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BOOK REVIEW

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ARTICLES
AUSTRALIAN ORIGINALISM WITHOUT A BILL OF RIGHTS: GOING DOWN THE DRAIN WITH A DIFFERENT SPIN

JAMES ALLAN*

I INTRODUCTION

Interest in, and advocacy of, some version or other of originalist theories of constitutional interpretation is largely — perhaps overwhelmingly — an American concern. In my native Canada, ‘living tree’¹ or what Americans would call ‘living constitution’² interpretive approaches have vanquished all remnants of originalism when it comes to the top judges there interpreting Canada’s entrenched, constitutionalized Charter of Rights and Freedoms.³ And if originalism has little appeal in Canada it

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* Garrick Professor of Law, University of Queensland. The author would like to thank Larry Alexander, Brian Bix, Grant Huscroft, Richard Kay and Steven Smith for their helpful comments.


² See, for example, Steven D Smith’s ‘That Old Time Originalism’ and Stanley Fish’s ‘The Intentionalist Thesis Once More’ both in Challenge of Originalism, 230, 114 respectively.

³ See Huscroft’s ‘Vagueness, Finiteness, and the Limits of Interpretation and Construction’ in Challenge of Originalism. And note that I refer to the theory the judges purport to adopt as opposed to what an observer might sometimes think they are doing in practice. Note too that this claim is not true when it comes to federalism cases, to interpreting division of powers disputes. See Justice Ian Binnie,
has basically none in the United Kingdom,\textsuperscript{4} in New Zealand,\textsuperscript{5} or in the decisions of the European Court of Human Rights in Strasbourg.\textsuperscript{6} Outside the US it is only in Australia that originalism still has a pulse.\textsuperscript{7} In fact I would say\textsuperscript{8} that Australia ranks second to the US in terms of ‘Constitutional Interpretation and Original Intent’ in (eds G. Huscroft and I. Binnie) \textit{Constitutionalism in the Charter Era} (LexisNexis, 2004), 345. Finally, I am also prepared to concede that almost everyone \textit{says} that original intentions and understandings matter to some extent, before many then immediately proceed to clarify that it is just that for them these intentions and understandings are not dispositive, or some such qualifier.

\textsuperscript{4} For instance, see how the section 3 reading down provision of the \textit{Human Rights Act 1998} (UK) has been interpreted in the leading case of \textit{Ghaidan v Godin-Mendoza} \textsuperscript{[2004]} 2 AC 557 (repeatedly affirmed subsequently): ‘It is now generally accepted that the application of s 3 [the reading down provision in the United Kingdom’s \textit{Human Rights Act}] does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning admits of no doubt, s 3 may none the less require the court to … depart from the intention of the Parliament which enacted the legislation … It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant…” at [29], [30], and [32]. See too my ‘Statutory Bills of Rights: You Read Words In, You Read Words Out, You Take Parliament’s Clear Intention and You Shake It All About – Doin’ the Sankey Hanky Panky’ in (eds. T. Campbell, K. Ewing and A. Tomkins) \textit{The Legal Protection of Human Rights: Sceptical Essays} (Oxford University Press, 2011), 108.

\textsuperscript{5} Again, the statutory bill of rights there has led to all other statutes being interpreted in what the judges take to be a rights-respecting way, though nowhere near as virulently as in the United Kingdom. See, for example, \textit{Simpson v Attorney-General} (‘Baigent’s Case’) \textsuperscript{[1994]} 3 NZLR 667. See too my ‘The Effect of a Statutory Bill of Rights where Parliament is Sovereign: The Lesson from New Zealand’ in (eds T. Campbell et al) \textit{Sceptical Essays on Human Rights} (Oxford University Press, 2000), 375.

\textsuperscript{6} See George Lestas, ‘Strasbourg’s Interpretive Ethic: Lessons for the International Lawyer’ (2010) 21 \textit{European Journal of International Law} 509 for an argument that the European Court of Human Rights has been dismissive of originalism, preferring a ‘moral reading’ of convention rights.


\textsuperscript{8} And American comparative law scholar, and originalism proponent, Richard Kay agrees with me in this claim.
originalism being a viable theory of constitutional interpretation with proponents in the courts,\textsuperscript{9} and in the law schools.\textsuperscript{10}

So that is one ground for looking to Australia when seeking answers to at least some of the disagreements between ‘living Constitution’ adherents and originalism adherents. Australia may, or may not, bolster some aspects of the originalist case.

