements would also include 'income security' and 'employment security' as employment that provides insufficient income to support a family will 'put pressure on family living standards and family structures' and 'insecure employment reduces the opportunity for planning and financial commitment, and may be often associated with benefit exclusion'. Id at 251. For a government summary of family-friendly provisions in Australian workplaces see Australian Government Department of Family and Community Services, *OECD Review of Family Friendly Policies: The Reconciliation of Work and Family Life: Australia's Background Report* (2002) at 46–50.

4 The notion of an 'ideal' worker being unencumbered or independent of non-work demands is raised in much of the feminist literature on work and gender. See, for example, Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000) at 2.

extended leave to deal with competing, non-work demands.<sup>5</sup> It is no wonder that the typical working parent is rarely an 'ideal' worker. Family caring work is time-consuming and the demands of childcare are both relentlessly routine, and yet often unpredictable. Sick children also demand immediate, unpaid overtime from their carers. This can certainly limit a worker's capacity to put in long hours or be infinitely flexible about overtime or varying hours. But does this mean that the typical parent or carer is a less valuable worker? Is the stereotypical 'ideal' an appropriate measure? In this ideal, time, and specifically 'face time' or visibility at the workplace, and absolute flexibility are used as direct or proxy measures for value. For a start, information technology and email communication offer many workers the opportunity to work from home, without the need to be geographically on site, although we note that changing the location of work will not alone address the central issue of conflicting time demands.<sup>6</sup> An employer willing to revise criteria for staff selection, reward and promotion to value productivity, loyalty, commitment, creativity and other contributions, not merely face time, can create a truly family-friendly work culture,<sup>7</sup> which allows parents to better participate and compete in the workplace without compromising fulfilment of family obligations.<sup>8</sup>

It is in this way that family-friendly practices are also gender-equality practices. While generally framed in gender-neutral terms, the underlying company policies of family-friendly practices are largely directed toward women in recognition of the biological and cultural role women play in relation to family.<sup>9</sup> In this way, these policies can work to attract, motivate and retain women as employees. By helping to reduce conflicts between family and work responsibilities, conflicts most acutely experienced by women, family-friendly practices can both effect and signify the cultural and structural changes needed to bring about greater gender equality in the workforce. It should be noted, however, that family-friendly policies that are directed toward women can also have the perverse effect of further entrenching traditional, gendered divisions of family caring responsibilities.<sup>10</sup> Truly gender-neutral policies can enable and even encourage men to take up greater responsibility for family caring work, as well as enabling women who hold such responsibilities to participate more easily.

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5 For a more detailed analysis of the way in which time norms structure the 'ideal' worker, see Belinda Smith, 'Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change' (2002) 11 *Columbia J of Gender & Law* 271, Part II.

6 Michelle Travis argues that without significant external control, technological innovation can be simply adapted to and governed by the existing employment structures and gender roles rather than challenge or transform existing gender norms in the workplace or the home. Michelle A Travis, 'Equality in the Virtual Workplace' (2003) 24 *Berkeley J Emp & Lab L* at 283.

7 See Lotte Bailyn, *Breaking the Mold: Women, Men, and Time in the New Corporate World* (1993) at xii for an argument that the introduction of family-friendly benefits is not enough to achieve real change and instead 'companies *must* include – explicitly, imaginatively, and effectively – the private needs of employees when reengineering their work'.

8 Smith, above n5.

9 For a comprehensive analysis of the limited use Australian men make of family-friendly work provisions see Michael Bittman, Sonia Hoffmann & Denise Thompson, Australian Government Department of Family and Community Services, *Men's Uptake of Family-Friendly Employment Provisions*, Policy Research Paper Number 22 (Canberra: AGPS, 2004).

### 3. *Gender Equality & Regulatory Tools*

Those who advocate a more acceptable work-family balance are faced with a raft of regulatory tools that could be used to achieve this. The diversity of employment and family needs that must be balanced suggests that no single regulatory approach would be adequate to solve the work-family challenge. Dickens proposes that to achieve equality in work, a tripod of regulatory approaches needs to be adopted as a multi-pronged strategy encompassing legal regulation (or legislation), joint or social regulation (collective bargaining) and, in effect, the unilateral regulation of employers that is primarily driven by business case arguments.<sup>11</sup>

Baird, Brennan and Cutcher support this, arguing in the Australian context that such an approach might be the best way to achieve paid maternity leave, which is a key step in the quest for equality in relation to family responsibilities work disadvantage.<sup>12</sup> They, among others, have examined how each prong or regulatory mechanism has been used with some success to achieve work entitlements that are ‘family-friendly’ or supportive of family commitments.

Legislation, for instance, has been used to provide most employees with an entitlement to (unpaid) maternity and paternity leave under either the *Workplace Relations Act* 1996 (Cth) or equivalent state legislation, such as the *Industrial Relations Act* 1996 (NSW).<sup>13</sup> Paid maternity (let alone parental) leave is notably absent from the legislative safety net,<sup>14</sup> other than for a select group of employees, namely some public servants.<sup>15</sup> Other basic family-friendly benefits, such as the right to work part-time hours, are also not found explicitly as legislative rights. However, while legislation has not explicitly prescribed many family-friendly benefits, it does provide limited equality rights that show potential as a means to assert such benefits, as we explore in this paper.

As a precursor and supplement to legislative rights to family-friendly work practices we have seen standards established in Australia through award test cases covering a variety of entitlements such as maternity leave,<sup>16</sup> parental leave,<sup>17</sup> and

10 Such concerns were expressed in the recent debate over paid maternity leave, where many advocates of paid leave argued that it should be ‘parental leave’ not merely maternity leave so as not to reinforce the traditionally gendered role of women caring for newborns. Belinda Smith, ‘A Time to Value: Proposal for a National Paid Maternity Leave Scheme’ (2003) 16(2) *AJLL* 226 at 228–229; Sex Discrimination Unit of the Human Rights and Equal Opportunity Commission, *A Time to Value: Proposal for a National Paid Maternity Leave Scheme*, s14.2 (*A Time to Value*) (2002).

11 Linda Dickens, ‘Beyond the Business Case: A Three-Pronged Approach to Equality Action’ (1999) 9(1) *Human Resource Management Journal* 9.

12 Marian Baird, Deborah Brennan & Leanne Cutcher, ‘A Pregnant Pause: Paid Maternity Leave in Australia’ (2002) 13(1) *Labour and Industry* 1 at 3.

13 See *Workplace Relations Act* 1996 (Cth) s170KA and *Industrial Relations Act* 1996 (NSW) Ch2, Pt4.

14 This prompted the recent national inquiry by the Sex Discrimination Unit of the Human Rights and Equal Opportunity Commission, *Valuing Parenthood: Options for Paid Maternity Leave: Interim Paper 2002* (2002), culminating in a proposal for a national scheme of 14 weeks leave. *A Time to Value*, above n10. As Baird, Brennan & Cutcher sum up in relation to this particular benefit, paid maternity leave, ‘The missing element in Australia is a national legislative foundation, and it is long overdue.’ Baird et al, above n12 at 17.

15 See, for example, *Maternity Leave (Commonwealth Employees) Act* 1973 (Cth).

16 *Maternity Leave Case* (1979) 218 CAR 120.

other family leave.<sup>18</sup> This mechanism is of particular importance for that section of the workforce that relies predominantly or even solely on awards for their terms and conditions of employment. But the benefit of such standards is not restricted to this group, as newly established benefits in a test case can flow through to all awards and in this way underpin bargaining, both collective and individual. The role of such test cases in raising public awareness and providing valuable research on the issues should also not be underestimated; they can help to shift the public expectation of a safety net as well as the content of the legal right. The Family Provisions federal awards test case currently being run by the Australian Council of Trade Unions (ACTU)<sup>19</sup> demonstrates ongoing use of this mechanism as a means for establishing family-friendly entitlements in the safety net for workers.

Enterprise bargaining, or joint regulation, has become one of the means favoured by this federal Government, as well as the previous Labor government, to achieve workplace change including any changes to the compatibility of work with family responsibilities.<sup>20</sup> While there is potential for employees to bargain for family-friendly work benefits, being dependent on collective organisation and bargaining power this mechanism has many well-known limitations as a means of achieving better conditions for workers. Baird, Brennan and Cutcher report, in relation to one key benefit that:

[D]espite the growing importance of enterprise bargaining and the increasing attention to the so-called 'family-friendly' issues... [the evidence does] not suggest a rapid uptake of paid maternity leave in the bargaining agenda at either the state or federal levels.<sup>21</sup>

And this is the case also for family-friendly conditions generally, with a number of studies reporting that only a minority of federal enterprise agreements contain family-friendly working arrangements.<sup>22</sup>

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17 *Parental Leave Case* (1990) 36 IR 1.

18 *Family Leave Test Case* (1994) 57 IR 121. Strachan and Burgess assert that this decision and the 1996 *Living Wage Case* were, at the time of their writing in 1998, probably the most important recent family-friendly working developments in Australia. Strachan & Burgess, above n3 at 261.

19 See the Australian Industrial Relations Commission website for the case: <<http://www.e-airc.gov.au/familyprovisions/>> (last updated 14 July 2004), or the ACTU campaign site at: <[http://www.actu.asn.au/public/campaigns/workandfamily/work\\_family\\_evidence.html](http://www.actu.asn.au/public/campaigns/workandfamily/work_family_evidence.html)> (21 July 2004). In this application the unions are seeking extended unpaid parental leave, secure part-time work and emergency family leave.

20 See Strachan & Burgess, above n3 at 256–257 for pronouncements of both governments on how enterprise bargaining would encourage and enable (although not guarantee) working arrangements that were more family-friendly.

21 Baird, Brennan & Cutcher, above n12 at 10.

22 *Id* at 259; Bittman et al, above n9 at 17–29. Further, Burgess and Strachan warn that many provisions that are supposedly family-friendly, such as flexible hours, are not necessarily so when the worker has little control. They assert that 'Flexible working arrangements often mean working over a longer time span of what constitutes the "standard" day and the "standard" week while at the same time being denied access to penalty rates for working unsociable hours'. *Id* at 258 (citing Belinda Probert, Department of Education, Employment and Training, *Part-time Work and Managerial Strategy: Flexibility in the New Industrial Relation Framework* (Canberra: AGPS, (1995)).

The third prong of Dickens' strategy for equality is unilateral regulation, or the uptake of family-friendly provisions by management for business reasons, rather than legal compliance reasons. For inducing rather than compelling change, the business case argument has been characterised as the carrot, rather than the stick.<sup>23</sup> This has become the dominant approach in a neo-liberal climate and in the absence of extensive legislated entitlements or any significant emergence of such rights out of enterprise bargaining. One of the questions we examine in this paper is whether family-friendly policies adopted by management are enforceable at law.

A number of recent cases point to two regulatory approaches that need to be considered in this debate about work-family balance and gender equality in the workplace. The two approaches are public equality laws, specifically anti-discrimination legislation, and private contract law. The claimants in the cases we consider below used these two approaches to make claims for particular family-friendly provisions, specifically unpaid maternity leave and the right to work part-time hours after maternity leave. These are only two particular benefits, but we consider these as examples of family-friendly practices more generally and attempt to draw implications for a wider range of practices.

Public equality laws, in the form of anti-discrimination legislation, do not impose a command on employers to provide specific family-friendly benefits such as parental leave or the right to part-time work. In that sense, they do not provide a clear safety net or standards of conditions for workers, as a legislated entitlement to paid maternity leave, for instance, would. However, as we will see, by providing a limited right to equality in work, these laws can be used by individuals to assert such specific rights as they are needed to avoid discrimination in the particular workplace. The legislation thus operates, in effect, primarily by providing private rights of action.

Stated generally, anti-discrimination laws establish for workers the right not to be treated less favourably because of particular, personal traits. The protected trait seemingly most relevant in this debate is family responsibilities, but, as can be seen in the cases we examine below, the protection of other traits such as sex and pregnancy also provides some scope for achieving more family-friendly working conditions. So, for instance, by characterising the need for maternity leave as a characteristic appertaining generally to women who are pregnant, the prohibition on pregnancy discrimination can be employed to help pregnant workers take maternity leave without detriment.<sup>24</sup>

The other regulatory approach we explore is private contract law which supports consensual, and (supposedly) mutually beneficial bargains made between those who engage labour, and those who work. Through private contract law, the business case initiatives of employers acquire legal consequences. Even though family friendly initiatives may be 'volunteered' by employers (rather than won through negotiation and bargaining), once employment is accepted on those

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23 Linda Dickens, 'The Business Case for Women's Equality: Is the Carrot Better than the Stick?' (1994) 16(8) *Employee Relations* 5.

24 As was the case in *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (Thomson).



proffered terms, employees become entitled to treat these promises as legally enforceable contract rights.

Contract rights can derive (as we shall see) from ‘human resources’ (HR) policies and manuals now often used in contemporary workplaces, and which frequently express aspirations (albeit often in vague phraseology) about commitments to work-life balance and family-friendly work practices. These HR policy promises are perfectly genuine: for the employer they offer an opportunity to attract and retain well-trained and conscientious staff who will sometimes be willing to trade off immediate income for these valuable benefits. When in practice these promises prove difficult to fulfil, the question arises: are such promises enforceable as common law contracts? At least one federal court decision<sup>25</sup> in recent times has upheld a worker’s contractual claim to the benefit of a family-friendly workplace policy, as we examine below.

We will examine these two avenues — public regulation in the form of anti-discrimination statutes, and private contract law — and reflect on their efficacy in meeting the needs of contemporary Australian citizens for liveable working and family lives. We take a pragmatic approach, and examine experience through the lens of recently decided cases. The cases chosen focus on the particular demands faced by women workers with new childcare responsibilities.<sup>26</sup>

#### **4. *Anti-Discrimination Law***

While policy statements of family-friendliness might give rise to contractual obligations, as we examine below, anti-discrimination law can give rise to a wider, more general, non-contractual obligation to review and revise existing practices for their family-friendliness. Specifically, the recent cases we examine here suggest that an obligation to provide particular family-friendly practices arises out of the duty to provide a discrimination-free workplace under federal and state anti-discrimination legislation. If family-friendly practices can improve gender equality then it is not altogether surprising that their absence arguably can somehow amount to sex discrimination.

The particular cases we examine here deal with how employers handle the return to work of employees who have taken maternity leave. They show how anti-discrimination legislation can be used to improve or compensate for poor practices. In the first set of cases — *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 (30 July 2002), and *Rispoli v Merck Sharpe & Dohme (Australia) Pty Ltd* [2003] FMCA 160 (3 October 2003) — claims were made successfully that failure to return the employees to their former or comparable positions after maternity leave amounted to *direct* pregnancy discrimination. In the second set of cases — *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 (6 August 2003) and *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 (15

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25 *Thomson*, above n24.

26 We acknowledge that the broader ‘work-life balance’ debate encompasses a range of demands for recognition of human choice in how we nurture not only our loved ones but also ourselves. Many of the same arguments could be made for people with responsibilities for the care of elderly relatives or very ill life partners.

December 2003) — the *indirect* discrimination provisions of the *Sex Discrimination Act 1984* (Cth) (*SDA*) were used to argue (with mixed success) for the right to work part-time hours upon return from maternity leave.

Before exploring these cases in detail, it should be acknowledged that the potential for anti-discrimination legislation to bring about workplace change is naturally determined in part by the regulatory framework of these laws.<sup>27</sup> In particular, there are key characteristics of these laws that limit their capacity to effect widespread or systemic change in workplaces. Firstly, all anti-discrimination laws in Australia are framed in a similar way in that the primary means by which they seek to address discrimination is to provide a tort-like right for individual victims to seek redress.<sup>28</sup> The legislation identifies particular traits or characteristics to be protected, such as sex or race, prohibits discrimination on the grounds of these traits, and then permits the victims of such discrimination to sue the perpetrators for compensation. There is generally no public prosecution of breaches. Thus, the only real way in which discrimination prohibitions are enforced is through individuals bringing claims, at their own expense and for their own redress. Success in the litigation depends on the ability of the applicant to squeeze her real life situation into the artificial boxes of the elements of discrimination as defined under the legislation. Any system of regulation that relies on traditionally disempowered individuals being able to navigate the legal system to enforce rights is inherently limited. This reservation applies equally to enforcement of contract rights in common law courts.

Secondly, all anti-discrimination laws in Australia use confidential and compulsory conciliation as the first and primary means of resolving discrimination disputes; only after such conciliation has been tried do applicants have the option of pursuing the matter by formal hearing.<sup>29</sup> Most claims are settled at these conciliation conferences, with few matters ever making it to a court or tribunal. It is arguable that such an approach to dispute resolution benefits individual complainants because it is less formal and less intimidating than public litigation,<sup>30</sup> but the private nature of the conciliation naturally limits the public awareness and possible disapprobation brought to bear on respondents.

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27 For a comprehensive discussion of the limits on anti-discrimination legislation to achieve change and, in particular, the importance of the understanding of tribunal members and judges who hear matters that go to hearing, see Beth Gaze, 'Context and Interpretation in Anti-Discrimination Law' (2002) 26(2) *MULR* 325.

28 In addition to their dispute resolution roles, the administrative agencies responsible for implementing anti-discrimination legislation are generally also charged with addressing discrimination by other regulatory means, such as education and training. See, for example, s11(1)(h) *Human Rights and Equal Opportunity Commission [HREOC] Act 1986* (Cth) empowers the HREOC to undertake research and educational programs to promote human rights.

29 See, for example, *Anti-Discrimination Act 1977* (*ADA*), s92 Resolution of complaint by conciliation and s94 Reference of complaints to the Tribunal. Note that it is not compulsory to hold a conciliation conference; it is compulsory to attend if one is held. The agency has discretion to decide not to conciliate on the basis that the matter is unlikely to be resolved by conciliation.

Finally, whether by settlement or court order, damages pay-outs are often quite low. In some jurisdictions, such as New South Wales, damages are also limited by a statutory cap.<sup>31</sup> In this way, Australian anti-discrimination legislation lacks even the threat of a big stick to compel or encourage compliance with non-discriminatory norms.<sup>32</sup>

Some commentators remind us that, while these limitations are significant, anti-discrimination legislation still plays an important role in struggles for equality. In proposing her tripod of regulatory approaches, Dickens points out the potential that such equality legislation presents, arguing that it can play an important role in, for example,

setting and broadening employer equality agendas; in shaping the climate within which employer decisions are taken (a ‘symbolic’ function of law); in providing universal standards and minima, thus generalising and underpinning good practice; and in altering the costs of discrimination and employer inaction.<sup>33</sup>

We examine here how the individual applicants in these particular cases fared and ponder the implications of these cases. But, in contemplating the nature of any legal duty imposed by anti-discrimination law, it is worth bearing in mind some of these inherent limitations of the regulation to achieve widespread or systemic change.

#### A. *Maternity Leave*

To appreciate the significance of the first cases, *Thomson* and *Rispoli*, we first need to remind ourselves of the nature of maternity leave in Australia.

Maternity leave in Australia is still largely unpaid.<sup>34</sup> Only 38 per cent of female employees have any legal entitlement to paid maternity leave and ‘there are very limited cases in Australia where women receive the international standard of a minimum of 14 weeks [and] in many cases available leave falls well short of this standard.’<sup>35</sup> As noted above, there is no right to paid maternity leave provided for

30 For one critique of this see Margaret Thornton, ‘Equivocations of Conciliation: the Resolution of Discrimination Complaints in Australia’ (1989) 52(6) *Mod LR* 733. See also Hilary Astor & Christine Chinkin, *Dispute Resolution in Australia* (2<sup>nd</sup> ed, 2002) at 362.

31 \$40 000 in New South Wales. See s113(4) *ADA*.

32 This can be contrasted with potentially huge damages pay-outs under discrimination suits in the United States where, under federal legislation, liability and damages awards for discrimination are not capped and are usually decided by juries. As Susan Sturm explores, the potential liability for very large damages payments has fostered the development of insurance policies against liability. Interestingly, this in turn has prompted the insurers to promote or even require as a policy condition the auditing and improvement of management practices to minimise the incident of discrimination and hence the risk of liability. Insurers have thus become significant actors in initiating measures to avoid discrimination in the workplace. Susan Sturm, ‘Second Generation Employment Discrimination: A Structural Approach’ (2001) 101(3) *Colum LR* 458.

33 Dickens, above n11 at 13. Each of these roles warrants a further exploration but must be left for another paper.

34 *A Time to Value*, above n10 at 28–36. HREOC reports that ‘The most recent data on paid leave arrangements found that 38 per cent of female employees reported that they were entitled to some form of paid maternity leave’ and concludes ‘Existing paid maternity leave arrangements are limited, haphazard and fall significantly below what could be considered a national system’. *Id* at 29 and 25, respectively.