Another reason to look at Australia, and I will come back to this in a section below, is because Australia lacks any sort of a national bill of rights, constitutional or statutory. This absence might be surprising given that all other democracies today have some variant or other of a bill of rights instrument.\textsuperscript{11} Or it might also be surprising given that by far the biggest influence in drafting the 1901 Australian Constitution — the one that was most copied and mimicked — was the US constitution.\textsuperscript{12}

\textsuperscript{9} For example, the recently retired Justice Dyson Heydon of the High Court of Australia is an originalist. See, for example, his judgment in \textit{Rowe v Electoral Commissioner} (2010) 243 CLR 1, [267]. So too was retired High Court of Australia Justice Ian Callinan.

\textsuperscript{10} See, above n 7.

\textsuperscript{11} See, from someone with whom I whole-heartedly disagree on many substantive issues, Geoffrey Robertson’s noting that ‘Australia is the only progressive country without a bill of rights’ in \textit{The Statute of Liberty: How Australians can take back their rights} (Vintage, 2009), 152. Of course the role of judges is nowhere near as powerful in some of these other jurisdictions with bills of rights as it is in the US and Canada. Moreover this is a comparatively recent phenomenon. At the end of World War II only France and the US had national bills of rights, and in the former it was not justiciable.

The Framers of Australia’s Constitution were extremely well acquainted with the American model. Albeit in the context of the inherited British Westminster parliamentary model, they opted for a US-style elected Upper House Senate\(^\text{13}\) rather than the Canadian or UK options (though at the time of federation the US’s Senate was indirectly elected, its members being chosen by State legislatures). They also copied the American model of federalism rather than the Canadian one.\(^\text{14}\) They left the choosing of the top State court judges to the States, as in the US, not to the centre, as in Canada. In fact, Australia even copied the US in opting to create a national capital city not part of any State.\(^\text{15}\) As far as important matters go, the Australian Founders only rejected the US model when it came firstly to the amending provision — Australia opting for a Swiss-inspired direct democracy section 128 which requires amendments to be passed in at least one House of the national Parliament and then to win a two-pronged referendum needing a majority of voters nationally and a majority of voters in a majority of the States\(^\text{16}\) — and secondly when it came to the Bill of Rights.

\(^{13}\) The similarities to the US model include the facts of there being the same number of Senators from each state (currently in Australia it is 12 per State); the limited period of tenure; and the full-blooded scope of review powers of these Upper Houses. But Australia’s Framers added a ‘dispute between the two Houses’ resolving mechanism. See s 57 double dissolution dispute resolving procedure if the two houses disagree.

\(^{14}\) So the Australian drafters opted for a list of enumerated powers for the central government alone (the residue going to the States), rather than the Canadian-style option of enumerating the powers of both the centre and the provinces.

\(^{15}\) See, Tony Winkelman, ‘Selecting a Capital Territory’ (2012) 56 Quadrant 80. And note that until the 1970s residents there did not have a vote for the Senate or House. For the High Court of Australia case that decided territorians could be given Senate representation by Parliament see Western Australia v Commonwealth (‘First Territory Senators Case’) (1975) 134 CLR 201.

\(^{16}\) There have been 44 Constitutional referenda in Australia and 38 have failed. All but 5 of the failures lost on the first prong of not garnering a majority of voters nationwide.
So despite copying so much else from the American Constitution, a bill of rights was deliberately (and from today’s vantage perhaps was surprisingly) omitted. This decision not to include one was made after careful consideration, discussion and debate by those with an excellent knowledge of the US Bill of Rights. Remember that because it will be relevant later in this paper.

II WHY CONSIDER ORIGINALISM IN A JURISDICTION WITHOUT A BILL OF RIGHTS?

My goal in this paper is not to debate the pros and cons of a Bill of Rights. Rather, my goal is to look at originalism in the context of a

\[17\] In fact I think an argument could be made that Australia is the closest constitutional progeny the US has, certainly the most successful progeny.

\[18\] See Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 106, 136: ‘[T]he prevailing sentiment of the framers [was] that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.’ per Mason CJ. See too Nicholas Aroney, ‘A Seductive Plausibility: Freedom of Speech in the Constitution’ (1995) 18 University of Queensland Law Journal 249, 252 and his Freedom of Speech in the Constitution (CIS, 1998), ch. 2. And also see Alexander Reilly, Gabrielle Appleby, Laura Grenfell and Wendy Lacey, Australian Public Law (OUP, 2011), 44-5.

jurisdiction without a Bill of Rights, namely Australia. Yet the obvious question that needs answering before doing that is ‘why bother?’ ‘What can a bill of rights-lacking jurisdiction tell us, or possibly tell us, about originalist constitutional interpretation more generally?’

‘Maybe something quite important; maybe nothing at all; it depends upon why you value originalism’, is my answer. And in the rest of this section I will attempt to sketch out that answer, to give at least the arguments for why, on some bases and in some circumstances, looking at Australia can be informative in testing certain core presuppositions and is something American originalists ought to do.

A Depends on why you value originalism

To begin to sketch out a case for the possible relevance of Australia to American originalists, our first stop is to ask why someone values or supports originalist interpretation. I will divide the world into two: those who support originalism on a conceptual or analytical basis and those who do so for some normative or ‘it will further some other value of mine’ basis. The first of these amounts to a universalist-type claim, that if you want to claim to be interpreting the words of any constitution – to be honestly seeking their meaning – then only some form or other of originalism actually does that. Put more directly, these sort of originalism adherents take the position that appeal to originalist methods is necessary in order actually to be doing constitutional interpretation.


20 We can for now ignore or postpone which forms or variants of originalism that might be.
That may be because of the nature of constitutional (or more widely of legal, or more widely still of any sort of) interpretation itself. Or, it may be because of the nature of all constitutions.

Brian Bix has considered both of these possible grounds for supporting this universalist-type claim on behalf of originalism. He is very sceptical about arguments flowing from some supposed essential nature of all constitutions themselves, while he is somewhat less sceptical of a ‘universal theory of constitutional originalism [that focuses on] … the nature of legal interpretation’.

Of course Bix limits his consideration of these universalist options more or less wholly to ‘new originalist’ or original public meaning (‘OPM’) variants, commenting in passing that ‘[t]raditional originalism, focusing on original intentions [call this original intended meaning or ‘OIM’], might be a somewhat better candidate to be part of a general [or universalist] theory of interpretation’.

I certainly agree with that passing comment. Indeed, the chapters by Stanley Fish and Larry Alexander that appear in the same book as Bix’s chapter can be read as offering not just a defence of ‘old originalism’ or

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22 And anyway, as Bix puts it, ‘an argument that all constitutions must be interpreted the same way seems an even harder persuasive task than the broader argument… that all (legal) interpretation must be done the same way. For assuming that the broader argument cannot be made, it would be difficult to say why constitutions would have to be interpreted in one single way’. Ibid 295.

23 Ibid 299. Yet while this ‘may be the most promising [option] … it would seem hard to show how a single approach to interpretation must be used’.

24 Ibid 296.
of original intentions interpretation, but also as making precisely this sort of universalist, ‘this just is what interpretation is’ type claim.\textsuperscript{25}

That said, and whatever one might make of these various universalist claims (and as an aside I find the Fish/Alexander/Kay position to be a very powerful one), in this paper I put them all to one side and focus on the contingent, normative basis for supporting originalism — that it will (or is likely to) further some other value or goal that is highly desired. I do that, for one thing, because universalist claims on behalf of originalism leave little, if any, room to ask Americans to learn from the bill of rights-lacking Australian experience. If doing originalism just is, by definition almost, what interpreting and seeking meaning really is, then more limited arguments about how, say, originalist interpretation is more constraining on point-of-application judges, or leaves more scope for democratic decision-making, are only needed where plenty of judges are prepared to do something other than really interpret.