35 *Id* at 35.

in legislation, other than for some public servants. While it can be provided for in enterprise agreements, the evidence shows that only approximately seven per cent of federal enterprise agreements provide such leave,<sup>36</sup> and an even smaller proportion of federal awards,<sup>37</sup> leaving this important benefit largely to individual arrangements and company policies.

Despite the efforts of the federal Sex Discrimination Unit in researching, consulting and developing a comprehensive and credibly costed proposal for a national paid maternity leave scheme of 14 weeks of government funded leave,<sup>38</sup> no such scheme has yet been developed. And we suggest no one hold their breath waiting for one, with both the Government and federal Opposition supporting instead a ‘baby bonus’ lump sum means-tested payment to be made to all mothers, irrespective of employment.

However, the entitlement to unpaid maternity leave is quite widespread and it has a relatively long history in Australia. Under federal law this dates from 1973 for Commonwealth employees,<sup>39</sup> 1979 for federal award employees<sup>40</sup> and currently exists as a minimum entitlement under the *Workplace Relations Act* 1996 (Cth).<sup>41</sup> As noted above, State legislation similarly provides for unpaid parental leave,<sup>42</sup> with some states having more liberal eligibility criteria than under the federal entitlement.<sup>43</sup>

Being unpaid leave, the essence of maternity leave for most Australian women is the right to take time off work for the birth (or adoption) of a child and to return to the same or equivalent position afterwards. In effect, the right is simply and only one of job security — the right to get your old job back at the end of the leave, as one does after sick leave, annual leave, long service leave and the like.

But what aspects of the job are secure and how can this security be enforced? The *Thomson* and *Rispoli* cases provide one answer. We focus on *Thomson v Orica* because it was the first of these cases, more comprehensively reasoned, issued by the Federal Court, and it was applied in *Rispoli*.

(i) *Facts — Thomson v Orica*

The Thomson and Orica dispute arose out of the following facts. Cynthia Thomson started working for Orica Australia Pty Ltd in 1989, had taken maternity leave without a hitch in 1996–97 and had then worked her way up to a key account manager position before seeking to take maternity leave again in 1999. Her boss reacted angrily to this request shouting that he ‘would never employ a female

36 Id at 30 reporting that ‘for the two-year period from 1 January 2000 to 31 December 2001 seven per cent of federal certified agreements made in that period contained paid maternity provisions, a decrease of three per cent from the 1998–1999 period.’

37 HREOC reports that a 2000 ‘review of 100 federal awards with the highest coverage of workers... found that only six federal awards included provision for paid parental leave.’ Ibid.

38 Ibid. See Smith, above n10 for an outline and summary of the report.

39 *Maternity Leave (Commonwealth Employees) Act* 1973 (Cth).

40 *Maternity Leave Case* (1979) 218 CAR 120.

41 Section 170KA.

42 See, for example, *Industrial Relations Act* 1996 (NSW) Ch2, Pt4.

43 For example, the *Industrial Relations Act* 1996 (NSW) extends eligibility to ‘regular casual employees’ as defined in s53(2).

again', that 'there's laws against this' and that 'now I've got *three* women on maternity leave'.<sup>44</sup>

Thomson took her leave, but on returning was not allowed to resume her former position, which continued to be occupied by her replacement. Instead of being returned to her position as an account manager for select high value clients in the Chemnet division of the company, she was to be placed in a position managing a multitude of lower value clients in the Spectrum division. While the salary and job title were unchanged, the new position was found to be an inferior position in two ways: lower status and significantly less responsibility. The replacement employee certainly experienced her move as a significant promotion and did not want to be returned to the position Thomson was being offered.

Orica had a family leave policy that reflected legislative entitlements to maternity leave under the *Industrial Relations Act 1996* (NSW).<sup>45</sup> It provided that an employee was entitled to maternity leave and, after their leave, entitled 'to return to their previous position, or if this no longer exists, to a comparable position if available'.

(ii) *Discrimination Claims — Thomson v Orica*

Cynthia Thomson argued that the promise to return her to her former or comparable position after maternity leave covered not only her pay and official title, but also the benefit of a particular level of responsibilities and status. She argued successfully that the position she was in fact returned to was not comparable in these ways, and that as a result, she suffered loss or injury for which Orica should be liable. She argued that this failure to reinstate her into a comparable position amounted to direct pregnancy discrimination because Orica had, in effect, used her pregnancy (or her maternity leave) as a basis for the change.

Direct pregnancy discrimination under the *SDA* was the primary claim in this case. Thomson argued that Orica discriminated against her on the basis of pregnancy, by not returning her to her former or a comparable position upon her return from maternity leave. Cast in the language of anti-discrimination law the question posed to the Court was: Did the applicant suffer a detriment in employment from being treated less favourably than someone who was not pregnant in circumstances that were not materially different because of her pregnancy? In essence, Thomson argued:

- that she was demoted on return from maternity leave;
- that maternity leave is a '*characteristic appertaining generally*' to pregnancy;
- that she was demoted *because* she took maternity leave, and thus demotion amounted to pregnancy discrimination.

DETRIMENT?

Thomson argued that she suffered detriment in various ways,<sup>46</sup> including, centrally, a demotion. However, the question of whether Thomson was demoted at

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44 *Thomson*, above n24 at para 51 (emphasis in the original).

45 *Industrial Relations Act 1996* (NSW) s66.

46 *Thomson*, above n24 at para 149.

all was a surprisingly contentious one and much of the judgment focused on the evidence about this. Orica's position was that so long as it maintained Thomson's salary, title and grade, it could allocate work without this amounting to a breach of policy (or contract) and, importantly for the discrimination action, without it amounting to a detriment in employment.

To determine whether Thomson had suffered a detriment Allsop J looked at her treatment and the company's policy. Thomson had not argued that the policy should include maternity leave; it did include this benefit. She argued, in effect, that the company had not applied the policy correctly and, in doing so, had imposed a detriment or treated her less favourably. Looking at the use of the term 'position' in the company's policy, Allsop J held that position was more than merely grade and salary. He also noted that the policy was likely to have been based on similar legislative rights in the *Industrial Relations Act* 1996 (NSW) (and its predecessors), and that a similar conclusion had been reached in jurisprudence on these provisions.<sup>47</sup> He found that 'Thomson was offered duties and responsibilities of significantly reduced importance and status, of a character amounting to a demotion (though not in official status or salary)',<sup>48</sup> and 'no one with any experience in the organisation of Orica could have realistically or rationally thought otherwise'.<sup>49</sup>

Although not radical, this is an important finding. It says to employers that aspects of employment such as status and responsibilities are important to employees and that these benefits are not necessarily discretionary. They may in fact be enforceable. Contract law has already been used to show that employment is more than a work-wage bargain; a significant reduction in responsibilities or status can constitute a repudiation of the contract. And, in a new economy where future employability may ride on one's existing status and responsibilities, the value of these aspects of employment has probably only increased.

#### 'CHARACTERISTIC APPERTAINING GENERALLY'

How does pregnancy relate to maternity leave under anti-discrimination legislation? The *SDA*, like other anti-discrimination legislation,<sup>50</sup> specifically expands protection to cover not only the particular trait but also a penumbra of characteristics that appertain generally or are imputed to people with the protected trait.<sup>51</sup> Allsop J readily accepted that maternity leave, 'the taking of a period of leave before and following the birth of a child,' was a characteristic that *appertains generally* to women who are pregnant.<sup>52</sup> No argument was put to the contrary.

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47 *Id* at paras 133–134 citing *Illawarra County Council v Federated Municipal & Shire Employees' Union of Australia* (1985) 11 IR 18.

48 *Thomson*, above n24 at para 53.

49 *Id* at para 110.

50 For example, *ADA* (NSW) s24(1A) (sex discrimination).

51 See, for example, *SDA* s7(1)(b) and (c), respectively.

52 *Thomson*, above n24 at paras 165–166. In accepting this Allsop J at para 166 applied the decision of the Human Rights and Equal Opportunity Commission in *Gibbs v Australian Wool Corporation* (1990) EOC 92–327.

This finding could have proven to be a critical step in establishing that the employer conduct was discriminatory. Ultimately, as we see below, the significance of this was moderated by the way Allsop J framed the comparator question.

#### CAUSATION

Ultimately, the real challenge for Allsop J was to decide causation: Was the demotion ‘because of’ pregnancy, or a characteristic appertaining generally to pregnancy, and therefore prohibited discrimination?

The causation and comparator questions under Australian anti-discrimination legislation are often, and perhaps necessarily, conflated. Most Australian legislation employs a comparator model, asking the applicant to show that they have been treated less favourably than someone in similar circumstances who does not have the protected trait.<sup>53</sup> In theory, such a comparison should be useful in illuminating the cause or true basis of any different treatment: if all circumstances are equalised and the only difference between the applicant and the comparator is the protected trait, then we should be able to conclude by implication that the treatment was ‘because of’ that protected trait.

However, this exercise has not proven easy or, in many cases, even useful. The comparator requirement poses all sorts of difficulties. For Thomson, the first difficulty was in trying to establish the attributes of the comparator. The second was having to show causation as a separate and additional element.

What attributes should the comparator have? Allsop J struggled with this question. It is clear that the comparator cannot be pregnant. That is, they must not have the very trait that is to be protected; the legislation says this much. But what about the other characteristics of a pregnant person? And why does this matter?

If the taking of maternity leave is a characteristic generally appertaining to pregnancy, can this characteristic be attributed to the comparator? The legislation requires that the circumstances of the comparator be not materially different. The critical question is: If something is accepted as a characteristic (that is, identified as integrally part of the trait that is being protected), can it also be a material circumstance (that must be attributed to the comparator in order to take it out of the equation)? Applied to the Thomson facts, the question becomes: Should Thomson, who took maternity leave, be compared with someone who has also taken leave — treating leave as a circumstance — or should she be compared with someone who has not taken any leave?

While Allsop J accepted that the taking of maternity leave was a characteristic appertaining generally to pregnancy, he then refused to say the legislation required that someone taking maternity leave should be treated as well as someone who has not taken any leave at all. In trying desperately to ensure that all material circumstances were removed from the equation, his Honour identified the comparator as:

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<sup>53</sup> See, for example, *SDA* s5(1), *ADA* s24(1)(a).

a similarly graded account manager with Ms Thomson's experience *who, with Orica's consent, took twelve months leave and wanted to return [and] ... had a right to return on the same basis as Ms Thomson.* [Emphasis added.]<sup>54</sup>

By attributing the comparator with the taking of leave the Court thereby accepted that the employer merely had to treat those returning from maternity leave as it would treat those returning from any other sort of similar leave. Fortunately for Thomson's case, Allsop J did find that she was treated less favourably than such a comparator in that the returning policy was not properly followed in respect of Thomson and there was no evidence that Orica would treat a comparator employee contrary to its own policy on leave.

His Honour is not alone in adopting this reasoning. A similar question was posed for the High Court in the recent case of *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 (11 November 2003),<sup>55</sup> where this approach was adopted by the majority (although on the basis of slightly different legislation). Justices Kirby and McHugh, however, in the *Purvis* dissent offer a comprehensive, progressive and persuasive argument for the alternative reasoning.<sup>56</sup> They state unambiguously:

Discrimination jurisprudence establishes that the circumstances of the person alleged to have suffered discriminatory treatment *and which are related to the prohibited ground* are to be excluded from the circumstances of the comparator.<sup>57</sup>

They cite numerous cases in support of this interpretation, starting with the oft-quoted words of Sir Ronald Wilson in *Sullivan v Department of Defence* (1992) EOC 92-421 at 79 005:

It would fatally frustrate the purposes of the Act if the matters which it expressly identifies as constituting unacceptable bases for differential treatment... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act.<sup>58</sup>

It is arguable that the majority of the Court was pushed to adopt this approach in *Purvis* due to an apparent anomaly in the relevant legislation, which denied the respondent a defence of 'unjustifiable hardship'<sup>59</sup> in trying to cope with the

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<sup>54</sup> *Thomson*, above n24 at para 121.

<sup>55</sup> This was a direct disability discrimination claim under the *Disability Discrimination Act 1992* (Cth). In brief, the case concerned a challenge to a school decision to remove the applicant, a disabled boy, from a mainstream school because of his violent behaviour toward staff and other students. The key questions were whether his behaviour was the reason for the decision, whether his treatment should be compared with someone who exhibited the same behaviour but who was not disabled and whether the behaviour could be considered so inseparable from the disability that a decision based on the behaviour was a decision based on the disability.

<sup>56</sup> McHugh & Kirby JJ dissented. *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62 at paras 16–176.

<sup>57</sup> *Id* at para 119.

<sup>58</sup> *Ibid*.



demands of a violent disabled student. However, the Court did not suggest that their reasoning should be limited to the facts of the case or even to the disability discrimination legislation. The implications are consequently quite significant, potentially limiting the scope of anti-discrimination provisions which were arguably inserted in order to extend protection beyond some narrow understanding of the trait to reach characteristics associated with or stereotypes attributed to those who held the trait.

While the Thomson case shows that even under this narrow interpretation a court might still, at a stretch, find that the treatment was discriminatory, it certainly makes it harder to show that the trait is ever the reason for the poor treatment. It denies the special status that the legislation aims to give, in this case to pregnancy, in order to eradicate discrimination. The bottom line is that giving the comparator an attribute that relates to the protected trait undermines the very protection that the legislation aims to afford.

Despite this more difficult test, Thomson was still able to establish that she was treated less favourably than a comparator. However, under Allsop J's interpretation, she faced yet another hurdle of having to establish that this different treatment was *because of* the trait of pregnancy. Why this additional step? Because the comparator question generally is, and was in this case, interpreted as a distinct element of the action, rather than as a means of establishing causation.

Fortunately, or unfortunately, for Thomson, she had the best kind of evidence for proving causation: her boss had expressed blatant hostility and prejudice about pregnancy and the taking of maternity leave to her face. Recall the outburst upon her request for maternity leave? Those harsh statements, coupled with the lack of a credible reason for the change to Thomson's position, led to a finding that the taking of maternity leave was, at least in part, the reason for Thomson's dismissal.<sup>60</sup>

(iii) *Rispoli v Merck Sharpe & Dohme*

The facts in the case of *Rispoli* were very similar to those in Thomson. Frances Rispoli held a relatively senior managerial position before taking maternity leave and she took this leave with an assurance that she would be returned to her former or equivalent position. This assurance was based on company policy, which, in turn, reflected industrial relations legislation. When Rispoli returned from leave she found that her remuneration was maintained, but her new position was two grades lower and there was an equivalent loss of status.<sup>61</sup> She accepted this new position for approximately 12 months, and was then unsuccessful in getting the discrepancy rectified when she finally raised it with her employer. This prompted the discrimination claim.

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59 The *Disability Discrimination Act* (1992) (Cth) provides that in deciding whether to accept into a school, but not in deciding whether to expel a student, educators are permitted a defence to discrimination of 'unjustifiable hardship'.

60 *Thomson*, above n24 at paras 163–164.

61 *Rispoli v Merck Sharpe & Dohme & Ors* [2003] FMCA 160 at para 78.

As in *Thomson*, Rispoli argued that the promise to return her to her former or comparable position after maternity leave covered not only her pay and official title, but also the benefit of a particular level of responsibilities and status, and failure to provide these amounted to direct pregnancy discrimination.

In this case Driver FM applied the reasoning of Allsop J in *Thomson*. He concluded that Rispoli had not been returned to a comparable position on returning from maternity leave and that this amounted to a demotion and a breach of the company policy<sup>62</sup> (as well as a breach of the contract of employment, as discussed below). Further, Rispoli suffered pregnancy discrimination in that she was ‘treated less favourably than a comparable employee would have been who was not pregnant and who was returning after nine months leave and with rights of the kind reflected in the maternity leave policy.’<sup>63</sup>

### **B. Part-time Work after Maternity Leave**

While maternity leave is critical, it represents only the first stage of the work-family balancing act for new parents. The sleepless nights might abate, but the challenges of parenting certainly do not magically stop at the end of maternity leave! And so we turn to the ongoing needs of mothers once they return from maternity leave.

One way that many mothers try to cope with the sometimes competing demands of work and parenting is by changing from full-time to part-time working hours. Continuing our look at anti-discrimination law, the question considered here is whether anti-discrimination law provides any basis for asserting a right to make this shift within a job.

As with the cases just discussed, it is arguable that the general duty to provide a discrimination-free workplace might compel this family-friendly practice. A number of recent federal cases — namely *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 and *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 — have dealt with the claim that the failure to allow this change in hours amounts to sex discrimination under the *SDA*.

This is not a new idea: over 10 years ago Rosemary Hunter suggested that the requirement to work full time could amount to indirect sex discrimination against women.<sup>64</sup> There have also been a few cases which have successfully shown this,<sup>65</sup> although mostly they have been from different jurisdictions or decided by administrative tribunals and thus of limited value as precedents for Mayer and Kelly. Nonetheless, they are worth noting here if only to provide the jurisprudential context in which the Mayer and Kelly claims were brought.

<sup>62</sup> *Rispoli*, above n61 at para 82. See below, Implication in Fact, below n99 onwards, for a discussion of how the policy in this case was found to be contractually binding.

<sup>63</sup> *Ibid.*

<sup>64</sup> Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992) at 156–158. See also Rosemary Hunter ‘Part-time Work and Indirect Discrimination’ (1996) 21 *Alt LJ* 220 (exploring Australian cases to see how career advancement depends on working full-time hours).

<sup>65</sup> Beth Gaze provides a useful analysis of these cases and relevant legal literature on part-time work in ‘Working Part Time: Reflections on “Practicing” the Work-Family Juggling Act’ (2001) 1(2) *QUTLJJ* 199.

The earliest case in which this argument was made successfully in Anglo-Australian equality jurisprudence appears to be *Holmes v Home Office* [1984] 3 All ER 449. The employer, the Home Office, was found to have indirectly discriminated on the ground of sex for refusing to allow Holmes to work part-time after maternity leave without an acceptable justification. In the UK at least this jurisprudence has developed quite favourably for applicants, prompted primarily by various EU directives on equality and part-time work.<sup>66</sup>

The first successful Australian claim was in the case of *Hickie v Hunt and Hunt* [1998] HREOCA 8. Marea Hickie successfully claimed that Hunt and Hunt's requirement that she return to her contract partner position on a full-time basis after maternity leave, and the non-renewal of that contract for failing to return on this basis, amounted to indirect sex discrimination. Hickie had actually returned to work under a part-time work agreement with the firm, but was then subjected to conditions and performance evaluations that were found to constitute an expectation or requirement to work full-time. Unfortunately, the decision provides very little explanation of the reasoning used by Commissioner Evatt to reach this outcome, confining the finding largely to the facts of the case.

In another tribunal decision, *Bogle v Metropolitan Health Service Board* (2000) EOC 93-069, the Equal Opportunity Tribunal of Western Australia found that the Board had discriminated indirectly against Bogle on the ground of 'family responsibilities' under the *Equal Opportunity Act 1984* (WA), in not allowing her to return to work part-time as a supervisory dental nurse after her maternity leave. This decision is important as it found against the Board, finding that the Board's decision-making in relation to Bogle was tainted by assumptions or beliefs about whether the job could be carried out on a job-share basis, which did not amount to an adequate justification for refusing the switch to part-time work.

Finally, *Escobar v Rainbow Printing Pty Ltd* (No 2) [2002] FMCA 122, was the first Australian case in which this claim was argued before a court, in addition to a claim for direct discrimination on the basis of family responsibilities. The Court found that Escobar was dismissed from employment because she was unavailable for full-time work after maternity leave (due to family responsibilities) and the employer was unwilling to consider a part-time position. On this basis the Court held that the dismissal was because of family responsibilities and, in the alternative, that the employer had indirectly discriminated against Escobar on the basis of sex because the refusal to consider part-time hours was likely to disadvantage women because of their disproportionate child care responsibilities.<sup>67</sup>

Turning to *Mayer* and *Kelly*, we will see that while *Mayer* appears to build on the case for the right to part-time work, *Kelly* seems to throw the question open again.

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66 See Joanne Conaghan, 'The Family-Friendly Workplace in Labour Law Discourse: Some Reflections on *London Underground Ltd v Edwards*' in Hugh Collins, Paul Davies & Roger Rideout (eds), *Legal Regulation of the Employment Relations* (2000).

67 *Escobar v Rainbow Printing Pty Ltd* (No 2) [2002] FMCA 122 at [37].

(i) *Facts — Mayer v ANSTO and Kelly v TPG*

In both cases, the applicants were employed in full-time positions prior to taking maternity leave and sought, but were refused, the option of working part-time upon their return.

Samantha Mayer was employed full-time in a professional position, as a Business Development Manager, by the Australian Nuclear Science and Technology Organisation ('ANSTO') on a three-year contract. She advised ANSTO that she intended to take 12 months maternity leave. She also indicated that she would like to return to work part-time, but nothing was agreed to or even discussed at this stage. (Note that prior to taking leave ANSTO renewed Mayer's contract but only for a year, whereas it was usual for renewals to be for the same period or more. This conduct by ANSTO was found to be direct pregnancy discrimination).

Three months before returning to work, Mayer asked about the possibility of returning part-time, noting that she could not get full-time child care. She was advised by ANSTO that her position could not be done on a part-time basis and thus her request was denied. However, there was evidence that her immediate supervisor had identified 'many projects' on which Mayer could have been engaged in a part-time capacity for the remainder of her contract. This option was never offered and Mayer treated the contract as terminated.

In the other case of *Kelly v TPG Internet*, Rebecca Kelly had worked in a relatively senior role, as Corporate Billing Supervisor of TPG Internet, prior to taking maternity leave. (Similarly, she too made a successful claim of direct pregnancy discrimination for treatment she received prior to taking leave, namely her appointment to a more senior position on an acting rather than permanent basis.) About three months before the date she was due to return from maternity leave Kelly asked whether she could return on a part-time basis, however there was some confusion on the part of TPG about her entitlement to return at all prior to a full 12 months of leave. Significantly Kelly not only asked to return part-time, but she was also looking for a base salary in excess of that which she had been earning prior to taking leave and she indicated that she did not want to return to the call centre division of the company.

TPG's response was to offer Kelly her original full-time position, or a *casual* reduced hours position, but only at her old rate of pay, and only in the call centre. Kelly treated these offers as terminating her employment, accepting them as a repudiation of the contract of employment.

(ii) *Discrimination Claims*

In both of these cases, the central claims in respect of part-time hours were framed as *indirect* sex discrimination under the SDA. The argument was that by not allowing the change to part-time hours the employer (a) imposed a condition or requirement of full-time hours that (b) had, or was likely to have, the effect of disadvantaging women, and this constituted sex discrimination.<sup>68</sup>

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<sup>68</sup> *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209 at para 71; *Kelly v TPG Internet Pty Ltd* [2003] FMCA 584 at para 58.

Under the *SDA* indirect discrimination is prohibited in respect of dismissing employees, in the offering of terms and conditions of employment, denying them access to benefits, or subjecting employees to any other detriment.<sup>69</sup> In both cases the applicants argued that the imposition of the requirement amounted to constructive dismissal.

#### MAYER V ANSTO

Mayer was successful in proving indirect sex discrimination.<sup>70</sup> In finding discrimination, Driver FM firstly found that Mayer was constructively dismissed on the basis of her sex when ANSTO, by refusing the request to work part-time, 'made it impossible for [her] to return to work at all'.<sup>71</sup> Interpreting this term widely, he further accepted that this refusal constituted a condition under the *SDA*.<sup>72</sup>

Federal Magistrate Driver required little to convince him of the second part of the discrimination test, that such a requirement has, or is likely to have, the effect of disadvantaging women. He stated:

I need no evidence to establish that women per se are disadvantaged by a requirement that they work full time. As I observed in *Escobar v Rainbow Printing* [(no 2) [2002] FMCA 122] and as Commissioner Evatt found in *Hickie v Hunt & Hunt* [[1998] HREOCA 8], women are more likely than men to require at least some periods of part time work during their careers, and in particular a period of part time work after maternity leave, in order to meet family responsibilities.<sup>73</sup>

The key issue in the Mayer case was whether the requirement to work full time was reasonable in all the circumstances. The 1995 amendments to the *SDA* mean the applicant no longer bears the onus in indirect discrimination claims of establishing that the requirement or condition is not reasonable, but the respondent can plead reasonableness as a justification and defence.<sup>74</sup> ANSTO failed to prove that the requirement was reasonable, primarily because of a single critical piece of evidence which showed that appropriate work for a part-time position was available but not offered to Mayer.<sup>75</sup> Importantly, it was reasonable for ANSTO to refuse job sharing or working from home in the existing position, as Driver FM accepted that the job could not be effectively performed in either way.<sup>76</sup> Effectively, it was not reasonable for the employer to refuse to provide a benefit that was available.

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69 *SDA* s14(2)(a)–(d).

70 *Mayer*, above n68 at para 67–77.

71 *Id* at para 74.

72 *Id* at para 71.

73 *Id* at para 70.

74 See *SDA* s7B and 7C.

75 *Mayer*, above n68 at para 75.

76 *Id* at para 77.

## KELLY V TPG

While the Mayer case does show that the *SDA* can be used to assert a right to return to part-time work after maternity leave, building on the case of *Hickie v Hunt and Hunt*, the more recent case of *Kelly v TPG* makes clear that this is not an unambiguous right. Two steps forward, one step back for workers?

Rebecca Kelly was not able to prove that she had a right to change from full-time to part-time hours. For the magistrate in her case, the critical issue was whether a refusal to change existing conditions could even constitute the imposition of a requirement, or whether this needed something more. Raphael FM ultimately held that because Kelly's contract was originally for full-time employment and she was merely 'being asked to carry out her contract in accordance with its terms', there was no imposition of any requirement to her detriment.<sup>77</sup>

He accepted the respondent's argument that finding there was a duty to provide a change in hours would amount to imposing a duty of positive discrimination. In deciding that a denial of a benefit was not the imposition of a detriment he effectively accepted that such a change was still within the employer's discretion. He did however hint at some limitations: ironically, if flexibility was generally available at the workplace, the denial could more readily be seen as the imposition of a detriment.<sup>78</sup> It was in this way that the Mayer case was distinguished.<sup>79</sup> The intervening case of *State of Victoria v Schou* [2001] VSC 321, in which Harper J refused to characterise the refusal of Ms Schou's employer to allow her to work partly from home as a requirement or condition, may also go some way to explaining the difference in the two federal magistrates' judgments.

### C. Framing Claims and Choosing Jurisdiction

It is interesting to note that the claimants in these cases used prohibitions on sex or pregnancy discrimination to base their claims for the family-friendly policies of maternity leave and the right to work part-time, rather than the more recent and apparently applicable ground of family responsibilities. This is presumably because of the limitations on family responsibilities claims and the difficulties of establishing the actions. The federal prohibition on family responsibilities discrimination in the *SDA*, for instance, is limited to direct discrimination and only in relation to dismissal.<sup>80</sup> To date, few applicants have been successful in pursuing such claims,<sup>81</sup> although *Escobar* demonstrates how both sex (indirect) and family responsibilities (direct) claims could be used effectively in the alternative.<sup>82</sup>

<sup>77</sup> *Kelly*, above n68 at para 79.

<sup>78</sup> Raphael FM cited Harper J's judgment in *State of Victoria v Schou* (2001) 3 VR 655 at para 658: The section does not turn the denial by an employer of a favour to the employee into discrimination, although if the favour is generally available to other employees, its denial to one could conceivably, in the particular circumstances, amount to an offence against the Act.

<sup>79</sup> *Id* at para 80.

<sup>80</sup> See *SDA* ss7A and 14(3A), respectively.

<sup>81</sup> See, for example, *Song v Ainsworth Game Technology Pty Ltd* [2002] FMCA 31 (8 March 2002); *Escobar v Rainbow Printing Pty Ltd* (No 2) [2002] FMCA 122 (5 July 2002); *Evans v National Crime Authority* [2003] FMCA 375 (5 September 2003) (affirmed in *Commonwealth of Australia v Evans* [2004] FCA 654 (25 May 2004)).

The New South Wales *Anti-Discrimination Act 1977 (ADA)* prohibits discrimination on the basis of ‘responsibilities as a carer’<sup>83</sup> and is more far reaching than the federal counterpart in that it prohibits both direct and indirect discrimination<sup>84</sup> and applies to all stages of employment, not merely termination.<sup>85</sup> However, in respect of indirect discrimination, the applicant bears the heavy onus of establishing that the requirement or condition imposed was not reasonable.<sup>86</sup> This was the element Ms Gardiner failed to prove in the first case under the provisions.<sup>87</sup> The latest instalment in the case of Deborah Schou against the State of Victoria, ruling against Ms Schou’s claim of indirect discrimination on the basis of her status as a carer or parent, also illustrates the difficulties faced in trying to establish this element.<sup>88</sup>

Further, the NSW prohibition has the significant limitation for applicants that employers can plead a defence of ‘unjustifiable hardship’ in cases of hiring and firing.<sup>89</sup> In effect, this defence is akin to a defence of ‘reasonableness’ but, importantly, it applies to direct discrimination as well as indirect discrimination.

These limitations might have prompted the applicants to use sex and pregnancy as the grounds for their claims.<sup>90</sup> Discrimination in respect of these grounds extends to both direct and indirect discrimination, and the prohibition is not limited to dismissal. The *SDA* offers particular appeal for indirect discrimination claimants because of the shifted onus, permitting the respondent to claim reasonableness rather than requiring the applicant to prove lack of reasonableness.<sup>91</sup>

Further pondering the choice of jurisdiction, the cases of *Thomson* and *Rispoli* both highlight how federal anti-discrimination claims that have been pursued to a hearing allow for the addition of a separate claim for breach of contract, which will be discussed below. Being heard by a federal court, as opposed to an administrative tribunal, the applicant is free to attach an associated contract claim to be heard simultaneously. This might make the federal jurisdiction more attractive than state discrimination jurisdictions,<sup>92</sup> although applicants face a higher risk of having costs awarded against them in a federal court, militating against the jurisdiction.<sup>93</sup> The absence of a damages cap under federal legislation similarly might make the federal jurisdiction more attractive.

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82 Above n67.

83 Part 4B.

84 *ADA* s49T defines discrimination on the ground of a person’s responsibilities as a carer.

85 *ADA* s49V.

86 *ADA* s49T(1)(b). Note the applicant bears this onus in respect of indirect discrimination claims under any grounds in the *ADA*. See, for example, s24(1)(b) (sex).

87 *Gardiner v Work Cover NSW* [2003] NSWADT 184.

88 *State of Victoria v Schou* [2004] VSCA 71.

89 *ADA* 49V(4).

90 Although, if the cases are typical, they would not have been preceded by a high level of analysis about the most effective strategy. It is probably more typical that the applicant has, prior to legal advice, turned to whichever agency she has heard of, to complain of mistreatment, and it is only later that the claim becomes formalised into a legal action.

91 See *SDA* ss7B & 7C.

92 Although it appears from interlocutory decisions in *Thomson* that the contract claim was not even raised until very late in those proceedings, and thus was not a factor in choosing jurisdiction.

93 Conversely, it might be more feasible to engage legal representation and hence pursue a claim in a costs jurisdiction.

#### ***D. Implications for Family-Friendly Practices***

What do these cases tell us about the usefulness of anti-discrimination legislation as a tool to compel family-friendly work practices? The focus of anti-discrimination regulation on individual claims will always limit its effectiveness in achieving any kind of widespread change. However, by setting a precedent and getting publicity, the successful cases we have examined here do warn employers that there is some risk of legal liability for failing to implement family-friendly practices.

In respect of direct discrimination, the maternity leave cases make clear that an applicant will be able to refer to all aspects of her position to establish employment detriment or less favourable treatment; salary is not the only enforceable aspect.

However, as is often the case under anti-discrimination legislation, applicants will struggle to prove that the reason for the detriment was the protected trait. The approach adopted in *Thomson* (and by the High Court in *Purvis*) whereby characteristics can be treated as circumstances undermines what limited potential the comparator device had for establishing causation. It says that if an employer can show that it treated the applicant no differently than it would treat someone else who took a long period of leave — and it refrains from blatantly hostile outbursts — it may avoid a finding of direct pregnancy discrimination. By equating maternity leave with, for example, long service leave, it ignores the critical link between the trait of pregnancy and the taking of maternity leave and thereby denies that the legislation was established and is designed to protect people with particular traits that have been identified as the source of past and ongoing disadvantage.

How might this play out in respect of other characteristics and other policies? It would not be controversial to say that workers with family responsibilities are generally unable or less able to perform overtime (or at least to do so on short notice), and similarly less able to travel for work outside of ordinary work hours. Would it be discriminatory for an employer to treat these workers less favourably by, for example, not hiring them or considering them for promotion? Our federal and state anti-discrimination legislation supposedly protects against direct discrimination on the basis of family responsibilities, including characteristics appertaining generally to those with family responsibilities. It is arguable that the limitations on their capacity to do overtime or travel for work could be characterised as characteristics generally appertaining to those with family responsibilities. The hollowness of formal equality, on which direct discrimination definitions rest, is that it not only allows employers to utilise such ‘ideal worker’ norms (especially under managerial prerogative to determine inherent requirements of a job), it goes as far as saying that they are not discriminatory so long as you impose the criteria in the same way across all workers. This treatment would impact harshly on those with family responsibilities, but that is permissible under the formal equality approach so long as it also impacts harshly on others who cannot perform overtime or travel because of, say, sporting commitments or second jobs or responsibility for pets. While direct discrimination prohibitions might be effective in targeting blatant hostility or prejudice toward particular groups, this example demonstrates how they have limited potential to challenge the inherent bias of workplace norms.



This is where the indirect discrimination provisions suggest real potential, in challenging norms or rules that by their nature, rather than intent, have a disparate impact on particular groups of workers. *Mayer*, building on *Escobar* and *Hickie* (and the English precedent of *Holmes*), illustrates how a claim for the right to part-time work can be framed as an equality claim under anti-discrimination legislation. However, the potential of direct discrimination actions is significantly limited by the reasonableness requirement, whether this is an element that the applicant must prove or a defence available to the respondent. And the decision in *Kelly* shows that in fact every element is still open to contest, with one judge seeing the question of full-time versus part-time as a 'requirement or condition' being imposed (as in *Mayer*) and another seeing a similar scenario as involving a request for special treatment or positive discrimination (as in *Kelly*).

Success in using anti-discrimination law to achieve family-friendly practices such as part-time hours has been more forthcoming in the United Kingdom,<sup>94</sup> but arguably this has been influenced by the UK becoming subject to various European Union directives on working conditions, a supra-national regulatory pressure not felt in Australia. Presumably also, the context in which questions of reasonableness or justification for particular workplace practices are decided has been altered by the strong position taken by the 'New Labour' Government since its election in 1997.<sup>95</sup>

Ironically, while a central equality strategy is to enable and even encourage men to take up more of the domestic load, actions for family-friendly practices that rely on claims of sex discrimination as opposed to family responsibilities discrimination are generally unavailable to men. In relation to direct discrimination, it is difficult for men to claim that caring responsibilities or the need for parental leave is a characteristic appertaining generally to men, as they currently are for women. And the gender imbalance of domestic work is the very factor that leads to family-unfriendly practices having a disparate impact on women, supporting indirect sex discrimination claims. As Joanne Conaghan asserts:

The success of a sex discrimination strategy thus hinges on the continued unequal allocation of labour in the home and, if/when statistical evidence ceases to support the dominant perception that childcare and other domestic responsibilities are largely performed by women, this strategy will fail.<sup>96</sup>

However, maybe when family caring responsibilities are being shared evenly in the home, we will not need a sex discrimination strategy!

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94 Conaghan, above n66.

95 See Joanne Conaghan, 'Women, Work, and Family: A British Revolution' in Joanne Conaghan, Richard Michael Fischl & Karl Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2002) at 53 for a discussion and critique of the 'family-friendly workplace as progressive labour law strategy' and New Labour's family-friendly working policies.

96 Conaghan, above n66 at 178-179.

## 5. *Contract Law*

So much for anti-discrimination legislation and its potential to compel family-friendly work practices. Our second promise was to investigate the contribution that private contract law may make. In two of the cases examined above — *Thomson v Orica* and *Rispoli v Merck Sharpe & Dohme* — the claimants argued that the employer conduct which amounted to unlawful discrimination also constituted a breach of contract. And in both cases, the contract argument succeeded (although in *Rispoli*, the plaintiff was held to have waived her entitlement to sue for breach of contract by sitting on her rights for too long and effectively accepting the breach).

Before we consider whether and if so how a promise of family-friendly work practices can have contractual effect, we need to identify why this conclusion is so significant. As every law student will know, the remedy for breach of contract is damages based on expectation. So long as it meets the requirements for contract formation, the common law will enforce a consensual bargain between parties on the basis that each is entitled to be given the benefit of the contract. Damages will be assessed to put the disappointed party in the position she or he would have been, had the contract been properly performed. Of course, because the common law is deeply reluctant to specifically enforce contracts for personal services, this means that the disappointed party will be paid the court's assessment of the financial value of the benefit. This means that a person with a promise of family-friendly conditions can sue for damages assessed on the basis that they are entitled to enjoy those benefits. For a highly paid person who is forced into resignation because a contract term is not fulfilled, this can mean a substantial damages award, not capped by any statutory limit set by discrimination legislation.

Contract law therefore provides a means for legally enforcing promises of family friendly working conditions — whether those promises have been explicitly bargained for or offered on the initiative of the employer for business case reasons.

### A. *Human Resources Policies and the Contract of Employment*

Before a claim can be made in contract, there must be a contractual promise which has been breached. In each of *Rispoli* and *Thomson*, counsel argued that the employee had a contractual right to return to an equivalent position after maternity leave, that this contractual right arose from the employer's policy manual, and that breach of the contract created by the policy manual should sound in damages to the employee. There are basically three ways in which an HR policy may acquire contractual force. The first is by express incorporation into the contract. The second is by implication in fact, on the assumption that the parties obviously intended the policy to have contractual force, because it was necessary to give effect to their bargain. The third option is that the policy may flesh out the employer's implied obligation of 'mutual trust and confidence.' We examine each of these options in turn.

(i) *Express Incorporation*

An HR policy will not necessarily be a contract in itself, however it may be incorporated into the contract of employment by reference, if there are express statements to that effect in a letter of appointment or some other communication between the parties. A policy concerning entitlements to redundancy pay was held to be incorporated by reference into a contract of employment by the majority of the Federal Court in *Riverwood International (Australia) Pty Ltd v McCormick (Riverwood)*.<sup>97</sup>

One cannot assume that a policy or policy manual will automatically be incorporated into the employment contract. It is necessary that the policy be expressly referred to in the letter of employment or other communication between the parties, and the wording must be able to be construed as a promise that the employer agrees to be bound by the policy. In *Riverwood*, the majority held that a statement that the employee agreed to be bound was enough to incorporate those parts of the policy manual which imposed obligations on the employer as well. Lindgren J dissented from the majority, and held that merely referring to a policy in a letter of appointment is not enough to incorporate it as part of the contract.

There are some traps to incorporation by reference. If the firm has ambulatory policies which are modified from time to time, then any communication which incorporates policies as contract terms needs to acknowledge that the parties agree to be bound by current policies as they are in force from time to time, so that contractual obligations reflect current policies. Of course, the employee must be made aware of the policy. No-one can have a contractual obligation thrust upon her behind her back, so employers need to promulgate their policies by some means which makes the text readily available to employees. Failure to take appropriate steps to properly authorise and disseminate a policy document proved an obstacle in *Victoria University of Technology v Wilson & Ors*,<sup>98</sup> a case about a university intellectual property policy. In that case, the employer's failure to properly authorise and publish the document to staff meant that it could have no contractual force.

Some policies deal with a wide range of issues that are not properly the subject matter for a private legally enforceable bargain between individual parties. These issues will not form part of any contract because they are not promissory in nature. For example, an employer's staff manual may include some statements about the employer's firm commitment to preserving the natural environment and being a socially responsible corporate citizen. If the employer later ceased its practice of recycling paper, or terminated its sponsorship of a charitable organisation, this would not give individual employees any right to sue for breach of the employment contract, because these particular commitments would not form part of their own bargain with the firm. On the other hand, any policies relating to typical industrial matters, including remuneration, work practices, performance review procedures, termination and redundancy are clearly suitable matters for an employment contract.

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97 (2000) 177 ALR 193.

98 [2004] VSC 33 (18 February 2004).

(ii) *Implication in Fact*

Even without express incorporation, a policy may be a term implied in fact to ‘give business efficacy’ to the employment contract.<sup>99</sup> Driver FM came to this conclusion in *Rispoli*. As noted above (in our discussion of discrimination issues), Ms Rispoli brought an action against her employer for failing to provide her with a job of equivalent status when she returned to work after maternity leave. Ms Rispoli was paid her pre-maternity leave salary, but was given less challenging work and a less pivotal role in the organisation than she had filled before taking leave. Under 19<sup>th</sup> century employment contract law, Ms Rispoli would have no grounds for complaint. Unless she was an artiste of some distinction her contract of employment would not be held to include an obligation upon the employer to provide her with any kind of work at all. Payment of salary alone would meet the employer’s obligations. In the 21<sup>st</sup> century, however, Ms Rispoli was able to claim a right to be given particular duties. As we saw above, she was able to make a claim for discrimination under the SDA. She was also able to claim that the employer had breached a specific term in her contract of employment constituted by the employer’s policy on return to work after maternity leave.