And given that in my view originalist constitutional interpretation loses its attractiveness (whether the alternatives really be interpretation or not) in countries where constitutions are imposed by departing former colonial masters or by triumphant wartime vanquishers, in short where the

\textsuperscript{25} See Stanley Fish, ‘The Internationalist Thesis Once More’ and Larry Alexander, ‘Simple-Minded Originalism’ in \textit{Challenge of Originalism}, 99 and 87 respectively. See too Richard Kay, ‘Original Intention and Public Meaning in Constitutional Interpretation’ (2009) \textit{103 Northwestern University Law Review} 703. Of course saying ‘this is what interpretation is’ is not the same as saying ‘those with the authoritative power to declare what their country’s constitution will henceforth be taken to mean cannot undertake some other activity when that constitution is deemed to be illegitimate, morally suspect, or both’.
constitution being interpreted has little or no legitimacy, I want here to side-step all those arguments, and sub-arguments.

I want to consider the situation where originalism is valued because its use is believed to have good consequences, to further other desired values and goals, and want to do so regardless of whether the main alternatives of ‘living Constitutionalism’, or ‘moral readings’, or ‘Herculean best fits’ are (or are not) best characterised as really interpreting or as doing something else.

The arguments in the remainder of this paper, then will be unashamedly aimed at those who are normative originalists. It is to them, or some of them, that I say ‘have a look at bill of rights-lacking Australia’.

1 Depends on which values in particular

In setting out why American originalists might wish to look at Australia, I firstly pointed to the practical reality that originalism (though less so than in the US) is still alive Down Under, unlike in Canada (and for that matter in India and South Africa with some of the most ‘judicially active’ judges anywhere, the question of constitutional interpretation not arising in the unwritten constitution jurisdictions of the United Kingdom and New Zealand). But secondly, I claimed more specifically that a bill of rights-lacking jurisdiction such as Australia might help test certain grounds or reasons sometimes given for supporting originalism. In the

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section above, I ruled out any universalist, conceptual type originalism-supporting grounds or bases for looking at Australia. If considering a bill of rights-lacking jurisdiction is worthwhile, it is only worthwhile when originalism is supported on normative, contingent, ‘this interpretive approach is likely to deliver these other values and outcomes I support’ grounds.

Of course Australia without a bill of rights will not be a testing ground for all instrumental reasons Americans might have for being originalists, only some. In this sub-section I will specify which ones I think those are. (And as it happens they are ones that matter to me too.)

These contingent values or outcomes claimed to follow (on average, over time) from the honest application of originalist interpretation will come as no surprise to anyone. They are the benefits of 1) a more constrained judiciary with less room for judges to appeal to their own moral judgments or sentiments in deciding cases and 2) living in a jurisdiction in which there is more scope for society’s contentious, debatable issues to be decided by democratic decision-making procedures (meaning ‘letting the numbers count’ or majoritarian procedures).

Steven D Smith calls them the purposes of ‘(a) constraining courts and preventing them from simply reading current fashions into constitutional law [and] (b) preserving the ability of democratic institutions — of “We the People” — to make meaningful decisions about their constitutions by enacting provisions with relatively definite and fixed meanings [and

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27 Ibid.
hence] providing a basis for criticizing “activist” decisions’. 29 Brian Bix describes the benefit as being ‘the constraint of judges who might otherwise be tempted to enforce their policy preferences’. 30 And Stanley Fish rather more broadly comes at it from the other direction saying ‘that “the-interpreters-decide-on-the-basis-of-what-is-best” account of interpretation is the true judicial activism because by attaching interpretation to political hopes and sundering it from authorial intention, it sets interpreters free from any constraints (what I or you think best is not a constraint) and encourages them to make it up as they go along’. 31

These are the two claimed instrumental benefits of originalist interpretation — more constrained judges and more scope for democratic decision-making — that a bill of rights-lacking jurisdiction such as Australia may more easily test.

2  May depend on which originalism

It would be nice at this point to move on as though originalist interpretation were one monolithic approach, not riven by ‘old’ and ‘new’ branches, not splintering into camps variously focused on intentions, text, original methods, interpretation versus construction, expected rule meaning versus expected rule application, and more — very much like

30 See Bix in Grant Huscroft and Bradley W Miller (eds.), The Challenge of Originalism: Theories of Constitutional Interpretation (CUP, 2013) 288.
31 See Fish in Grant Huscroft and Bradley W Miller (eds.), The Challenge of Originalism: Theories of Constitutional Interpretation (CUP, 2013) 116
the schisms of Protestant denominations.\textsuperscript{32} Alas, though, originalist theories of constitutional interpretation clearly are not uniform and not monolithic. For my purpose in this paper, though, that does not directly matter. What does matter is whether the particular variant of originalist interpretation has the practical effect (to use Steven Smith’s words) of ‘collapsing … into its long-time nemesis, the idea of the “living Constitution”’.\textsuperscript{33}