The policy manual stated:

It is likely that you will return to the same job or similar job (this does not include a job to which you were transferred because of your pregnancy). If your job no longer exists when you return to work, and other jobs are available, you must be given a job which, in salary and status, is most like the one you occupied before you went on leave and one for which you are qualified and which you are capable of performing.<sup>100</sup>

It is worth setting out in full Driver FM’s findings in respect of this policy statement:

The first respondent’s maternity leave policy reflects the first respondent’s obligations under the *Industrial Relations Act* [1996 (NSW)]. I accept the applicant’s submission that the policy formed part of the contract of employment between the first respondent and the applicant. That is because the first respondent acknowledged its statutory obligations in relation to maternity leave in its maternity leave policy.... These were important matters of the employment relationship regulated by section 66 of the *Industrial Relations Act* and were well known to employees. In my view the terms of the policy gave business efficacy to the employment contract and should properly be regarded as forming an implied term of it.<sup>101</sup>

This demonstrates that Driver FM accepted the policy term as a term implied in fact, on the basis of the ‘business efficacy’ test propounded by Lord Simon in the Privy Council decision in *BP Refinery (Westernport) Pty Ltd v Shire of*

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99 Terms are implied in fact on the principles set out in *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 345–6.

100 *Id* at para 30.

101 *Id* at para 81.

*Hastings*.<sup>102</sup> Driver FM based this assessment of business efficacy on the employer's acknowledgement of a statutory obligation under s66 of the *Industrial Relations Act* 1996 (NSW) to provide for a return to work.

As much as it would be convenient to find that all such policies are implied in fact into employment contracts, implication in fact is not so straightforward as Driver FM's statement would suggest. An acknowledgment by an employer of some statutory obligation that they have, even if this acknowledgement is communicated to employees, will not necessarily cause that obligation to become a contractual obligation. The High Court of Australia's decision in *Byrne v Australian Airlines Ltd (Byrne)*<sup>103</sup> (more recent than the *BP Refinery* case in any event) held that a termination change and redundancy clause in an industrial award was *not* implied in fact into a contract of employment. The High Court reasoned that the award, including this clause, had been imposed on the employer by arbitration and was not the result of a consensual bargain. The award had a different juridical nature from contract. It bound the parties only as a result of an arbitral decision, not because it formed part of the consensual bargain between the parties. The clause therefore took effect only according to the provisions of the *Industrial Relations Act* 1988 (Cth) under which it was made. It did not create any obligations enforceable under common contract law. This meant that while the employees may have been able to persuade a tribunal to order the employer to comply with the clause, and while a defaulting employer might be levied with a statutory fine for refusing to do so, the employer could not be held liable in contract to pay damages for breach. The Court held that expectation-based damages were appropriate only where the parties had voluntarily agreed to confer a particular benefit.

We might argue in the same way about the maternity leave policy in Rispoli's case. The policy has been expressed as an acknowledgement of a statutory obligation. It identified what the employer 'must' do, not what it had agreed to do. This obligation to provide equivalent work on return from maternity leave had been created by legislation, and the legislation provided its own remedies for non-compliance. These are primarily fines: see ss66(4) and 68(1). As the court stated in *Byrne*, it was by no means necessary to imply this term for the sake of business efficacy, because the obligation was already created and enforced by statutory provisions, regardless of any term of the employment contract.

If the policy were expressed as a voluntarily assumed obligation, it may well be treated as a contract term. But while it does nothing more than reiterate obligations imposed by the *Industrial Relations Act* 1996 (NSW), a court may well employ *Byrne* as authority to find that it was not an implied term of the employment contract. It may seem artificial to distinguish between policies purely on the basis of the form of words used — but this is a distinction which *Byrne* presses us to accept. According to *Byrne*, contractual obligations arise only on clear evidence of a consensual bargain.

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102 (1977) 180 CLR 266 at 282–3.

103 (1995) 131 ALR 422.

In Rispoli's case, this argument is merely academic. Although Driver FM found that the policy was a term implied in fact into the employment contract, and that it was breached by the employer, he also found that Ms Rispoli had waived any right to sue for breach. She had continued to work after this breach and without sufficient protest, was taken to have forgiven the breach and could no longer rely on it to support her claim based on contract. As we saw above, her remedy lay solely in compensation for breach of the *SDA*.

(iii) *The Implied Duty of Mutual Trust and Confidence*

There is a further avenue for finding that a 'family-friendly' policy promise has contractual force. By signalling to employees how the employer expects to treat its valued employees, an HR policy may provide some useful content for the otherwise amorphous obligation of 'mutual trust and confidence' which is implied by law into every employment contract.<sup>104</sup> This duty is described most commonly as the employer's duty 'not to conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee'.

The English House of Lords decision in *Malik and Mahmud v Bank of Credit and Commerce International SA (in liq)*<sup>105</sup> is consistently cited as authority for the existence of this obligation. In fact, the House of Lords in *Malik* endorsed a line of authority developing in decisions of lower courts.<sup>106</sup> The earlier case law had developed this implied duty in the context of employer strategies to circumvent unfair dismissal protection, by using tactics to provoke resignations. *Malik* was a landmark decision because it held that an employee might also seek an award of damages for the breach of the duty itself, apart from any remedy for wrongful or unfair dismissal.

In the English jurisprudence,<sup>107</sup> *Malik* has engendered a rich body of case law and academic commentary, culminating in statements by eminent jurists that the employer owes employees a duty of fair dealing.<sup>108</sup> As an example of a recent case, in *Visa International Service Association v Paul*<sup>109</sup> an employer who neglected to inform an employee who was away on maternity leave of new promotion opportunities within the company, was held to have breached its duty

104 *Malik and Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 WLR 95 (*Malik*).

105 [1997] 3 WLR 95.

106 See, for example, *Courtaulds Northern Textiles v Andrew* [1979] IRLR 84; *Woods v W M Car Services (Peterborough) Ltd* [1982] ICR 693; *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308.

107 See Douglas Brodie in 'A Fair Deal at Work' (1999) 19 *Oxford J of Legal Studies* 83; 'Beyond Exchange: the New Contract of Employment' (1998) 27 *Indust'J LJ* 79 and 'Recent Cases, Commentary, The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 *Indust'J LJ* 121, cited with approval in *Malik* at 109 (Steyn LJ).

108 See *Johnson v Unisys Ltd* [2001] IRLR 279 at 285 (Steyn LJ). Recent cases developing this jurisprudence include *Clark v Nomura International plc* [2000] IRLR 766; *BG plc v O'Brien* [2001] IRLR 496, upheld by the Court of Appeal in *Transco plc (formerly BG plc) v O'Brien* [2002] IRLR 444.

109 [2004] IRLR 42 (*Visa*).

of mutual trust and confidence to her. In *Visa*, Mrs Paul was able to claim that Visa had constructively dismissed her when it failed to tell her of a job opportunity — even though it was subsequently shown that she was not qualified for the position and would not have secured it. Her claim was not based on a lost opportunity or chance to have the promotion — but on the serious damage to trust and confidence in the relationship caused by the employer’s deliberate decision to exclude her from receiving information about the position.

*Malik* has been applied in most Australian jurisdictions without any serious debate as to the existence of the implied term of mutual trust and confidence.<sup>110</sup> Australian academic and professional commentary has documented the acceptance of this new formula in Australian jurisprudence.<sup>111</sup> Here however, it has yet to develop (outside the unfair contracts jurisdiction of the NSW Industrial Relations Commission<sup>112</sup>) into a more general duty of ‘fair dealing’. In the United Kingdom, employees have used the term to establish entitlements to particular benefits — payment of bonuses,<sup>113</sup> promised pay rises,<sup>114</sup> and severance payments on par with colleagues.<sup>115</sup> In those cases, courts awarded damages to recognise the employee’s entitlement to have the implied promise of fairness fulfilled, and did not merely use the broken promise as justification for terminating the contract and paying out a notice period. An Australian court exercising only common law jurisdiction has yet to make such an award. Nevertheless, it is clear that breach of the duty can be called in aid of a claim of wrongful dismissal. It is no surprise then that Allsop J was confident that there was ‘ample authority’ to draw on this implied term, and to find in favour of Cynthia Thomson in her claim that Orica breached its employment contract with her. In our view, this avenue provides the most promising path for the development of contractual rights to family-friendly work practices.

(iv) *How the ‘Mutual Trust and Confidence’ Obligation Helped Ms Thomson*

Orica’s policy document dealing with maternity leave contained the following statement:

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110 See, for example, *Sea Acres Rainforest Centre Pty Ltd v State of New South Wales* (2001) 109 IR 56 at 66 (Haylen J). See also, *Linkstaff International Pty Ltd v Roberts* (1996) 67 IR 381; *Jager v Australian National Hotels Ltd* (1998) 7 Tas R 437; *Hollingsworth v Commissioner of Police* (1999) 88 IR 282 at 318 (Wright & Hungerford JJ); *Gambotto v John Fairfax Publications Pty Ltd* (2001) 104 IR 303 at 309-311 (Peterson J); *Aldersea & Ors v Public Transport Corporation* (2001) 3 VR 499 at para 67; *Thomson v Broadley & Ors* (Qld Supreme Court, Jones J, 20 June 2002).

111 See Adrian Brooks, ‘The Good and Considerate Employer: Developments in the Implied Duty of Mutual Trust and Confidence’ (2001) 20 *U Tas LR* 29; Joellen Riley ‘Mutual Trust and Good Faith: Can Private Contract Law Guarantee Fair Dealing in the Workplace?’ (2003) 16 *AJLL* 28; Kelly Godfrey, ‘Contracts of Employment: Renaissance of the Implied Term of Trust and Confidence’ (2003) 77 *ALJ* 764.

112 See s106 of the *Industrial Relations Act 1996* (NSW). The jurisprudence about this provision has been documented in Jeffrey Phillips & Michael Tooma, *The Law of Unfair Contracts in NSW: An Examination of Section 106 of the Industrial Relations Act 1996 (NSW)* (2004).

113 See, for example, *Clark v Nomura International plc* [2000] IRLR 766.

114 *Clark v BET plc* [1997] IRLR 348.

115 *BG plc v O’Brien* [2001] IRLR 496, confirmed in *Transco plc v O’Brien* [2002] IRLR 444.

All employees granted entitled [sic] family leave have the right to return to their previous position, or if this no longer exists, to a comparable position if available.<sup>116</sup>

Allsop J held that the policy had been 'expressed in terms of rights and obligations'<sup>117</sup> and these were 'plainly intended in their expression to reflect rights and duties of both Orica and its employees'.<sup>118</sup> It had been made available to employees via an intranet computer system, so it signalled to employees how they could reasonably expect to be treated by the company.

After citing *Riverwood* as authority for the proposition that the policy ought to be treated as a part of the employment contract, Allsop J said that it was not necessary to make such a finding in order to give the policy contractual effect. He said that regardless of its contractual status, the existence of the policy and the manner of its breach constituted a breach of the employer's duty of mutual trust and confidence. When Ms Thomson's boss reacted angrily to her request for leave, and shouted that he would 'never employ another female again', and when he effectively demoted her to lesser duties without giving any reason, the company acted in a way calculated to destroy Ms Thomson's trust and confidence in her employment relationship with the company. Any reasonable woman would have been embittered by this treatment. It was entirely reasonable that she should accept this conduct as a repudiation of her employment contract and treat herself as constructively dismissed. She was therefore able to sustain a claim for damages in contract for wrongful dismissal. Allsop J's hearing of this matter was as to liability only. The quantum of damages (Ms Thomson claimed in excess of \$200 000) was ultimately never determined because the parties settled the matter on a confidential basis following the decision.

### **B. *Where to From Here?***

The willingness of the courts in both *Thomson* and *Rispoli* to find that an HR policy had contractual force suggests considerable potential for the legal enforcement of policies which promise a balance between work and family responsibilities.

First, it is clear that an employer which breaches its own policy will be held to have constructively dismissed an employee, whether or not the employer deliberately intended to induce a resignation. As Allsop J stated: '[I]t is a matter of objectively looking at the employer's conduct as a whole and determining whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it'.<sup>119</sup>

If the conduct of the employer in ignoring its own policy commitments demonstrates a breach of the mutual trust obligation, the employee will be entitled to treat herself as constructively dismissed.<sup>120</sup> Therefore employers need to take care lest they inadvertently signal a repudiation of the employment contract, by paying scant regard to their own policy commitments.

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116 *Thomson*, above n24 at paras 78 and 124.

117 *Id* at para 125.

118 *Id* at para 144.

119 *Id* at para 141. See also *Easling v Mahoney Insurance Brokers Pty Ltd* (2001) 78 SASR 489 at 99.



Secondly, these decisions confirm that courts will take the rhetoric of work/life balance ideals espoused in policy documents quite seriously. These particular cases dealt with promises that taking maternity leave would not of itself impair career prospects. But there are other types of policies which would attract the same judicial treatment.

The policy statement at the centre of Ms Schou's dispute with her employer in *State of Victoria v Schou*,<sup>121</sup> provides an example. Deborah Schou's case is, in fact, a rather sad indictment on the efficacy of discrimination law to deal with renege commitments to family-friendly policies. Ms Schou sought to take up what appeared to be encouragement of 'flexible' work practices when she had a sick child suffering separation anxiety. She proposed to work from home via a computer modem for some of the working week. It was a short-term problem, requiring a relatively short-term solution. Nevertheless, her employer declined to assist her, she resigned and brought a claim for breach of the *Equal Opportunity Act 1995 (Vic)*<sup>122</sup>. The case went first to the Victorian Civil and Administrative Tribunal (VCAT), where Ms Schou won her case. The Department was unhappy with this decision and then sought judicial review of the VCAT decision before Harper J in the Victorian Supreme Court. Harper J decided<sup>123</sup> that the VCAT had applied the test for discrimination incorrectly, so sent the case back to be done again. The second VCAT outcome was also in favour of Ms Schou.<sup>124</sup> The Department sought review again, and a full court of the Victorian Supreme Court by majority overturned the second VCAT decision and substituted its own judgment, finding that there was no discrimination.<sup>125</sup> By this time, the sick boy was well advanced in his schooling. Time resolves these problems. Law does not. The employer's unwillingness to be flexible for the short time necessary to see the child grow out of his ailment robbed Ms Schou of her career. The law proved incapable of remedying her loss.

How might Ms Schou have fared under contract? Her employment was in fact governed by a policy which promised that the employer would 'promote... flexible and progressive work practices and reasonable changes to the way work is organised'. It also stated that this agreement was made 'in a spirit of trust and goodwill... to engender and enhance a constructive working relationship'.<sup>126</sup>

Those words arguably gave expression to the mutual trust and confidence term, and the subsequent promise of flexible work practices gave some substance to these aspirations. But when put to the test, the Department refused to deliver on those promises. On Allsop J's reasoning in *Thomson*, renege on a solemn

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120 This conclusion was confirmed in *Morrow v Safeway Stores plc* [2002] IRLR 9, where it was held that a breach of mutual trust and confidence necessarily goes to the heart of the contract, and will always give rise to a repudiation.

121 *Schou* (2004), above n88.

122 And its predecessor, the *Equal Opportunity Act 1984 (Vic)*.

123 *State of Victoria v Schou* (2001) 3 VR 655.

124 *Schou v State of Victoria Melbourne (Department of Parliamentary Debates)* (VCAT, Duggon VP, 24 May 2002) (*Schou* (2002)).

125 *Schou* (2004), above n121.

126 *Schou* (2002), above n124 at para 71.

commitment to act in ‘trust and goodwill’ and to be ‘flexible’ and ‘cooperative’ may well be taken by a reasonable employee as a repudiation of the contract of employment. Perhaps if Ms Schou had argued her case on this basis, she may have had more success.

There will be cynics who will argue that words like ‘flexible’ and ‘cooperative’ are duplicitous words which, despite a miasma of generous sentiment, disguise management’s real agenda, which is to squeeze every drop of productivity out of every minute of the worker’s time. On this view, ‘flexibility’ is a monologue by management, to grease the introduction of measures dismantling any remaining rigidities in working time and practices which hinder an inexorable path to greater and greater productivity. Promises of cooperation and flexibility are a silk glove on an iron fist threatening longer, less predictable hours, and further commitment of time to the mill, at the expense of time by the hearth at home.

Contract law, however, is about dialogue. In theory at least, contract law supports the mutual expectations and aspirations of the parties, as those aspirations are expressed in the documents and discussions which formulate their bargains. If contract law is to be true to its justifications, then the words must be taken at face value, and the mutual trust and confidence obligation inherent in the relationship needs to be given full expression in the legal enforcement of family-friendly policies.

Of course, just as Ms Schou’s discrimination claim proved an arduous litigious process, so would any claim in contract if it were necessary to bring it to court, and perhaps to survive a subsequent appeal. Ms Thomson was fortunate to have the resources to bring federal court proceedings. Many others are not so fortunate. Nevertheless, every strident individual who takes the financial risk of litigation creates precedent which — through the usual workings of the legal profession in advising parties on legal rights and obligations from the knowledge of past cases — can percolate through the system and influence the behaviour of enterprises keen to avoid the risks of litigation. Many a settlement has been built on knowledge of an earlier case. Ms Thomson’s fortitude in pursuing her claim leaves a valuable legacy in the form of a Federal Court precedent which may assist others to reach suitable settlement of their claims.

## **6. Conclusion**

In these cases we have seen a turning of the tide. The old technological revolution opened up a cavernous divide between working time in the mills and on the factory production lines, and time for domestic pursuits. For a time, the tension created by this divide was resolved (however unsatisfactorily) by a stereotypic division of labour — men in the public sphere and women at home by the hearth. The Luddites’ great great grandchildren face a new world, which values (in fact, demands) gender equality. Workers, especially women with family commitments, need to be able to straddle both spheres. The challenge for employment law is to find appropriate regulatory tools to support these social changes and the needs of working families.

# Cases and Comments

## Choice of Law on the High Seas: *Blunden v Commonwealth*

ALISON MUTTON\*

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### *Abstract*

The High Court of Australia has in recent years clarified issues of choice of law in tort, formulating a *lex loci delicti* rule for both intra and international torts. The emphasis that had been placed on the importance of certainty and uniformity in doing so has now been undermined by the recent case of *Blunden v Commonwealth*. Given the opportunity to formulate a corresponding choice of law rule for torts that occur on the high seas, the court instead limited its decision by reference to the federal nature of the action, unanimously determining the applicable law to be that of the forum in accordance with s80 of the *Judiciary Act* 1903 (Cth). This paper evaluates the High Court's decision in *Blunden*, arguing that the court's failure to develop a general rule to resolve the choice of law issues presented is out of line with its previous decisions.

### **1. Introduction**

With the cases of *John Pfeiffer Pty Ltd v Rogerson*<sup>1</sup> and *Regie Nationale des Usines Renault SA v Zhang*,<sup>2</sup> the High Court of Australia formulated new rules for choice of law in tort, and in doing so favoured certainty and uniformity over flexibility. In *Pfeiffer* the Court provided that the applicable substantive law for intranational torts that are connected to more than one Australian jurisdiction is the *lex loci delicti*.<sup>3</sup> In *Zhang* they extended their reasoning to international torts occurring outside Australia yet being brought before an Australian court, finding that the same rule applied. The recent case of *Blunden v Commonwealth*<sup>4</sup> presented to the High Court the opportunity to examine choice of law rules once more, this time when considering a tort occurring on the high seas.<sup>5</sup>

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\* BA, final year student, Faculty of Law, University of Sydney. The author would like to thank Ross Anderson for his valuable time and insights. The views expressed in this article are those of the author.

1 (2000) 203 CLR 503; 172 ALR 625 (hereinafter *Pfeiffer*).

2 (2002) 210 CLR 491; 187 ALR 1 (hereinafter *Zhang*).

3 Consistent with practice within the courts and academic commentary, the terms *lex loci delicti* (or law applying at the place of the commission of the tort) and *lex fori* (or law of the forum) are used.

4 (2004) 203 ALR 189 (hereinafter *Blunden*).

5 The term 'high seas' has been defined as 'beyond the geographical territory of Australia and beyond any internal waters or any waters which Australian law treats as territorial waters': see *Blunden*, above n4 at [56] (Kirby J). See also Convention on the High Seas done at Geneva on 29 April 1958, 1963 *Australia Treaty Series* 12 (entered into force for Australia on 13 June 1963).

The issue of choice of law on the high seas that presented itself in *Blunden* was not addressed in either *Pfeiffer* or *Zhang*. As Kirby J pointed out, ‘the issue presented identifies an apparent gap in the statement of principles contained in *Pfeiffer* and *Zhang*.’<sup>6</sup> The joint judgment in *Zhang* specifically reserved issues of maritime and aerial torts for further consideration, stating that ‘special considerations’ may apply to these types of torts.<sup>7</sup>

Maritime torts were examined post-*Zhang* in *Union Shipping New Zealand v Morgan*,<sup>8</sup> where it was held that in the case of a tort committed on board a foreign ship moored in territorial waters, the law to be applied was that of the littoral state. However, the Court of Appeal in *Morgan* was careful to confine its decision to the factual context of that case.<sup>9</sup> Heydon JA expressly left open the prospect that the applicable law for torts occurring where a ship is merely engaged in innocent passage through territorial waters may be that of the flag of the ship, and not that of the littoral state.<sup>10</sup>

Where an internal tort occurs within a vessel on the high seas there is a general assumption, albeit one for which little judicial authority exists, that the governing law is that of the flag of the ship.<sup>11</sup> Yet where a tort on the high seas involves a collision between two ships of different flag states, it has been suggested that the *lex fori* applies, which in Australia includes the general principles of maritime law.<sup>12</sup> Neither of these principles, however, were sufficient to address the situation in *Blunden*, concerned as it was with a collision between ships on the high seas belonging to the same nation state.

The Commonwealth in *Blunden* submitted that the reasoning of the High Court in *Pfeiffer* and *Zhang* establishing the common law choice of law rules for intra and international torts should be extended to torts occurring in places where there is no system of law, thereby ‘completing the triangle’.<sup>13</sup> The High Court, however, declined to do so. Instead the Court unanimously found their answer in the construction of s80 of the *Judiciary Act* 1903 (Cth).<sup>14</sup>

6 *Blunden*, above n4 at [58] (Kirby J). See also *id* at [20] (Gleeson CJ, Gummow, Hayne & Heydon JJ).

7 *Zhang*, above n2 at [76] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ). Unfortunately the judgment does not give any indication as to what these ‘special considerations’ may be. Some possible considerations are explored in Lawrence Collins (ed), *Dicey & Morris on the Conflict of Laws* (13th ed, 2000) at 1537–1543.

8 (2002) 54 NSWLR 690 (hereinafter *Morgan*).

9 *Id* at [104]–[106] (Heydon JA; Hodgson & Santow JJA agreeing).

10 *Id* at [105] (Heydon JA; Hodgson & Santow JJA agreeing).

11 This was assumed in the case of *Roerig v Valiant Trawlers Ltd* [2002] 1 WLR 2304. Dictum to this effect can be found in *Morgan*, above n8 at [17] (Heydon JA). See also CF Finlayson, ‘Shipboard Torts and the Conflict of Laws’ (1986) 16 *VUWLR* 119 at 140; Collins, above n7 at 1537. In a federal system such as exists in Australia, the law of the place of registration will apply: Finlayson, above at 140.

12 See William Tetley ‘Choice of Law – Tort and Delict – Common Law/Civil Law/ Maritime Law – Maritime Torts’ (1993) 1(1) *Tort LR* 42.

13 See *Blunden v Commonwealth of Australia* [2003] HCA Trans 262 (7 August 2003) at <<http://www.austlii.edu.au/au/other/HCATrans/2003/262.html>> (27 July 2004).

14 Hereinafter the *Judiciary Act*.

## 2. *The Facts*<sup>15</sup>

On 10 February 1964, in the course of a naval training exercise, two ships of the Royal Australian Navy came into collision off the Australian coast. The aircraft carrier HMAS *Melbourne* struck the destroyer HMAS *Voyager* on the high seas 18.4 miles from Australian Territory, and the *Voyager* sank. The plaintiff in this action, Mr Barry Blunden, was at the time of the collision serving as a member of the crew on the *Melbourne*. Shortly before the collision the two ships had sailed from Sydney, with the *Melbourne* anchoring in naval waters in New South Wales. The vessels had departed territorial waters on the morning of the collision and were due to return that evening.

As national naval vessels of Australia, neither ship had a port of registration or home port.<sup>16</sup> The Royal Australian Navy was at the time controlled and administered by the Naval Board, which was located in Canberra. The flag officer commanding the naval exercise was at the time of the collision physically present in Canberra, although he retained operational control of the fleet.

## 3. *The Proceedings*

Over 34 years after the incident, on 14 May 1998, the plaintiff commenced proceedings against the Commonwealth in the Supreme Court of the Australian Capital Territory. Mr Blunden claimed damages for personal injuries<sup>17</sup> allegedly caused by the negligent acts and omissions for which the Commonwealth was responsible.

On 11 March 2003, on application by the Attorney General for the Commonwealth and pursuant to s40(2) of the *Judiciary Act*, there was removed to the High Court the part of the cause pending in the Supreme Court ‘involving the question of what, if any, limitation law applies to the plaintiff’s claim for damages in so far as it relates to any negligent acts or omissions by servants or agents of the Commonwealth in international waters’.<sup>18</sup> This choice of law issue was foregrounded as the proceedings had an arguable connection with more than one Australian jurisdiction.

The Commonwealth contended that the proceedings were subject to a defence based on the statutory limitation laws of either the Australian Capital Territory or New South Wales applying to the plaintiff’s claim.<sup>19</sup> The plaintiff alleged that due

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15 The facts are primarily obtained from *Blunden*, above n4 at [1]–[5] (Gleeson CJ et al), [78]–[79] (Kirby J).

16 See *id* at [26] (Gleeson CJ et al), [78] (Kirby J).

17 Chronic post-traumatic stress disorder; major depressive disorder; alcohol abuse; and shock and sequelae.

18 *Blunden*, above n4 at [3] (Gleeson CJ et al).

19 The case stated also nominated the potential applicability of the statutory limitation period prescribed by s3 of *Imperial Act 21* James 1, Chapter 16 (as it applied in the Australian Capital Territory or New South Wales). However, the *Imperial Act* was ‘not supported by any viable argument’: *Blunden*, above n4 at [69] (Kirby J), and accordingly was not dealt with in the course of judgment.

to the place of the wrong being the high seas, the applicable law was the common law unmodified by statute and that therefore no relevant limitation period existed in respect of his claim.<sup>20</sup>

#### 4. *Decision by the High Court*

The Court handed down three judgments. The joint judgment consisted of Gleeson CJ, Gummow, Hayne and Heydon JJ. Kirby J, while approaching some of the issues differently, was essentially in agreement with the findings of the joint judgment. Callinan J also agreed with the joint judgment, adding only a few additional remarks regarding the circumstances of the case.

It was accepted by the Court that the Supreme Court had the jurisdiction to decide the matter by virtue of s56 of the *Judiciary Act*.<sup>21</sup> It was further accepted that what was invoked was federal jurisdiction, attracted by the identity of the defendant as the Commonwealth.<sup>22</sup> What was stressed, however, was that possessing jurisdiction to decide a matter was only the initial step a court must take. Questions dealing with choice of law must then be addressed as a separate issue.<sup>23</sup>

The Court's decision ultimately rested upon the interpretation of s80 of the *Judiciary Act*. Section 80 states:

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

It was necessary for the plaintiff to invoke s80 in order to render the Commonwealth liable to him in tort.<sup>24</sup> The case of *Commonwealth v Mewett*<sup>25</sup> established that the liability of the Commonwealth in tort is created by the common law.<sup>26</sup> A court's power to render the common law applicable to the Commonwealth comes only from federal legislation, and thus the plaintiff needed to rely on the federal statute of the *Judiciary Act*, specifically s80.<sup>27</sup> Section 64 of the same statute makes the Commonwealth liable to the plaintiff as though it were a natural person.<sup>28</sup>

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20 *Blunden*, above n4 at [623] (Kirby J). See also *Blunden*, above n4 at [61] (Kirby J): 'the common law did not develop a general principle to oblige the commencement of proceedings within a given time'.

21 *Id* at [9] (Gleeson CJ et al), [107] (Callinan J).

22 *Id* at [9] (Gleeson CJ et al), [89] (Kirby J).

23 *Id* at [12] (Gleeson CJ et al), [86] (Kirby J). See also Pfeiffer, above n1 at [25] to [28] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

24 *Blunden*, above n4 at [89]–[91] (Kirby J).

25 (1997) 191 CLR 471 at 525–7; 146 ALR 299 at 328–9 (Gaudron J).

26 *Blunden*, above n4 at [9] (Gleeson et al), note 97 (Kirby J).

27 *Id* at [90]–[91], note 97 (Kirby J).

28 *Id* at [43] (Gleeson CJ et al), [91] (Kirby J).

Both parties accepted that s80 was relevant to the claim, but differed in their submissions as to its application. In order to evaluate the submissions of the plaintiff and the Commonwealth, it will be helpful to examine the Court's application of s80 in three parts.

(a) *'So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect or to provide adequate remedies or punishment...'*

Should the laws of the Commonwealth be found to be applicable and capable of being carried into effect, the balance of s80 would not have occasion to arise. The plaintiff submitted that this was the case here, arguing that the opening words, 'laws of the Commonwealth', were not confined to the statute law, but included also the common law of Australia – a law which was applicable and sufficient to provide an adequate remedy, notwithstanding the absence of any applicable limitation laws.<sup>29</sup>

Primarily, the plaintiff submitted that the common law, through *Pfeiffer* and *Zhang*, dictated that the *lex loci delicti* be applied in the present case. The *lex loci delicti*, the plaintiff went on, must be the common law of Australia, 'because the tort occurred on an Australian ship "carrying its Australian law"'.<sup>30</sup> The joint judgment clearly rejected any such suggestion that ships 'carry the law' of the territory to which they belong.<sup>31</sup> Such an argument, the so-called 'floating island' theory, was understood by the Court to be untenable and abandoned, following comments of Lord Atkin in the Privy Council decision of *Chung Ch Cheung v R*.<sup>32</sup>

In addition to arguing that the common law in its pristine form was 'applicable' in this way, the plaintiff further argued for the common law as modified by the *Navigation Act* 1912 (Cth).<sup>33</sup> This argument was dismissed in the joint judgment as they found that the relevant provisions of the *Navigation Act* did not 'speak to Mr Blunden's claim'.<sup>34</sup>

Further, the Court also rejected the suggestion that the opening words of s80 refer to the common law at all. Applying *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd*,<sup>35</sup> they stressed that the term 'laws of the Commonwealth' refers expressly to statute law.<sup>36</sup>

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29 Id at [28] (Gleeson CJ et al).

30 Id at [30] (Gleeson CJ et al). See also the transcripts of the High Court proceedings where counsel for the plaintiff encouraged the view that *lex loci delicti* referred not specifically to a geographical place but rather to a 'law area'; here, it was submitted, the Court must deal with the *lex loci delicti* as a 'Commonwealth law area': *Blunden v Commonwealth of Australia* [2003] HCA Trans 262 (7 August 2003) at <<http://www.austlii.edu.au/au/other/HCATrans/2003/262.html>> (27 July 2004).

31 *Blunden*, above n4 at [30]–[32] (Gleeson CJ et al).

32 [1939] AC 160 at 174. See also DP O'Connell, *The International Law of the Sea* (1984) at 735–7; Martin Davies & Anthony Dickey, *Shipping Law* (2<sup>nd</sup> ed, 1995) at 60.

33 Hereinafter the *Navigation Act*.

34 *Blunden*, above n4 at [34] (Gleeson CJ et al), [108] (Callinan J).

35 (1922) 31 CLR 421 at 431 (Knox CJ & Gavan Duffy J).

36 *Blunden*, above n4 at [28]–[29] (Gleeson CJ et al), [91] (Kirby J).

The joint judgment summarised the situation thus far when they said ‘the fundamental point remains that, to Mr Blunden’s claim, the provisions of the federal statute law, s80 itself apart, would be insufficient to provide him with any adequate remedies.’<sup>37</sup> It was thus ruled necessary for the plaintiff to invoke the balance of s80 in order for him to claim the liability of the Commonwealth in tort under the common law.

(b) ‘...the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held... shall govern all courts exercising federal jurisdiction...’

Having needed to rely on this portion of s80 in order to claim the liability of the Commonwealth in tort, the Court then held that the plaintiff was bound by it in its entirety. That is, they held that the common law respecting limitation of actions applied as modified by the statutory law (including the *Limitation Act*)<sup>38</sup> of the Australian Capital Territory.<sup>39</sup>

It is emphasised many times throughout the judgments that this is a necessary condition of the plaintiff invoking the common law through s80. Kirby J highlights the issue:<sup>40</sup>

The plaintiff cannot accept the provisions of s 80 of the Judiciary Act, rendering the common law applicable to his claim against the Commonwealth, but reject the ‘modification’ enacted by the same provision, subjecting that common law claim to the limitations statute of the Australian Capital Territory. By the terms of s 80, the two go together.

The Commonwealth contended that this was not necessary. In the Commonwealth’s submission, the common law choice of law rules impliedly recognised a necessary addition as follows (in the words of the joint judgment):<sup>41</sup>

Where the events giving rise to the Commonwealth’s liability occur in international waters and involve ships that carry the flag of a federal nation but which (unlike merchant vessels) do not have a port of registration, the locus delicti is that law area within Australia with which the events have the closest relevant connection.

Such a rule, it was argued, was the correct extension of the common law rules resolved by the High Court in *Pfeiffer* and *Zhang*. For a tort occurring in a place where there was no applicable *lex loci delicti*, it was suggested that analogous reasoning would point a court to the law of the jurisdiction with the ‘closest connection’.<sup>42</sup>

37 Id at [35] (Gleeson CJ et al), 108 (Callinan J).

38 Hereinafter the *Limitation Act*.

39 Id at [35], [38]–[39], [45] (Gleeson CJ et al), [91] (Kirby J), [109] (Callinan J).

40 Id at [97] (Kirby J).

41 Id at [36] (Gleeson CJ et al). Note that Kirby J in characterising the Commonwealth’s submission did not limit the suggested rule to events which gave rise to the Commonwealth liability but rather to any ‘cause of action arising on the high seas’: id at [67].

42 Id at [68], [80] (Kirby J).



According to the Commonwealth, such a rule would lead the Court to either the law of the Australian Capital Territory (as the seat of administration of the Royal Australian Navy, and the jurisdiction in which the ultimate control of the ships lay) or New South Wales (as the jurisdiction from which the *Melbourne* had departed before the collision and to which the ship was due to return,<sup>43</sup> and the jurisdiction with the closest proximity to the collision).<sup>44</sup>

It was then submitted that as the common law pointed the Court to the jurisdiction with the closest connection, it was the limitation law of this jurisdiction which provided the solution and thus, within the meaning of s80, ‘the common law is not modified by the Constitution or... by the statute law in force in the [forum] territory.’<sup>45</sup>

Ultimately, the Court declined to follow this line of reasoning. Primarily, the joint judgment felt that such an addition to the common law choice of law rules was taking a step back in that it was essentially applying the ‘proper law of the tort’, an approach which had been rejected in *Pfeiffer*.<sup>46</sup> In addition, they emphasised that such a rule would operate to violate the principle, reflected in the *Judiciary Act* itself,<sup>47</sup> that the Commonwealth should be on equal footing with a defendant.<sup>48</sup> Kirby J felt that s80 was sufficient to decide the contested point and that therefore no opportunity arose to consider the validity of the Commonwealth’s arguments concerning the proposed ‘closest connection’ rule.<sup>49</sup>

(c) ‘...so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth...’

The requirement of applicability is addressed in detail by Kirby J.<sup>50</sup> Kirby J firstly established that ‘there is no relevant provision in the Constitution or federal statute law inconsistent with this consequence.’<sup>51</sup> He next ruled out any objection that may come from either the fact that the cause of action arose outside of the jurisdiction of the *Limitation Act*,<sup>52</sup> or that the Act was enacted after the cause of action arose.<sup>53</sup>

Kirby J then addressed the reality that a statute would not be ‘applicable’ for the purposes of s80 if it were dealing with a procedural issue – these are established as being governed by the forum.<sup>54</sup> The Court recognised the classification of limitation laws as substantive in nature; this being through the statute law of each state, and the common law itself as established in *Pfeiffer*.<sup>55</sup>

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43 Applying *Commonwealth v Mewett* (1997) 191 CLR 471 at 527 (Gaudron J).

44 *Blunden*, above n4 at [36] (Gleeson CJ et al), [69], [80], [83] (Kirby J).

45 *Id* at [37] (Gleeson CJ et al).

46 *Id* at [40]–[42] (Gleeson CJ et al).

47 *Judiciary Act 1903* (Cth) s 64.

48 *Blunden*, above n4 at [43] (Gleeson CJ et al). See also [99] (Kirby J).

49 *Id* at [100], [101] (Kirby J).

50 The joint judgment also specifically notes that ‘[the *Limitation Act 1985*] speaks to actions such as the present instituted in the courts of the territory’: *id* at [38] (Gleeson CJ et al).

51 *Id* at [92] (Kirby J).

52 *Id* at [94] (Kirby J). See also [19] (Gleeson CJ et al).

53 *Id* at [94] (Kirby J). See also [46] (Gleeson CJ et al).

54 *Id* at [5] (Kirby J).

Finally, Kirby J deals with the possible argument that the *Limitation Act* is inapplicable by reason of the only applicable law being that of the high seas in line with *Pfeiffer* and *Zhang*. This argument he rejects by emphasising that the plaintiff, in invoking s80, ‘attracts the benefits and burdens of that section.’<sup>56</sup>

*(d) The Outcome*

The outcome of the above application of s80 of the *Judiciary Act* was that the applicable limitation law was found to be the *lex fori*, that of the Australian Capital Territory. This was because the *Limitation Act* modifies the common law rights in accordance with s80 of the *Judiciary Act*, and in terms that are applicable to the cause of action.<sup>57</sup>

## 5. Analysis

The High Court in *Blunden* declined to formulate a general common law approach to determining choice of law issues where there is no relevant body of law. In so doing, the Court declined to ‘complete the triangle’ that it had begun constructing in *Pfeiffer* and *Zhang*.

In the course of judgment, Kirby J commented that the Commonwealth’s submission for a ‘closest connection’ principle had ‘obvious logical attractions’.<sup>58</sup> The decision that Kirby J ultimately made turned on a construction of s80 that allowed him to decline to resolve the arguments put forward by the Commonwealth.<sup>59</sup> Similarly, the joint judgment rejected the ‘obvious logical attractions’ of the Commonwealth’s submissions with little substantive analysis of them.

That the Court was able to do this reflected the unique nature of the case.<sup>60</sup> The invocation of federal jurisdiction by virtue of the Commonwealth being a party to the action; the fact that the two ships were in the same ownership; the absence of any non-Australian features that would give a foreign jurisdiction an interest in the proceedings: all of these were facts that allowed the Court to reason in the way it did.

### A. Evaluating the High Court’s Approach

The factors that make the reasoning of the High Court in dealing with the Commonwealth’s submissions disappointing are twofold. The first of these is demonstrated by the differing ways that the two main judgments characterised the Commonwealth’s submission. As noted above, while the joint judgment limited the scope of the common law rule said to be proposed by the Commonwealth to claims brought *against the Commonwealth*, Kirby J did not.<sup>61</sup> An examination of the transcript of the proceedings shows clearly that the Commonwealth proposed developing a general common law principle for torts committed in an area where

55 *Id* at [6]–[8] (Gleeson CJ et al), [95] (Kirby J).

56 *Id* at [98] (Kirby J).

57 *Id* at [35] (Gleeson CJ et al), [91] (Kirby J), [109] (Callinan J).

58 *Id* at [84] (Kirby J).

59 As said by Kirby J himself: *id* at [100].

60 *Id* at [106] (Callinan J). See also *id* at [25] (Gleeson CJ et al), [99] (Kirby J).

61 See above n41 and accompanying text.

there is no *lex loci delicti*, not one limited in the way that the joint judgment suggests.<sup>62</sup> What is particularly worrying about this mischaracterisation is that the alleged limitation of the rule to claims against the Commonwealth is one of the very reasons that the joint judgment uses to reject the rule.<sup>63</sup> Ultimately, this means that the Commonwealth's actual submissions were not evaluated as they should have been.

Secondly, the High Court places much emphasis on the similarity between the Commonwealth's submissions for a 'closest connection' rule and the disfavoured theory of the 'proper law of the tort'.<sup>64</sup> Quoted from *Pfeiffer* are two specific objections.

The first of these is that United States experience has shown that 'where the proper law of the tort theory has been adopted... it has led to very great uncertainty.'<sup>65</sup> This criticism is difficult to accept in the face of the final approach taken by the courts. While the Commonwealth was proposing a rule that would be compatible with the expectations of the parties, the end result of the Court's reasoning, in contrast, leaves questions of substantive issues to be left to the choice of the *lex fori*. Even more difficult to accept in the face of this reality, for obvious reasons, is the criticism that 'often enough, the search for the proper law of the tort has led... to the application of the law of the forum'.<sup>66</sup>

### **B. Evaluating the Commonwealth's Approach**

What the Commonwealth was submitting for was a rule that could be applied in any circumstance where a tort is committed in an area with no appropriate body of law. It is undeniable that it is a limited category of claims that such a rule would address.<sup>67</sup> Yet this in itself is not a reason to refuse to develop the common law. Uncommon situations may yet arise where a tort occurs in a place where there is no relevant body of law that can govern the claims.<sup>68</sup> Not all of these will necessarily be able to be decided by reference to s80 of the *Judiciary Act*, as was done in *Blunden*.