Let me be blunt. I am only focused on those variants that do \textit{not} collapse into ‘living constitutionalism’. On that basis, any versions of originalism that fall under the aegis of Jack Balkin’s \textit{Living Originalism}\textsuperscript{34} will not obviously claim to offer the instrumental benefits of more constrained judges and more scope for democratic decision-making that might be open to testing by considering Australia’s experience. So I ignore all such versions or variants of originalism, whichever they may be.

That said, I recognize that there are competing views on whether, or at least the extent to which, so-called ‘old’ and ‘new’\textsuperscript{35} originalist variants produce outcomes that differ all that much or more than marginally. On the one hand, there is Steven D Smith’s suspicion (and Jack Balkin’s and others’ hope\textsuperscript{36}) that new originalist variants are not at all interchangeable

\textsuperscript{32} Steven D Smith (see fn. 29 above) makes precisely this point, using just this analogy, in arguing that ‘the subject has become scholasticized’ (227).

\textsuperscript{33} Ibid 230

\textsuperscript{34} See Jack M. Balkin, \textit{Living Originalism} (Harvard University Press, 2011). See, too, the 2012, volume 92, Symposium issue of the \textit{Boston University Law Review} on this topic. And of course that is on the debatable assumption that Balkin’s interpretive methods really are best described in terms of originalism. For a strong argument that this is not the case, see fn. 36 below.

\textsuperscript{35} By which I mean textualist or OPM variants.

\textsuperscript{36} Some would argue that Balkin’s underlying interpretive approach ought not even to be considered as an originalist one, however much he might himself describe it that way. For just such a critique of Balkin’s position, see Larry Alexander, ‘The
with Alexander/Fish/Kay-type original intentions variants and will amount to yet another interpretive theory that delivers a so-called ‘living constitution’. However, on the other hand, there is Richard Kay’s and Larry Alexander’s argument\(^\text{37}\) that original intentions and original public meaning can only differ when the authors were either deliberately attempting to mislead (by secretly using words in a non-standard way) or when they erroneously did this, namely by screwing up.\(^\text{38}\) And in the context of writing a constitution (as opposed to a James Joyce novel) such ‘deliberately deceiving the reader at the time’ and ‘big time screw up in choice of words’ scenarios will be exceptionally rare. Certainly Justice Antonin Scalia does not see his version of textualist or public meaning originalism collapsing into anything with the slightest traces of metaphorical life.\(^\text{39}\)

But as I said, I need not take a position on any of that. I simply here repeat my proviso that using a bill of rights-lacking Australia to test the claims that originalism delivers a more externally constrained judiciary

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38 Grant Huscroft gives a Canadian example of screwing up with respect to the term ‘fundamental justice’ in s 7 of Canada’s Charter of Rights. See his ‘Vagueness, Finiteness, and the Limits of Interpretation and Construction’ in Grant Huscroft and Bradley W Miller (eds.), The Challenge of Originalism: Theories of Constitutional Interpretation (CUP, 2013) 215.

39 See, for example, Justice Antonin Scalia, ‘Romancing the Constitution: Interpretation as Invention’ in G Huscroft and I Brodie (eds.) Constitutionalism in the Charter Era (LexisNexis, 2004) 337.
and more scope for democratic decision-making may possibly depend on the particular variant of originalism.