What is particularly appealing about the Commonwealth's approach in the context of recent Australian choice of law decisions is that it addresses the primary concerns articulated by the High Court in formulating the *lex loci delicti* rule. The

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62 *Blunden v Commonwealth of Australia* [2003] HCATrans 261 (6–7 August 2003) at <<http://www.austlii.edu.au/au/other/HCATrans/2003/261.html>> (27 July 2004).

63 *Blunden*, above n4 at [43] (Gleeson CJ et al).

64 *Id* at [41] (Gleeson CJ et al).

65 *Ibid*, citing *Pfeiffer*, above n1 at [79] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

66 *Ibid*, citing *Pfeiffer*, above n1 at [78] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

67 As emphasised by the joint judgment: *id* at [42] (Gleeson CJ et al).

68 Examples given by the Solicitor-General of the Commonwealth and dismissed by the joint judgment as 'fanciful' (*id* at [42]) include unregistered pleasure craft off the coast, unregistered pirate ships, two swimmers in the middle of the ocean, new volcanic islands, a reef in the middle of the ocean, places where no particular foreign government is recognised as being in defacto control, a war zone where law and order has so totally broken down that there is no regime recognised by Australia as being a regime in power there: *Blunden v Commonwealth of Australia* [2003] HCATrans 262 (7 August 2003) at <<http://www.austlii.edu.au/au/other/HCATrans/2003/262.html>> (27 July 2004).

joint judgment in *Pfeiffer* placed considerable weight on the ‘odd or unusual’ outcome that may occur in a federal system, where the substantive issues to be decided in an action for a tort will be influenced by where the Court is sitting.<sup>69</sup> Specifically, in an action commenced in the original jurisdiction of the High Court (as indeed *Blunden* could have been) these matters will be determined simply by where the Court happened to be sitting at the time of the hearing.<sup>70</sup> It is anomalous that in *Pfeiffer* such a result warranted ‘reconsideration of the question of the applicable law in matters involving federal jurisdiction,’<sup>71</sup> yet in *Blunden* the Court gave no attention to the same issue whatsoever. As noted above, actions may arise to be decided where there is no governing *lex loci delicti* but which do not fall under federal jurisdiction. For these actions to require a different rule from similar actions that attract federal jurisdiction is undesirable.<sup>72</sup> As articulated by the joint judgment in *Pfeiffer*: ‘ideally, the choice of law rules should provide certainty and uniformity of outcome no matter where in the Australian federation a matter is litigated, and whether it is litigated in federal or non-federal jurisdiction.’<sup>73</sup>

However, it is worth remembering that the Commonwealth’s submissions are not necessarily the natural equivalent to the ‘*lex loci delicti*’ decisions in *Pfeiffer* and *Zhang*, and the ‘closest connection’ rule must itself be evaluated. The primary attractiveness of the closest connection rule is that where there is no applicable *lex loci delicti*, it will provide an outcome that is most compatible with the expectations of the parties.<sup>74</sup> Further, issues of forum shopping that are associated with a rule providing the *lex fori* are avoided.<sup>75</sup>

In sum, it appears that the Commonwealth’s approach is in line with the High Court’s approach to choice of law issues to date. That the High Court refused to give substantial consideration to the Commonwealth’s submissions is surprising. It is true that s80 of the *Judiciary Act* provided them with a solution that made it unnecessary to resolve the arguments.<sup>76</sup> However, this was also the case in *Pfeiffer*<sup>77</sup> and there the Court nevertheless formulated a general rule for the purposes of consistency and uniformity.

## 6. Further Implications

### A. Forum Shopping

The High Court’s decision allows a plaintiff in the position of Mr Blunden to effectively elect the substantive law that will govern his or her claim. As the

69 *Pfeiffer*, above n1 at [58] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

70 See Jeremy Kirk, ‘Conflicts and Choice of Law Within the Australian Constitutional Context’ (2003) 31 *Fed LR* 247 at 259.

71 *Pfeiffer*, above n1 at [59] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

72 *Id* at [60] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

73 *Id* at [44] (Gleeson CJ et al).

74 This is the primary appeal of the *lex loci delicti* rule according to Tetley: above n12 at 43. See also *Pfeiffer*, above n1 at [87] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ), [129] (Kirby J); *Zhang*, above n2 at [130] (Kirby J).

75 See Part 6A below.

76 *Blunden*, above n4 at [100] (Kirby J).

77 *Pfeiffer*, above n1 at [200] (Callinan J); Kirk, above n70 at 258.

*Judiciary Act* allows a claim which did not arise in a state or territory to be brought against the Commonwealth in *any* state or territory,<sup>78</sup> such a plaintiff will be free to choose the forum in which they sue.<sup>79</sup> The Commonwealth's objection to a rule that allows a plaintiff the opportunity to 'forum shop' in this way was noted in all three judgments.<sup>80</sup>

Mixed views on forum shopping exist, and a general consensus has at this point by no means been established.<sup>81</sup> Nevertheless, the High Court has in recent times criticised choice of law rules that allow forum shopping. Indeed, issues of forum shopping impacted on the decisions in *Pfeiffer* and *Zhang*. In *Pfeiffer*, Kirby J held that 'it is not reasonable that such a choice [of venue], made unilaterally by the initiating party, should materially alter that party's substantive legal entitlements to the disadvantage of its opponents.'<sup>82</sup> Further, the Australia Law Reform Commission has noted the current trend against forum shopping.<sup>83</sup>

Yet, the decision in *Blunden* gave relatively little weight to the issue of forum shopping. All three judgments felt that it was relevant in reply to such an objection that the Commonwealth had to date foregone the opportunity to enact a limitation regime for civil claims commenced in federal jurisdiction, or any other such limitation regime under which the plaintiff's action would fall.<sup>84</sup> Further, the joint judgment emphasised that the plaintiff's claim fell within 'a limited category within the class of maritime torts'.<sup>85</sup>

While these justifications for ignoring forum shopping concerns may carry some weight in the present case, the High Court has established a precedent whereby claims against the Commonwealth that occurred in a place with no relevant body of law will be governed by the *lex fori*. Thus substantive issues beyond the applicable limitation law have the potential to be chosen by the plaintiff.

### **B. The Significance of International Law**

In *Blunden*, Kirby J stressed that for claims based on extra-territorial acts, the first step in reasoning must always be an examination of public international law for any applicable principles.<sup>86</sup> This step is particularly important in adjudicating torts on the high seas (or indeed any other place that does not fall within the jurisdiction of any particular law area). For torts committed in such areas, sufficient attention

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78 *Judiciary Act 1903* (Cth) s 56(1)(c): the claim may be brought 'in the Supreme Court of any State or Territory or in any other court of competent jurisdiction of any State or Territory'.

79 See further, 'Court Win for Melbourne's Crew' *The Age* (11 December 2003), available at <<http://www.theage.com.au/articles/2003/12/10/1070732282494.html>> (27 July 2004).

80 *Blunden*, above n4 at [42] (Gleeson CJ et al), [84] (Kirby J), [108] (Callinan J).

81 Compare Friedrich K Juenger, 'What's Wrong with Forum Shopping?' (1994) 16 *Syd LR* 5 and Brian R Opeskin, 'The Price of Forum Shopping: A Reply to Professor Juenger' (1994) 16 *Syd LR* 14. See also Andrew Bell, *Forum Shopping and Venue in Transnational Litigation* (2003).

82 *Pfeiffer*, above n1 at [129] (Kirby J), [184] (Callinan J); *Zhang*, above n2 at [194] (Callinan J).

83 Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) at 1.16.

84 *Blunden*, above n4 at [44] (Gleeson CJ et al), [63]–[66], [99] (Kirby J), [108] (Callinan J).

85 *Id* at [42] (Gleeson CJ et al).

86 *Id* at [70], [76] (Kirby J).

must be given to the terms of treaties and to customary international law.<sup>87</sup> Kirby J made the important point that while in Mr Blunden's claim there existed a substantial and bona fide connection between the subject matter and the source of the jurisdiction, in other circumstances this principle of public international law affecting extra-territorial acts could — in other circumstances — 'control, or certainly affect, the ascertainment of the rule applicable in an Australian court otherwise having jurisdiction over the parties.'<sup>88</sup> Thus, in a similar situation to the *Voyager/Melbourne* collision, occurring between vessels flying different flags, it may be necessary for the Court to have consideration of principles of international law such as, for example, Article 11, paragraph 1, of the Convention on the High Seas.<sup>89</sup> This provides that in the event of a collision on the high seas 'no penal or disciplinary proceedings may be instituted against... persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.'<sup>90</sup>

## 7. Conclusions

In *Blunden*, the High Court was offered the opportunity to resolve tort choice of law issues that have as yet been left open. Specifically, the occasion presented itself to formulate a choice of law rule for torts occurring in a geographical place where there is no relevant body of law that can supply the *lex loci delicti*.

Unfortunately, the Court chose to limit its decision to the specific federal nature of the cause of action. It is unclear why the Judges felt limited in such a way, as three years earlier a similarly constituted Court did not adopt such a narrow decision when addressing a claim in federal jurisdiction in *John Pfeiffer Pty Ltd v Rogerson*.

Ultimately, the refusal of the High Court to consider the choice of law issues presented in a broader manner and in accordance with previous Australian High Court decisions as suggested by the Commonwealth, is disappointing. The 'apparent gap' in principles as established by *Pfeiffer* and *Zhang* remains. Further, the High Court has taken a step away from their established stance on issues such as forum shopping and on the uniformity in choice of law matters, regardless of the nature — federal or non-federal — of the jurisdiction being invoked.

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87 See for instance Convention on the High Seas, above n5; United Nations Convention on the Law of the Sea done at Montego Bay on 10 December 1982, 1994 *Australian Treaty Series* 31 (entered into force for Australia on 16 November 1994).

88 *Blunden*, above n4 at [76] (Kirby J). As to the requirement of a 'substantial and bona fide connection', see *id* at [72] (Kirby J); *Zhang*, above n2 at [105]; Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed, 2003) at 309.

89 See above n5. See also Convention on the Law of the Sea, above n87 at Art 97 para 1.

90 See also *Blunden*, above n4 at [74] (Kirby J).

# *Robb Evans of Robb Evans and Associates v European Bank Ltd*

MATTHEW BURSTON\*

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## *Abstract*

*Robb Evans* examines the ambit of exclusionary doctrines in private international law. Following a spectacular credit card fraud with a worldwide money trail, the US Federal Trade Commission sued under a US Act to recover on behalf of defrauded consumers. At first instance, the NSW Supreme Court held that this fell within the exclusionary doctrine against foreign “governmental interests”; the Court of Appeal then overturned the ruling, using a rather broader conception of “governmental interests” than Australian law previously recognised. This article examines that conception, and the inconsistency of Australian approaches to government-interest analysis within private international law, in the fields of exclusionary doctrines and choice of law.

## **1. Introduction**

Exclusionary doctrines the common law world over have long precluded the enforcement in a forum of foreign penal and revenue laws.<sup>1</sup> However, the status of ‘foreign public law’ remains unsettled. The High Court has ruled that the phrase has no meaning in Australia and has approached the matter in terms of ‘governmental interests’.<sup>2</sup> The ambit of those interests is yet to be determined authoritatively; whilst matters of national security are clearly encompassed, little else is certain.<sup>3</sup> *Robb Evans of Robb Evans and Associates v European Bank Ltd*<sup>4</sup> (hereinafter *Evans*) casts an interesting light on this question. It seemingly accepts as given an interpretation which extends well beyond questions of national security; in doing so, it highlights the inconsistency between the High Court’s approaches to governmental interest analysis in choice of law and exclusionary doctrines. Finally, the practical approach of *Evans* may spur a less restrictive application of foreign law, principally in the areas of competition and securities law.

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\* BA, final year student, Faculty of Law, University of Sydney. I would like to thank Ross Anderson for his advice with this note. Any errors remain mine.

1 *Government of India v Taylor* [1955] AC 491; *Regazzoni v KC Sethia (1944) Ltd* [1958] AC 301.

2 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd (No 2)* (1988) 165 CLR 30 at 44–45.

3 *Ibid.*

4 [2004] NSWCA 82.

## 2. *The Facts*

*Evans* concerned the aftermath of a spectacular credit card fraud perpetrated by a Mr Kenneth Taves, which involved his dishonestly debiting 912 125 credit card accounts a total of over \$US47.5 million. This violated the *Federal Trade Commission Act*<sup>5</sup> (hereinafter *FTC Act*). On 6 January 1999, the appellant, Mr Robb Evans, was appointed by a Californian court<sup>6</sup> under the *FTC Act* as receiver of the assets of Taves, his wife and several corporations controlled by them. Taves then began to move the fraudulently obtained money further from the US authorities' grasp. This included having European Bank Ltd, a Vanuatu corporation and the respondent, establish a Vanuatu corporation, Benford Ltd; \$US7 527 900 was then deposited into Benford's account with European Bank in Vanuatu. European Bank then deposited the funds into an account in its own name with Citibank Ltd in Sydney.

Evans, as receiver of Benford, subsequently commenced proceedings in the Supreme Court of New South Wales to recover the funds from European Bank. NSW jurisdiction arose from the presence of the subject-matter of the dispute in NSW.<sup>7</sup> European Bank argued that the matter fell within the private international law exclusionary doctrine that courts may not entertain actions 'for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state';<sup>8</sup> it submitted that the *FTC Act* constituted such a law, and that the claim was therefore unenforceable.

## 3. *At Trial*

At first instance, Palmer J held that Evans' claim was not enforceable, as it was made 'on behalf of an agency of a foreign State for the direct enforcement of a public law of that State'.<sup>9</sup> He gave several reasons for this characterisation. Firstly, he held that the proceedings were brought by Evans not to enforce his personal rights or those of individual fraud victims, but in his capacity as an appointee of the Federal Trade Commission seeking to enforce the *FTC Act*.<sup>10</sup> Second, he held that the *FTC Act* was a foreign public law.<sup>11</sup> He then framed this in terms of the Australian approach in *Heinemann*, characterising the Act as one the purpose of which 'was to secure the "governmental interests" of the United States in regulating the manner of conducting commerce...so as to protect a certain class of the public, namely consumers'.<sup>12</sup> Alternatively, he classified the Act as a penal law, as the damages recoverable under it were not calculated by or limited to the victims' losses, but were based on the wrong-doers' profits.<sup>13</sup> Additionally,

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5 15 USC 45 at 45(a)(1).

6 The United States District Court for the Central District of California, Western Division.

7 *Evans and Associates v Citibank Ltd* [2003] NSWSC 204 at para 8.

8 *Id* at para 45.

9 *Id* at para 82.

10 *Id* at para 83.

11 *Id* at para 84.

12 *Ibid*.

13 *Id* at para 86.



Palmer J held that Evans derived his status from the *FTC Act* and that this Act was legislated in the exercise of a prerogative of the United States Government.<sup>14</sup> Finally, he considered the decision he would have handed down, in the event of later overturning of his characterisation, and set forth other grounds for dismissing the claim unrelated to private international law.<sup>15</sup>

#### ***4. On Appeal to the NSW Court of Appeal***

On appeal, Evans claimed that Palmer J had erred by characterising the *FTC Act* as either a foreign public law or a law enforcing foreign governmental interests, and that the exclusionary rule should not, therefore, apply. He also appealed aspects of the ruling which did not concern private international law. Spigelman CJ, with Handley and Santow JJA concurring, held that Palmer J had erred in his classification, but dismissed the appeal on grounds unrelated to private international law.

#### ***5. Reasons for the Decision***

The major factor underlying the decision was a preference for substance over form with regard to exclusionary doctrines. This applied in two main areas: the characterisation of the *FTC Act* and its remedies, and the position of plaintiffs in proceedings under the Act.

Spigelman CJ first established his methodology for assessing the question. He considered the development of the public law exclusionary doctrine and its various formulations.<sup>16</sup> He established that governmental interests were not merely ‘public interest[s] protected by legislation’,<sup>17</sup> and that whether applying particular statutes would enforce such interests depended on the relevant provisions’ scope, nature and purpose and the facts of the case.<sup>18</sup> He noted that this was a question of substance, not form.<sup>19</sup>

Spigelman CJ then considered the case at hand. The two main bases of his decision concerned the characterisation of the *FTC Act* and its remedies, and the nature of the plaintiff. First, the Act authorised several remedies, some of which ‘would have the requisite governmental character’.<sup>20</sup> However, the damages sought here were, in substance, compensatory rather than penal; they would be divided amongst the fraud victims in recompense for their losses. Spigelman CJ noted that the damages recoverable were, as identified by Palmer J, based on the profits of the wrong-doers rather than the victims’ losses, and were not co-extensive with or limited to the amount defrauded.<sup>21</sup> However, whilst Palmer J

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14 Id at para 88.

15 Id at para 91.

16 Id at para 37.

17 Id at para 42.

18 Id at para 44.

19 Id at para 45.

20 Id at para 86.

21 Id at para 56.

took this as evidence of the penal nature of the Act and a basis for application of the exclusionary doctrine, Spigelman CJ, approvingly cited Cardozo J in *Loucks v Standard Oil Co of New York*<sup>22</sup> to the effect that penal classification, in the private international law sense, depended not on the method of calculating damages, but on their destination and purpose,<sup>23</sup> as the damages here were intended to compensate individuals, rather than penalise wrong-doers on behalf of the state, they were not penal in nature.<sup>24</sup> Where Palmer J looked to form, Spigelman CJ looked to substance; whilst Spigelman CJ noted that the Act allowed for surplus funds, or funds which could not be distributed to victims, to pass to the US Treasury, he held that, given the small proportion of the total defrauded available for recovery, no such award to the state would be made and no penal character would arise.<sup>25</sup> As the damages were, in substance, compensatory, and as they would be awarded to the fraud victims rather than a foreign government, Spigelman CJ held that the interests enforced were not governmental in nature, and that the exclusionary doctrine did not apply.<sup>26</sup>

The second concern surrounded the nature of the plaintiff. The *FTC Act* empowered only the Federal Trade Commission or its appointees to seek relief. However, Spigelman CJ again turned to substance rather than form. Applying the above analysis, he held that, whilst an appointee of a public body might be the nominal plaintiff, the interests being enforced were those of the fraud victims; the Act simply provided a practical means for victims to recover amounts too small to pursue individually.<sup>27</sup> This prevented the interests enforced from bearing a governmental character, and the exclusionary doctrine from arising.

## 6. *Ambit of the Exclusionary Doctrine*

Perhaps the most interesting issue arising from *Evans* concerns the scope of governmental interests and, accordingly, the exclusionary doctrine. Spigelman CJ appears to accept a rather wider interpretation of governmental interests than that previously contemplated in Australia.

The ambit of the exclusionary doctrine has recently begun to widen in Australia. It is well established that foreign revenue and penal laws will not be enforced in Australian courts.<sup>28</sup> Internationally, questions have arisen as to the application of the doctrine to a somewhat amorphous third category of 'foreign public law';<sup>29</sup> the nature and scope of the kinds of foreign public laws to which this would apply are matters which remain unresolved. Domestically, the High Court has formulated the question in terms of whether the application of the

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22 120 NE 198 (1918).

23 *Evans*, above n4 at para 51.

24 *Id* at para 87.

25 *Id* at para 74–83.

26 *Id* at para 89.

27 *Id* at para 85.

28 *Heinemann*, above n2 at 40–2.

29 *Attorney-General (New Zealand) v Ortiz* [1984] AC 1 at 20–1 (Lord Denning MR); *Nanus Asia Co v Standard Chartered Bank* [1990] 1 HKLR 396.

relevant law would amount to the enforcement of the governmental interests of the foreign state, in the sense of powers peculiar to government.<sup>30</sup>

The High Court seems to have conceived of governmental interests in a narrow sense. In passing beyond the facts of the case, the joint judgment limited its discussion to other matters of national security.<sup>31</sup> This may indicate that the court intended only the most essential of state functions to fall within the exclusionary doctrine.

More recently, the Federal Court has suggested that the doctrine applies in matters which do not involve national security.<sup>32</sup> *Petrotimor* concerned a compensation claim arising from a purported granting by Portugal of proprietary rights over an area of the seabed outside Portuguese territory. Beaumont J held that the grant constituted a Portuguese exercise of sovereign authority outside Portuguese territory, and that upholding the agreement embodying it would amount to enforcing foreign governmental interests in Australia.<sup>33</sup> This created a possible extension of the scope of 'foreign governmental interests' beyond matters of national security.