So if certain variants or versions of originalism do turn out to collapse into the functional equivalent of ‘living constitutionalism’ then I am ignoring those versions in what follows.\textsuperscript{40}

III WHAT A BILL OF RIGHTS MIGHT OBSCURE FOR ORIGINALISTS

There is one last caveat to make before turning to Australia and three case studies. If you are someone who values originalist constitutional interpretation because you believe that it tends to impose more external constraints on the point-of-application interpreter — that it gives that interpreter less scope to appeal to his or her own first-order moral and political judgements and preferences — than ‘living constitutionalism’ or ‘the-interpreters-decide-on-the-basis-of-what-is-best’ account of interpretation,\textsuperscript{41} then the underlying basis for that belief has to do with thinking that a search for historical fact is more constraining than trying to find what is morally or politically best.\textsuperscript{42}

\textsuperscript{40} There is the further issue I have touched on in the past (see footnote 19 above) and that is raised in section 3 below. That issue amounts to this: Is the task of searching for historical facts just as subjective as the task of seeking morally best, or most preferable, outcomes? I say that the former is less subjective, that here there are more mind-independent constraints on the searcher than with the latter. And that comparative claim is nevertheless compatible with admitting that there are regular and reasonable debates and disagreements about historical matters. This boils down to accepting the Humean fact/value dichotomy. Those who reject that dichotomy may well go on to assert that finding historical claims is just as subjective an exercise as making moral evaluations/judgements. I disagree.

\textsuperscript{41} See Stanley Fish, cited in above n 31, 116. Fish also labels this the ‘a text means what its interpreters… say it means’ approach. Ibid 113.

\textsuperscript{42} See, for example, Antonin Scalia, ‘Originalism: The Lesser Evil’ (1989) 57 \textit{Cincinnati Law Review} 849.
Put differently, and as a generalisation, what-the-fact-of-the-matter-is (even the fact of what people in the past intended or understood, assuming the historical records are more than Spartan) has a smaller ‘penumbra of doubt’ than what-is-the-morally-best answer. Facts are less contestable and debatable, and so more constraining, than values, at least on average, over time. That is the claim at the core of normative originalism. And if you dispute that overall claim then the normative originalist ancillary claims about a more constrained judiciary and more scope for democratic decision-making will not follow for you either. Sure, you might still be a conceptual originalist of the sort sketched above, but you will not be a normative originalist.

Yet let us here simply assume that as a generalization the finding of answers to questions of historical fact is more certain and less contestable and debatable than it is to questions of which reading is more moral or more in keeping with changing social values. Let us just assume that for a moment (though in countries such as the US and Australia with quite full historical records I happen also to believe it to be true) because it is

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44 Of course there may in some circumstances be room for doubt about that overall claim, the doubt being that in some situations errors in regard to historical matters will be so frequent and so wide-ranging that the associated costs of those errors will outweigh the costs of ideologically-influenced, value-laden interpretation.
45 Perhaps because there are other ways equally, or more, likely to constrain the point-of-application interpreter. For example, see A W B. Simpson’s *Reflections on the ‘Concept of Law’* (OUP, 2011) and his notion that a cohesive, similarly indoctrinated legal profession can provide considerable certainty of outcome.
worth registering a partial caveat or rider to that ‘interpretation involving the finding of historical facts is more constraining’ position.

And here is my caveat or rider. It is that bills of rights (or indeed any morally pregnant words and phrases in a constitution) have the potential partially to obscure this fact/value divide. Or rather they have that obfuscating potential for originalists.\(^{47}\)

Notice that my caveat is a qualified one, that I say there is the ‘potential’ for a bill of rights ‘partially’ to obscure the normative attractions of originalist interpretation. What I have in mind is what Steven D Smith calls the ‘distinction between “meaning” and “expected application”’,\(^{48}\) with the latter for some originalists merely being evidence of the former, ‘the two things [being] distinct and … not [to] be conflated’.\(^{49}\)

Now, notice how difficult it is to distinguish between a rule’s expected meaning and that same rule’s expected application when the rule relates to some moral or normative criterion such as ‘no cruel punishments’ or ‘no unreasonable searches’. Smith himself suggests that this distinction between ‘meaning’ and ‘application’, though conceptually or at least verbally distinguishable, is highly suspect across the board. The two ‘are inextricably co-mingled’.\(^{50}\) But that is, I suspect, too sweeping. If the rule relates to some question of fact — not of value — then the distinction is moderately straightforward to make.

\(^{47}\) For ‘living Constitution’ adherents the interpretive task is anyway a morally pregnant one. So my caveat or rider here is directed at originalists.


\(^{49}\) Ibid.

\(^{50}\) Ibid 240.
No doubt that is why writers who offer up this distinction almost always (or so it seems to me) use hypotheticals in which the rule relates to a question of fact. Here is a hypothetical I have come across on a number of occasions used to illustrate the distinction. We are to imagine some variant on a constitutional provision that mandates that ‘all those suffering from a contagious disease be quarantined’.