Whilst *Petrotimor* may have broadened the interpretation of governmental interests beyond that suggested by *Heinemann*, both cases remained within the ambit of what might be called 'essential state functions'. A state will not exist for long without the ability either to determine its borders, as in *Petrotimor*, or to maintain its security, as in *Heinemann*. However, *Evans* seemed to accept almost as a given a much wider approach to governmental interests; Spigelman CJ cited academic discussions of matters such as price control regulations and anti-trust legislation.<sup>34</sup> Whilst peculiar to government, these do not reflect essential state functions; a state could well survive as a state without price controls or competition legislation. Spigelman CJ then continued:

There are, however, many regulatory interventions...which do not have the requisite governmental quality.<sup>35</sup>

The contrast suggests that, whilst many interventions may not fall within the scope of governmental interests, many others may do so; when combined with his citations of more broadly-interpreted academic discussions, Spigelman CJ gave the impression that he conceives of governmental interests as potentially encompassing broader considerations than those previously held in Australia.

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30 *Heinemann*, above n2 at 44.

31 *Ibid.*

32 *Petrotimor Companhia de Petroleos SARL v Commonwealth of Australia* [2003] FCAFC 3.

33 *Id* at para 160.

34 *Evans*, above n4 at para 46; Peter Nygh & Martin Davies, *Conflict of Laws in Australia* (7<sup>th</sup> ed, 2002) at [18.14]; Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (13<sup>th</sup> ed, 2000) at [5-036].

35 *Evans*, *ibid.*

## 7. *Broader Implications*

Two main issues emerge from *Evans*. First, whilst there have been moves in many areas of law to unify doctrines under a small number of theories, applied consistently across their fields, *Evans* highlights theoretical conflicts within Australian private international law. Second, applying the distinction between form and substance in *Evans* may lead to a less restrictive approach to laws surrounding government regulatory authorities; the two most important appear to be competition and securities laws.

### A. *Internal Inconsistencies in Australian Law*

One curious aspect of Australian private international law is highlighted by *Evans*: the seeming inconsistency between the guiding principles behind choice of law principles and exclusionary doctrines. *Heinemann* structured the Australian exclusionary doctrine in terms of governmental interests, and *Evans* has embraced this; by contrast, the High Court has rejected the influence of government interest analysis in its approach to choice of law.<sup>36</sup> Insofar as *Evans* widens the scope of governmental interests, it heightens the inconsistency between the approaches taken by the High Court within the sphere of private international law.

In *John Pfeiffer Pty Ltd v Rogerson*<sup>37</sup> and *Renault*, the High Court adopted the *lex loci delicti* as the applicable law for both intra- and inter-national torts. In doing so, it rejected both the ‘proper law of the tort’ and the possibility of a ‘flexible exception’.<sup>38</sup> The High Court attacked the ‘American “governmental influence”’ analysis, which it saw as underlying the ‘proper law of the tort’ approach and influencing the English ‘flexible exception’; it noted academic claims of its ‘parochialism and systematic unfairness to defendants’.<sup>39</sup>

However, as Lindell notes,<sup>40</sup> this contrasts rather strongly with the approach of Australian courts to exclusionary doctrines. From their adoption by the High Court in *Heinemann*, to their approving citation in *Renault* as a means of systematising public policy reservations<sup>41</sup> and their furthering in *Evans*, governmental interests have formed a cornerstone of private international law exclusionary doctrines in Australia. Lindell is correct to point out the inconsistency of rejecting ‘government interest’ analysis in the context of choice of law and accepting it in the context of exclusionary doctrines; in widening the possible ambit of such interests, *Evans* further heightens the internal inconsistency of Australian private international law.

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<sup>36</sup> *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10 at para 63.

<sup>37</sup> (2000) 172 ALR 625.

<sup>38</sup> *Renault*, above n36 at para 63.

<sup>39</sup> *Ibid*; Catherine Walsh, ‘Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims’ (1997) 76 *Canadian Bar Review* 91 at 110.

<sup>40</sup> Geoffrey Lindell, ‘*Regie Nationale des Usines Renault SA v Zhang*: Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia’ (2002) 3 *Melbourne J of Int’l Law* 364 at 374.

<sup>41</sup> Above n36 at para 53.

## **B. Competition and Securities Laws**

Arguably the most relevant areas affected by *Evans* concern foreign securities and competition law. These fields frequently involve regulatory authorities or their appointees acting to secure compensation on behalf of a number of individuals or corporations. Here, the distinction emphasised by *Evans* between form and substance is likely to have its most significant application.

As Dodge notes, courts have often refused to enforce the competition laws of other countries.<sup>42</sup> The House of Lords has refused to enforce the American *Clayton Act*,<sup>43</sup> a long line of American authority has held such non-enforcement to be a factor when making *forum non conveniens* rulings.<sup>44</sup> The Federal Court has refused to void an acquisition which infringed even Australian law, on the grounds that its order would not be enforced in England.<sup>45</sup> In the wake of *Evans*, though, greater attention might be paid to the substance of claims over their form. Whilst Spigelman CJ did cite English academic work suggesting that anti-trust legislation might fall within the exclusionary doctrine, two considerations arise from his analysis. First, competition legislation would seem to form a part of the ‘standard of commercial behaviour’ he addressed,<sup>46</sup> there need not be an inherent characterisation of competition law as reflecting a governmental interest. Second, if it can be shown that the purpose of proceedings is to compensate victims rather than to punish wrong-doers, then the substance of those proceedings would involve the enforcement of private rather than governmental interests, even if a government body or appointee were acting as the nominal plaintiff.<sup>47</sup> The key criterion for this appears to be the destination of the money recovered; should it go to the individuals involved as compensation, rather than to a government as a penalty, then there seems no reason to characterise the interests enforced as governmental.

Similar considerations should apply to foreign securities laws. Securities legislation has often been characterised as penal in nature,<sup>48</sup> even where the plaintiffs are private individuals.<sup>49</sup> Perhaps the most significant contrast lies in *Nanus*, in which the US Securities and Exchange Commission sought disgorgement of profits payable to defrauded investors and a penalty payable to the

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42 William Dodge, ‘Breaking the Public Law Taboo’ (2002) 43 *Harv Int’l LJ* 161 at 185–7; see also Hans Baade, ‘The Operation of Foreign Public Law’ (1995) 30 *Texas Int’l LJ* 429 at 472–4; Felix Strebler, ‘The Enforcement of Foreign Judgments and Foreign Public Law’ (1999) 21 *Loyola of Los Angeles Int’l and Comparative LJ* 55 at 87.

43 *British Airways Board v Laker Airways Ltd* [1985] 1 AC 58.

44 See, for example, *Industrial Investment Development Corporation v Mitsui and Company* 671 F 2d 876 (1982); see also the discussion in Dodge, above n42 at 185–6.

45 *Re Trade Practices Commission and Australian Meat Holdings Pty Ltd* (1998) 83 ALR 299 (Wilcox J).

46 *Evans*, above n4 at para 84.

47 *Id* at para 83 and 87.

48 *Schemmer v Property Resources Ltd* [1975] Ch 273.

49 *McIntyre Porcupine Mines Ltd v Hammond* (1975) 119 DLR 3d 139, in which the Ontario High Court of Justice, whilst deciding the case on a different ground, suggested that *prima facie* it would follow *Schemmer*, *ibid*.

US Treasury.<sup>50</sup> Unsurprisingly, the Hong Kong court characterised the latter measure as penal in nature. However, even though the damages would go to individuals in recompense for private losses suffered, the court also ruled that the disgorgement sought was public in nature and would not be recognised.

By contrast, *Evans* emphasised substance over content; most relevantly here, it required an assessment of the nature and role of the plaintiff and the character and destination of the damages.<sup>51</sup> By *Evans*, there seems little reason to treat individuals who have been defrauded in violation of foreign securities legislation any differently from those who have been defrauded in contravention of the *FTC Act*; both establish a standard of commercial conduct and closely parallel common-law rights to recover money of which individuals have been defrauded.<sup>52</sup> Should a securities regulator seek, under a foreign statute, to recover on behalf of a group of defrauded investors, with the money to be returned to them, then *Evans* would lend support to their case.

## 8. Conclusion

*Evans* is an interesting case. On the one hand, its approach to the scope of the definition of ‘governmental interest’ is less than satisfactory; Spigelman CJ gives the impression that the doctrine might extend beyond essential state functions, but does little to structure his musing. However, his possible acceptance of a wider doctrine also highlights the theoretical inconsistency which has developed in Australian private international law since *Pfeiffer* and *Renault*; to the extent that further attention is focused on this matter, the decision is welcome. Finally, the most important and potentially enduring aspect of the judgment is its focus on substance over form and its practical application of the distinction. This should be welcomed as being better able to adapt to a multitude of possible circumstances than a less flexible approach; it should better serve the ultimate end of the law in doing justice between the parties.

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50 *Nanus*, above n29.

51 *Evans*, above n4 at para 83 – 89.

52 *Id* at para 84.

# *The Human Genome, Property of All: Opportunities Under the ALRC Inquiry into Gene Patenting and Human Health*

JOHN PAUL HINOJOSA \*

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*‘The human genome is the heritage of humanity’<sup>1</sup>*

## ***Abstract***

This article highlights the revolutionary and dramatic implications brought about by the advances in genetics. Among the myriad of legal problems involved, gene patenting is regarded as one of the most controversial. In a critical evaluation of the current inquiry into gene patenting and human health, the author argues that the Australian Law Reform Commission falls short of a thorough recommendation by failing to grant due recognition to the Universal Declaration on the Human Genome and Human Rights. Starting with the fundamental premise that the human genome is the ‘heritage of humanity’, it is argued that the fruits of genetic research must flow back to humankind, and any law reform process must thereby ensure that the economic and health benefits of genetic research are available to all. Specifically, the Patents Act 1990 (Cth) should be amended to include the ‘medical treatment’ defence to patent infringement, following the lead of overseas jurisdictions. It should also incorporate an ‘experimental use’ defence to ensure an unhindered approach to research and development. In doing so, the patent law regime will be truly balancing the interests at stake, which will accommodate more fully Australia’s domestic needs and international obligations.

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<sup>1</sup> United Nations Educational, Scientific and Cultural Organization (UNESCO) *Universal Declaration on the Human Genome and Human Rights*, 11 November 1997 (hereinafter *Universal Declaration*). See also Human Genome Organisation Ethics Committee, *Statement On The Principled Conduct Of Genetics Research* (1996).

## 1. *Introduction: Genetics, Law Reform and the Future*

Few developments in science have had the impact on society, institutions, laws, and health care that genetics is having and, undoubtedly, will continue to have. We already have glimpses of what may come: a cure for cancer and many of the more than 4000 genetic diseases that afflict mankind;<sup>2</sup> cracking the ‘ageing’ gene;<sup>3</sup> and designing individuals to specification.<sup>4</sup> The Human Genome Project, one of the greatest scientific enterprises in history, has signalled the commencement of a new era in science. The revolutionary and dramatic implications of genetic research cannot be understated. The myriad of legal problems these developments entail have prompted ample discussion and a variety of responses from governments and institutions.<sup>5</sup> Among these legal problems, patenting is regarded as one of the most controversial issues raised by advances in genetics.<sup>6</sup> The Australian Government has therefore recently commissioned the Australian Law Reform Commission (ALRC) to review the intellectual property issues associated with genetic information. The aim of this paper is to evaluate critically this current inquiry into gene patenting and human health.<sup>7</sup> We seek to assess the extent to which the recommendations by the ALRC are consistent with the fundamental premise that the human genome is the ‘heritage of humanity’, as envisaged in the Universal Declaration on the Human Genome and Human Rights.<sup>8</sup> In particular, this paper argues that the *Patents Act* 1990 (Cth) should be amended to include the ‘experimental use’ and ‘medical treatment’ defences to patent infringement.

## 2. *ALRC’s Discussion Paper and UNESCO’s Universal Declaration*

### A. *The ALRC Inquiry into Gene Patenting*

In December 2002, in the course of an inquiry into the Protection of Human Genetic Information,<sup>9</sup> the Attorney-General commissioned the ALRC to undertake a comprehensive review of whether Australia’s intellectual property

2 See, for example, Ross Grant, *Can Genetic Research Yield Cancer Cure?*: <<http://www.hon.ch/News/HSN/512232.html>> (11 April 2003); and Human Genome Project Information, *Understanding Our Genetic Inheritance: The US Human Genome Project*: <[http://www.ornl.gov/sci/techresources/Human\\_Genome/project/project.shtml](http://www.ornl.gov/sci/techresources/Human_Genome/project/project.shtml)> (29 October 2003).

3 BBC News World Edition, *Science Closing in on Ageing Gene*: <<http://news.bbc.co.uk/2/hi/health/3483431.stm>> (13 February 2004).

4 Peter Aubusson & Eileen Kennedy, *Biology in Context: The Spectrum of Life* (2000) at 398.

5 Some of the legal areas affected by genetics include: privacy law, medical law, intellectual property, discrimination law, employment law, insurance law, human rights law, family law, and criminal law. The *Modern Law Review* has devoted an entire issue to consider the broad range of legal problems presented by the Human Genome: see *Modern Law Review*, Volume 61: Issue 5, September (1998).

6 Anne Finlay, ‘Gene Patenting: Seeking Benefits for All’ (2003) 82 *Reform* 52 at 53.

7 The Australian Law Reform Commission released an issues paper in July 2003: Australian Law Reform Commission, *Gene Patenting and Human Health: Issues Paper 27* (Sydney: ALRC, 2003) (hereinafter *Issues Paper*). It then released a discussion paper in February 2004: Australian Law Reform Commission, *Gene Patenting and Human Health: Discussion Paper 68* (Sydney: ALRC, 2004) (hereinafter *Discussion Paper*). The ALRC is due to release the final report to the Attorney-General on 20 June 2004.

8 *Universal Declaration*, above n1.



laws could cope with the rapid advances in genetic science and technology, with a particular focus on human health issues. The inquiry is certainly welcome news: many argue that patent law is struggling to meet the challenges posed by the advent of biotechnology.<sup>10</sup> Our patent law regime was designed close to 400 years ago,<sup>11</sup> for a ‘bricks and mortar world’,<sup>12</sup> when genetic information only existed in nature. Furthermore, the acquisition of proprietary rights in aspects of the human genome and its downstream products promises to be ‘the gold rush of the twenty-first century’.<sup>13</sup> A review was therefore imperative. The inquiry is comprehensive and complex. The *Discussion Paper* released includes 49 proposals and poses 19 questions. However, at this stage, the ALRC has not found real evidence that a radical overhaul of the patents system is warranted.<sup>14</sup>

### **B. UNESCO’s Universal Declaration**

In November 1997 the General Conference of UNESCO adopted the Universal Declaration on the Human Genome and Human Rights.<sup>15</sup> The Declaration is a major achievement in itself and is said to be ‘the first attempt of the international community to state the broad principles that should govern ethical and legal responses to which the Human Genome Project will give rise’.<sup>16</sup> Many of its articles have critical implications to any law reform process concerned with gene patenting.<sup>17</sup> It is thus rather discouraging that the ALRC has only given minor consideration to the Universal Declaration in its Discussion Paper. The Universal Declaration disappointingly receives no consideration in the chapter dedicated to consider Australia’s international obligations. It is submitted here that the ALRC should give greater weight to the Declaration and it should form part of the framework for law reform. By doing so Australia would ensure that it fulfils its obligation to promote the principles set forth in the Universal Declaration.<sup>18</sup>

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9 Australian Law Reform Commission & Australian Health Ethics Committee, *Essentially Yours: The Protection of Human Genetic Information in Australia*, No 96 (2003).

10 Julia Black, ‘Regulation as Facilitation: Negotiating the Genetic Revolution’ (1998) 61 *Mod LR* 621 at 646.

11 The origins of our patent law regime can be traced back to the *Statute of Monopolies* (1623) 21 Jac 1 c3, which continues to have relevance in Australian patent law today: see *Patents Act* 1990 (Cth) s18(1)(a). Our current patent law regime has been substantially reformed since 1623, however no single piece of reform has addressed the issues raised by gene patenting.

12 Rebecca Eisenberg, ‘Re-examining the Role of Patents in Appropriating the Value of DNA Sequences’ (2000) 49(3) *Emory Law Journal* 783 quoted in Luigi Palombi, ‘Patentable Subject Matter, TRIPS and the *European Biotechnology Directive*: Australia and Patenting Human Genes’ (2003) 26(3) *UNSWLJ* 782 at 792.

13 A Haas, ‘The Wellcome Trust’s Disclosures of Gene Sequence Data into the Public Domain & the Potential for Proprietary Rights in the Human Genome’ (2001) 16 *Berkeley Tech LJ* 145 at 145.

14 Australian Law Reform Commission, *Press Release: ALRC Inquiry Reveals Confusion, Anxiety Over Gene Patents* (4 March 2004).

15 *Universal Declaration*, above n1.

16 Michael Kirby, ‘Genomics and Democracy – A Global Challenge’ (2003) 31 (1) *UWALR* 1 at 8.

17 Articles 1, 4, & 12–19 of the *Universal Declaration*, above n1, have direct implications on gene patenting law.

18 *Universal Declaration*, above n1, Art 22: ‘States should make every effort to promote the principles set out in this Declaration and should, by means of all appropriate measures, promote their implementation.’

### 3. *Our Genes, Who Owns Them?*

#### A. *The Human Genome: The Heritage of Humanity*

The Universal Declaration begins with the fundamental premise that the genome is the ‘property of all’:

*Article 1: The human genome underlies the fundamental unity of all members of the human family, as well as the recognition of their inherent dignity and diversity. In a symbolic sense, it is the heritage of humanity.*

This view has received widespread support.<sup>19</sup> But one may ask: what exactly does it mean that the human genome is the ‘heritage of humanity’ and what consequences flow from this assertion? Do we own it as tenants in common, all six or seven billion of us? And, what exactly do we own? One must begin by noting that the Declaration qualifies the fundamental premise by stating that the human genome, *in a symbolic sense*, is the heritage of humanity. One could thus argue that article 1, as such, does not have any direct legal application. Yet, the fundamental premise in article 1 must be of some consequence. It is more than a simple metaphor.<sup>20</sup> It is therefore here submitted that the concept that the human genome is the ‘heritage of humanity’ has the following two applications:

- (a) Since the human genome belongs to humankind, it must follow that all the rights and benefits associated with research on the human genome, and any downstream applications derived from it, also belong to humankind. An analogy may help: when a person owns land, that person also owns the fruits of the land. The law must therefore ensure that the fruits of research in the human genome eventually reach their true owners: humankind.
- (b) The human genome as the ‘property of all’ is a concept that underlies the rest of the articles in the Universal Declaration and therefore has indirect, but practical, applications. Article 4, for instance, provides that ‘the human genome in its natural state shall not give rise to financial gains’.

#### B. *The Patents System: Striking The Right Balance*

A patent law system is said to be in the interests of the public good in that ‘it stimulates industrial invention by granting limited monopoly rights to inventors and by increasing public availability of information on new technology’.<sup>21</sup> From an economic perspective it is the result of a cost-benefit analysis. Monopolies are an undesirable cost to society. But the benefits, in terms of progress and innovation, outweigh the cost of a monopoly. It may appear scandalous to suggest

19 It has been supported by the Council of Europe Parliamentary Assembly: *Recommendation No 1425: Biotechnology and Intellectual Property* (23 September 1999) rec 10; the Human Genome Organisation’s Ethics Committee: above n1; the United Kingdom’s Nuffield Council of Bioethics: *The Ethics of Patenting DNA* (2002) at 22–23; and numerous submissions to the ALRC inquiry: *Discussion Paper*, above n7.

20 See suggestions by Professor Ryushi Ida in Michael Kirby, above n16 at 10–11.

21 Patents Amendment Bill 1981 (Cth) (Second Reading Speech).

that a private corporation might one day have monopoly rights for 20 years on the cure for cancer. Yet, without a patent incentive, it may take hundreds of years longer to find the cure for cancer.

If the human genome is the ‘heritage of humanity’, and thus the ‘property of all’, does it follow that no monopoly rights should be granted over genetic materials and technologies? Some suggest that they should be completely excluded from patentability:<sup>22</sup> ‘genes are our collective property and should not be subject to ownership by individual intellectual property rights’.<sup>23</sup> However, this would ignore the reality that a fine-tuned patents regime may bring about more health and economic benefits to society sooner and better. Furthermore, to exclude genetic materials and related technologies from patentability could have detrimental effects on the Australian biotechnology industry.<sup>24</sup> It may also conflict with Australia’s international obligations under the *Agreement on Trade Related Aspects of Intellectual Property Rights* 1994.<sup>25</sup> The ALRC has therefore proposed that the *Patents Act* 1990 (Cth) should not be amended specifically to exclude genetic materials or technologies from patentability.<sup>26</sup>

It should also be noted that in Australia and most other jurisdictions patent law distinguishes between a gene *in situ* (in its natural state) and a gene that has been extracted from the body by a process of isolation and purification.<sup>27</sup> The former is not patentable subject matter. This distinction, in our view, marks a distinct boundary, consistent with the premise that ‘in its natural state the human genome shall not give rise to financial gains’.<sup>28</sup> It strikes the right balance between the notion of the human genome as ‘property of all’ and the convenience of granting intellectual property protection over genetic materials and technologies to further innovation and improve health.