Here, because what diseases are and are not contagious is a question of fact in the external, causal world, we can separate what the rule means and what its enactors intended. If these enactors intended the rule to apply to psoriasis, say, then because they were simply wrong about a question of fact as to which diseases are contagious, we can moderately easily distinguish that expected application from the meaning of ‘contagious’.

Yet there is no such neat way to make the distinction work when we turn from a rule focused on facts (what is and is not contagious) to a rule focused on values (such as whether punishment X ought to be understood as cruel). Indeed I think, and have argued, that this conflating of facts and values can lie at the heart of flawed arguments in favour of, say, greater and more frequent appeals to transnational legal standards in constitutional interpretation\(^{51}\) or Dworkinian defences of there being ‘one right answer’ in matters of interpretation.\(^{52}\)


But whether you agree with those wider claims of mine or not, the point here is that when an originalist is asked to find the meaning of some rule that lays down a morally pregnant, value-laden standard, then in that situation I think Smith’s assertion that the expected meaning of the rule and what its enactors thought its expected application would be are ‘inextricably co-mingled’. At the very least they are exceptionally hard to unravel because for the originalist interpretation simply is a search for historical fact. It is the ‘living constitutionalists’ who look to tell us what they think (or feel, for most non-cognitivists) the most moral reading is or the most ‘keeping pace with society’s changing values’ reading is. It is they who appeal to value judgements. Originalists do not (at least when interpreting as opposed to what Larry Solum and Randy Barnett call ‘constructing’).

So for originalists seeking the historical fact of which punishments are cruel, there is no mind-independent reality (as with which diseases really are contagious) to which appeal can be made to make the distinction easily work. They either appeal to the framers’ expectations – to what the historical record on the balance of probability tells us they thought was cruel and so to which the rule applied — or they appeal to some other group’s expectations and moral judgements, maybe those of today’s judges or their own personal ones or some hypothetical, made-up person’s (which almost always collapses into their own personal ones) or those of overseas judges or what have you. Even if they opt to use

framers’ expectations only as a guide or starting point – perhaps by putting them in a list and then attempting to discern the ‘essential features’ of that list so as to extrapolate for the present day – it is nevertheless today’s listmaker whose judgement is deciding on what those supposed essential features are. And that, too, is surely a value laden (and normatively contestable) endeavour.

To be blunt, a morally laden rule’s expected meaning, for an originalist, is very, very difficult to know without looking to what those who made the rule thought were its expected applications. Those are the facts that constrain today’s interpreters. So in this realm, and as Steven D Smith asserts, ‘[e]xpected applications are not evidence of a provision’s meaning, perhaps, as much as they are ingredients of that amalgamation [of meaning and application] … [and] insisting on a distinction … distorts understanding’.


Brian Bix makes essentially this same point, that when it comes to normatively charged provisions ‘the tie between meaning and application may be closer’ than with assertive or descriptive provisions, ‘that discussion of the “meaning” of a term from a legal norm … differs in important ways from a similar discussion in the context of descriptive propositions’.

56 See Brian Bix, ‘Constitutions, Originalism and Meaning’ Originalism’ in Grant Huscroft and Bradley W Miller (eds.), The Challenge of Originalism: Theories of Constitutional Interpretation (CUP, 2013) 286-91.

57 Ibid 289.
I agree with Bix. And if we restrict ourselves to morally pregnant rules or provisions then I agree with Smith too. The distinction between that sort of a rule’s expected meaning and its expected application is a hard one, perhaps sometimes an impossible one, to uphold for originalists. Certainly what the framers expected some normative rule’s application to be needs to be more than just evidence to throw in the pot with the interpreter’s own moral antennae being the final determiner. That is ‘living constitutionalism’ interpretation. It is not a search for historical fact, with all the potential mind-independent constraints that carries with it.

So that is why, in my opinion, a bill of rights with its enumerated list of morally-laden provisions has the potential to obscure, at least in part, the core consequential benefits that are claimed on behalf of originalism — that it imposes more external constraints on the point-of-application interpreter and hence, normally, leaves more decision-making to the democratic process. With a bill of rights in place it might, just might, be harder to see the difference between the answer originalist interpretations throws up and the answer ‘living constitution’ interpretation can throw up. The normative benefits of originalism might be somewhat obscured.