### ***C. Ensuring the Benefits Flow Back to Us: Research and Health Care.***

The idea of the human genome as ‘property of all’ is thus consistent with intellectual property rights over genetic materials and technologies. However, it should be recalled that a patent law regime is the result a balancing exercise. Costs

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22 See Patents Amendment Bill 1996 (Cth); Natasha Stott Despoja, Commonwealth of Australia, *Parliamentary Debates (Hansard)*, Senate, 27 June 1996, 2332. See also submissions in *Discussion Paper*, above n 7 at 181–182.

23 Geraldine Chin, ‘Is Gene Patenting in the Interests of Public Health? A Study of the Ethical and Public Policy Implications of Patenting Gene Sequences’ [1999] *ALSA Academic Journal* 1 at 5.

24 See *Discussion Paper*, above n7 at 182; Dianne Nicol & J Nielsen, *Patents and Medical Biotechnology: An Empirical Analysis of Issues Facing the Australian Industry* (2003) Centre for Law and Genetics Occasional Paper No 6 at 232. It may also be detrimental to the Australian Government’s current strategy for promoting research, development and innovation: see Commonwealth of Australia, *Backing Australia’s Ability: An Innovation Action Plan for the Future* (Canberra: 2001).

25 See *Discussion Paper*, above n7 at 183.

26 See Proposal 7–1 in *Discussion Paper*, above n 7 at 184.

27 *Kiren-Amgen Inc v Board of Regents of the University of Washington* (1995) 33 IPR 557. See also *Discussion Paper*, above n7 at 127–131.

28 Universal Declaration, above n1 Article 4.

are weighed against benefits. The role of the current ALRC inquiry is precisely to identify the avoidable costs of gene patenting. The ALRC has correctly identified in its Discussion Paper two major areas of concern: access to health care and detrimental effects on scientific research. Underlying these concerns is the fundamental problem of 'ensuring that the benefits of the completion of the first draft of the human genome sequence should be available to all humanity'.<sup>29</sup> In the next sections we explore these specific concerns, and we comment on possible solutions by amending the *Patents Act 1990* (Cth).

#### 4. *Access to Health Care and the 'Medical Treatment' Defence*

##### A. *The Problem*

Gene patenting can clearly have a detrimental effect on access to health care. It may lead to restricted availability and prohibitive costs of genetic testing, genetic therapy and pharmacogenetics, many which may be critical to public health.<sup>30</sup> In the complex area of health and patents, there can be clear overriding considerations in the interest of public health that may tip the balance against intellectual property rights. Humankind, the true owner of the human genome, must have access to the all health benefits brought about by genetic research and technology. Thus the Universal Declaration specifies that the applications of genetic research shall seek to offer relief from suffering and improve the health of individuals and human kinds as a whole.<sup>31</sup> All Australians, rich and poor, must have equitable access to genetic testing and treatment.

The case of patenting BRCA1, the breast cancer gene, is often cited as an example confirming the fears that gene patents will restrict access to health care.<sup>32</sup> A private corporation, Myriad Genetic, currently holds various patents over genes, gene sequences and genetic tests associated with breast cancer. The patents on BRCA1 have led to a threefold, and in some instances higher, increase in the cost of genetic testing for breast cancer and have substantially restricted the number of laboratories able to provide the tests.<sup>33</sup> Similar criticisms have been made about Chiron Corporation's patents over hepatitis C virus.<sup>34</sup>

While the ALRC has identified these potential problems, it has formed the view, based on submissions and consultation, that there is limited evidence to date that gene patents and licensing practices have had any significant adverse impact on the cost of healthcare provision in Australia.<sup>35</sup> Therefore, no legislative

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29 Michael Kirby, 'The Human Genome and Patent Law' (2001) 79 *Reform* 10 at 11.

30 UNESCO, 'The Human Genome and the Patent Boom Challenge', *Press Release*, 11 September 2001: <<http://www.unesco.org/bpi/eng/unesco-press/2001/01-97e.shtml>> (6 January 2003).

31 Universal Declaration, above n1, art 12(b).

32 Anne Finlay, above n6 at 56; Dianne Nicol, 'Gene Patents and Access to Genetic Tests' (2003) 11(7) *Australian Health Law Bulletin* 73; and Matthew Rimmer 'Myriad Genetics: Patent Law and Genetic Testing' [2003] 1 *European Intellectual Property Review* 20.

33 Rimmer, above n32 at 28; and Nicol, above n 32 at 75.

34 Chin, above n23.

35 *Discussion Paper*, above n7 at 602.

amendment is recommended. The recommendations so far canvassed concentrate on encouraging Commonwealth, state and territory health departments to undertake new roles in monitoring and challenging gene patents.<sup>36</sup> This, with respect, is a disappointing outcome. First, health departments already have the major burden of looking after public health. To ask them to divert time and resources to go to court in order to litigate and challenge patents is an inadequate solution. Secondly, the ALRC is basing its recommendations on past and present evidence. But law reform must concern the future. In the area of genetics, which arguably is in its infant stage, it is crucial to have regard for what the future may bring. It is not good policy to have to wait for a disaster to demonstrate that reform is needed.

### **B. *The Solution: ‘Medical Treatment’ Defence to Patent Infringement***<sup>37</sup>

In our view, introducing a ‘medical treatment’ defence is a suitable reform option. In broad terms, a statutory medical treatment defence would prevent patent holders from bringing an action for infringement against medical practitioners for providing medical services to patients. It would include diagnostic, therapeutical and surgical methods of treatment. The United States introduced a medical treatment defence in 1996.<sup>38</sup> Other jurisdictions, such as the United Kingdom,<sup>39</sup> New Zealand,<sup>40</sup> and the Canadian province of Ontario,<sup>41</sup> provide even wider protection by excluding medical treatment from the scope of patentable subject matter. The ALRC, at this stage, is reluctant to recommend the introduction of a medical treatment defence.<sup>42</sup>

It is here submitted that a medical treatment defence should be included in the *Patents Act* 1990 (Cth), as part of Australia’s commitment to the Universal Declaration. As was discussed above, it is crucial that the benefits of genetic research flow to all humankind, the owners of the human genome. The case is at its strongest in the area of health care. A medical treatment defence will ensure that the applications of genetic research will offer relief from suffering and improve the health of individuals and humankind as a whole. Without a medical treatment defence we run the risk of restricting access to the benefits of genetic research, which should be for all, and not only for those with healthy pockets.

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36 The ALRC has also canvassed other proposals that may indirectly address concerns over access to healthcare. For example, changes to Patent Office Practices; and clarification of the Crown use and compulsory licensing provisions in the Patents Act.

37 For a comprehensive discussion of the medical treatment defence see *Discussion Paper*, above n7, chapter 22: Medical Treatment Defence.

38 35 USC–287(c).

39 See *Patents Act* 1997 (UK) s4(2).

40 See *Wellcome Foundation Ltd v Commissioner of Patents* [1893] 2 NZLR 385.

41 See Canadian Patent Office, *Manual of Patent Office Practice* (1998) [16.04(b)].

42 See *Discussion Paper*, above n7 at 616–617.

## 5. *Genetic Research and the ‘Experimental Use’ Defence*

### A. *The Problem*

Another major concern over gene patents is that they may have a ‘chilling effect’ on the conduct of research. Justice Michael Kirby has correctly noted that the tradition of science has been turned ‘from a discipline that was open, at least in the field of pure science, to one which is now significantly affected by intellectual property imperatives’.<sup>43</sup> The adverse effect of patents is that research may be hindered by researchers’ concerns about infringing patents or about the difficulties of obtaining licenses to carry out research on patented inventions.

Research in genetics is essentially cumulative: ‘much basic research forms the foundation for later research and there are many steps between initial pioneering research ... and end products’.<sup>44</sup> Thus, the patent system may in fact create a ‘patent thicket’ that researchers must hack their way through in order to carry out further research and eventually commercialise new technology.<sup>45</sup> This leads to deterioration in the open exchange of information, high transactional costs and inhibition of research.<sup>46</sup> The case of the BRCA1 gene patent has also been considered as an example of patents hindering further research into genetic tests and treatment of breast cancer.<sup>47</sup>

### B. *The Solution: the ‘Experimental Use’ Defence to Patent Infringement*<sup>48</sup>

The Universal Declaration recognises that scientific knowledge can only move forward in an environment of intellectual freedom.<sup>49</sup> An ‘experimental use’ defence, it is here submitted, would effectively address the concern that patents may hinder research. Such a defence would protect researchers from claims of patent infringement based on the use of a patented invention to study or experiment on the subject matter of the invention. It is unclear whether such a defence exists at common law in Australia.<sup>50</sup> An experimental use defence is currently

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43 Michael Kirby, above n29 at 11.

44 D Nicol & J Nielsen, quoted in *Discussion Paper*, above n7 at 346.

45 Advisory Council on Intellectual Property, *Patents and Experimental Use: Issues Paper* (Canberra: 2004) at 14. See also Michael Helter and Rebecca Eisenberg, ‘Can Patents Deter Innovation? The Anticommons in Biomedical Research’ (1998) 128 *Science* 689.

46 Kate Murahige, ‘Patents and Research – An Uneasy Alliance’ (2002) 77 (12) *Academic Medicine* 1329.

47 Rimmer, above n32 at 27–28.

48 For a comprehensive discussion of the experimental use defence see *Discussion Paper*, above n7, chapter 14: Experimental and Research Use Defences; Craig Smith, ‘Experimental Use Exception to Patent Infringement – Where Does Australia Stand?’ (2003) 53 *Intellectual Property Forum* 14.

49 Universal Declaration, above n1, art 14. See also M Kirby, ‘Human Genome Project – Legal Issues’, paper presented at the Australian Lawyers’ Conference (Hanoi, Vietnam) 10–12 July 1999.

50 Smith, above n 48; *Discussion Paper* above n7 at 378–380.

recognised in many jurisdictions.<sup>51</sup> The ALRC has thus recommended amending the *Patents Act* 1990 (Cth) to introduce an ‘experimental and research use’ defence.<sup>52</sup>

A number of justifications have been canvassed supporting the introduction of the experimental use defence.<sup>53</sup> In this paper we would like to highlight that this law reform proposal is commendable in that it is consistent with the fundamental premise that the human genome is ‘property of all’ and the underlying principle of freedom of research. According to the Human Genome Organisation Ethics Committee:

The collaboration between individuals, populations and researchers in the free flow, access, and exchange of information is essential not only to scientific progress but also for the present or future benefit of all participants.<sup>54</sup>

Furthermore, by introducing the defence, Australia will comply with article 12 of the Universal Declaration, which provides that states should take appropriate steps to provide the framework for the free exercise of research on the human genome.

## **6. Conclusion: In Defence of the Proposed Defences**

The ALRC was asked to examine ways in which the patent system can be changed to ‘further the health and economic benefits of genetic research’.<sup>55</sup> But one may ask: whose benefits are to be furthered? The economic benefits of private corporations? The health benefits of wealthy individuals? This paper has highlighted the fundamental premise that the human genome is the ‘heritage of humanity’ and thus the fruits of genetic research must flow back to humankind. Any law reform process must conform to this premise and therefore ensure that the economic and health benefits of genetic research are available to all. In the proposed ‘experimental use’ and ‘medical treatment’ defences, Australia now has the opportunity of guaranteeing freedom of research and equitable access to health care. It is our hope that, in reforming the law of patents, our legislators will strike the right balance so as to bring about more health and economic benefits to all: sooner and better.

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51 United Kingdom: *Patents Act* 1977 (UK) s60(5); New Zealand: *Smith Kline & French Laboratories v Attorney General (NZ)* [1991] 2 NZLR 560; United States: *RocheProducts Inc v Bolar Pharmaceutical Co* (1984) 733 F 2d 858; Canada: *Micro Chemicals Ltd v Smith Kline & French Inter-American Corporation* (1971) 25 DLR (3d) 79.

52 *Discussion Paper*, above n7, proposal 14–1 at 412.

53 See Craig Smith, above n48 at 15–18; *Discussion Paper*, above n7 at 395–398.

54 Human Genome Organisation Ethics Committee, above n1.

55 Attorney-General, *Terms of Reference: Intellectual Property Rights Over Genetic Materials and Genetic and Related Technologies*, in *Discussion Paper* above n7.

# Books

WEALTH BY STEALTH: CORPORATE CRIME, CORPORATE LAW AND THE PERVERSION OF DEMOCRACY by Harry Glasbeek, Toronto, Between the Lines, 2002, 370pp, ISBN 1-896357-41-5

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The pictorial cover of Harry Glasbeek's polemic on corporate irresponsibility speaks the proverbial thousand words. A pair of besuited corporate wolves, fangs bared, conspire together in a wood-paneled gentlemen's club library. Fine china tea cups are laid beside them on a table bearing a cloth patterned with international currency. On the wall behind hangs an artwork depicting two leaden Monopoly tokens, passing 'Go' (and no doubt collecting \$200) on their gallop toward profits around the board. Here are the 'captains of industry', the powerful and wealthy insiders who control global capital, closeted in the luxury of a private club. Here are the wolves, exempted from the moral responsibilities imposed by society on the rest of us sheep, by the deviously clever artifice of the modern corporation.

Professor Glasbeek's thesis in this passionately written treatise is plain: the corporate law practised in western liberal democracies allows and indeed encourages the accumulation of wealth by a very few at the expense of the well-being of the broader global community. The two principal tenets of corporate law – the separate legal personality of the corporation, and limited liability for shareholders – provide the means for a wealthy elite to shirk the usual responsibilities borne by ordinary citizens to pay the costs of any harm they cause. The camouflage of the corporate form allows these privileged few to shift the social and environmental costs of creating their wealth onto others. In this, Glasbeek asserts, the corporation is the antithesis of the democratic and individualistic ideal supposedly enshrined in the liberal market economy. The theory that freely competitive, rational economic actors will allocate resources to those pursuits which will maximize general welfare – the true Adam Smith *Wealth of Nations* ideal – is aborted when the most powerful players in the market are able to abscond with profits, without meeting the true costs of making those profits. This corrupts not only the workings of the so-called 'free market', but also our conception of a democratic legal and political system 'in which the central principle is that sovereign individuals are to be responsible for their conduct' (p41).

Glasbeek draws an analogy with children who claim that an invisible playmate is to blame for the spills and breakages of their games. Only a foolishly fond parent would allow a child to escape punishment by such a ruse. But our system of law frequently allows the controllers of these invisible corporate friends to avoid responsibility entirely, or at most to bear relatively insignificant fines and penalties for the types of wrong-doing which would render an individual perpetrator liable to criminal sanctions. Moreover, the powerful elite who enjoy this privilege also assert for these invisible corporate friends the rights of natural persons: the right against self-incrimination, the right to freedom of speech (much abused in Glasbeek's view by the likes of the tobacco industry), and in some jurisdictions the right to sue for defamation (a powerful tool to curb public criticism).



Those familiar with Professor Glasbeek's scholarship will find nothing surprising in this book. Its 14 chapters capture the wealth of several decades of research and scholarship in the fields of political economy, industrial law, occupational health and safety, and corporate crime. The arguments – as extreme as many may find them – are buttressed by evidence drawn from example after example of corporate crimes and misdemeanours, most of which escaped any serious sanction when they occurred. The examples span a panoply of sins: revenue avoidance, anti-competitive conduct, environmental depredation, flagrant and deliberate disregard of product safety standards, extreme exploitation of indigent labour, and, not least, one of Professor Glasbeek's special research areas – industrial manslaughter. He does not simply tally up 'lifeless aggregate data' (p139) – although this tells a shocking story in itself – but narrates many true stories.

Those familiar with Professor Glasbeek's charismatic persona and compellingly direct speaking style will recognize the strident, no-beating-around-the-bush prose, and will appreciate the book's publishing format, which is designed to appeal to a broad readership. For a legal academic, it was first a little disconcerting to read such a forcefully argued narrative apparently unsupported by any footnoted authority. But the evidence is all there, in a thick section of very detailed scholarly endnotes from pages 285 to 335. There is also an extensive bibliography, and for those who would dip in and out of the pages, an index. The word 'greed', for instance, notes six separate entries.

The book was first published in Canada in 2002, and many of the examples are specifically Canadian. Nevertheless the general themes are equally relevant in Australia. North America had Enron; we had HIH. Canada had Westray, we had the Longford gas explosion. Indeed, the book provides both a timely and a timeless perspective on important questions about how a liberal democracy should regulate corporate activity.

The early chapters of *Wealth by Stealth* flesh out the argument in stages. Chapter 4, 'The Small and the Ugly', documents case studies on the abuse of the corporate form by the so-called 'entrepreneurs' in closely held corporations. This is principally a Canadian work, so the examples are drawn from that jurisdiction, but Australian readers will have no difficulty in substituting examples from our own. The 2003 budget estimate for the federal government's General Employee Entitlement Redundancy Scheme, which picks up the bill for unpaid entitlements when small companies fail owing workers money, was \$85 million. That represents quite a number of 'invisible friends' who have escaped paying their own debts and passed the cost on to general taxpayers.

Chapter 5, 'The Westray story', documents an example of an especially horrific and apparently avoidable mining 'accident', in which government bodies were implicated, to demonstrate the how much harm a corporation can cause, and how little responsibility it may be required to bear. The following chapters analyse the operations of large public companies, particularly their influence over government policy (Chapter 7), their general avoidance of criminal liability, even for causing death and large scale environmental destruction (Chapters 8 and 9), and their assertion of rights to the constitutional freedoms enjoyed by natural persons, even though they escape the legal responsibilities of natural persons (Chapter 7).

Chapters 10 to 12 move on to examine responses to the problem of corporate irresponsibility. Chapter 11 provides an excellent critique of the ‘stakeholder’ theories of corporate governance, which should be essential reading for undergraduate corporate law courses. In telling the story of the emergence of these communitarian approaches to corporate governance (which argue that corporate captains should be held accountable to a broad range of interests, not just shareholders), Glasbeek places the Adolf Berle versus Charles Dodds debate within its historical and socio-political context of the Great Depression, when corporate capitalism was patently *not* delivering on its promise of wealth and prosperity for all (p 190). In the course of this chapter, Glasbeek provides a concise explanation of the law and economics ‘nexus of contracts’ theory of the corporate firm, which students may well find useful. Ultimately, Glasbeek argues that the stakeholder theories, as laudable as they seem, are inherently self-contradictory. The corporation remains essentially a tool for profit-maximization and the ‘private accumulation of socially produced wealth’. As such, it is demanding nothing short of schizophrenia to expect this vehicle to promote public policy.

In Chapter 12, Glasbeek examines the prospects for consumer activism to bring aberrant corporations into line by using the consumers’ market power. Although he recounts some limited successes for consumer boycotts, the picture he paints is largely pessimistic. The worst abuses are the hidden ones. As an example he cites extensive harms caused by the mining of coltan mud in Africa to make the invisible microchips in electronic equipment (p210). The consumer boycotts, which may have had some influence in markets for a few wearable luxuries – like Nike runners and Body Shop beauty products – are making no impact on silicon mining in Africa.

Finally in Chapter 14 Glasbeek asks his own version of Marx’s question: ‘What is to be done?’ Here it is clear that Glasbeek’s chief grievance is that the wealth created by corporations is not shared with those at whose expense it is created.

The perspective of the ordinary working class people is never far from the surface in this book. Workers’ chief grievances include weak (or non-existent) rights to corporate information (p68), deliberate risk-taking with workers health (p161), and cavalier attitudes to workers’ deaths through avoidable industrial accidents (p171). Glasbeek proposes a number of measures to address these grievances: a need to personalize responsibility for corporate wrong-doing; statutory requirements for adequate capitalization before a firm may enjoy corporate status; ‘outing’ the captains of corporate industry who are complicit in corporate crime by publicizing their association with criminal activity; and improvements in workers’ rights to participate in corporate decision-making especially concerning safety standards and the introduction of new technology.

Principally, Glasbeek proposes a change to the corporate Monopoly rules. Invisible corporations which commit crimes, together with their controlling shareholders – those wolfish captains of industry – should bear full responsibility for their crimes. His message for them is clear: ‘Go to Gaol. Go Directly to Gaol. Do Not Pass Go and Do Not Collect \$200.’

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