Of course Australia has no national bill of rights. So turning to look at Australia, and constitutional interpretation there, might give us a clearer answer to whether originalist interpretation would be significantly more constraining on present day judges — and on the interpretive answers they could claim honestly to be finding — than the ‘living constitution’ interpretive alternatives. In fact I think Australia will show just that.

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58 One of the six States has a statutory bill of rights.
IV THREE CASE STUDIES FROM AUSTRALIA

The hypothesis we are now ready to test is that Australia without a bill of rights shows originalist constitutional interpretation to be far more constraining on the top judges (and so leaves more decision-making to the democratic process) than does ‘living constitution’ interpretation or indeed anything else. Without the obfuscations and complications that the interpretation of morally supercharged provisions might at times give rise to, we can look at three case studies to see whether originalism would clearly foreclose the sort of answers the High Court of Australia managed to produce by shunning originalism (in the majority judgments).

In each of these three cases the constitutional words being interpreted were ‘directly chosen by the people’. Of course these five words comprising this phrase are not value free, not normatively naked. But the phrase is clearly at the thin end of the moral overlay spectrum. And this phrase appears twice in the Australian Constitution, both times in Chapter I dealing with the legislature.

Section 7 reads to start:

7 The Senate

The Senate shall be composed of senators for each State, *directly chosen by the people* of the State, voting, until the Parliament otherwise provides, as one electorate. (emphasis mine).

Meanwhile, section 24 read to start:

24 Constitution of the House of Representatives
The House of Representatives shall be composed of members *directly chosen by the people* of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of senators. (emphasis mine)

The first of our three case studies is from 1992 and is known in Australia as the *ACTV* case. Prior to this case there had been two attempts, in 1944 and again in 1988, to amend Australia’s Constitution to include aspects of a bill of rights. In the latter instance (just 4 years before *ACTV*) Australians were asked in a section 128 constitutional amendment referenda whether they wanted to entrench protections of a sort typically found in a constitutionalised bills of rights, namely ones related to freedom of religion, jury trials and acquisition of property on just terms. The answer was an emphatic ‘no’. Indeed in the 1988 constitutional referendum there was not a single Australian State in which the majority of voters was in favour, with no State recording more than 37 percent in favour of any of the four proposed (and voted on separately) new rights for entrenchment. It was a landslide against.

What effect this had on proponents, many of whom came from legal circles, is anyone’s guess. But fewer than four years later came *ACTV*, the first of what in Australia is known as the implied rights series of

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59 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

cases.\textsuperscript{61} I have written about those initial implied rights cases elsewhere,\textsuperscript{62} and the way in which I think the majority decisions were premised on a ‘living constitution’ interpretive approach.\textsuperscript{63}

For this paper there is no need to recanvas all the detail. Let me instead just set out the central reasoning of the Chief Justice (in the majority) in that \textit{ACTV} case.

Mason CJ arrived at the conclusion that the Australian Constitution — one that you will recall explicitly and deliberately left out any US-style bill of rights or First Amendment-type free speech entitlements and protections opting, after much debate and discussion amongst the Founders (and after two failed attempts later to amend it), to leave such social policy balancing exercises to Parliament — nevertheless implicitly created an implied freedom of political communication amounting to less than a personal right but enough to be used to strike down or invalidate statutes. The Chief Justice’s reasoning followed these steps: 1) The Constitution provides that elected Members of Parliament (MPs) are to be ‘directly chosen by the people’;\textsuperscript{64} 2) hence these MPs are representatives of the people; 3) hence they are accountable to the people; 4) thus they

\textsuperscript{61} Others I will not cover here go from \textit{Nationwide News v Wills} (1992) 177 CLR 1 through to \textit{Lange v Australian Broadcasting Corporation} (1997) 189 CLR 520.


\textsuperscript{63} Or perhaps ‘substantive proceduralism’ or ‘half-baked albeit seductive progressivism’.

\textsuperscript{64} In sections 7 and 24 as set out above.
have a responsibility to take account of the views of the people; 5) therefore (these first four steps giving the grounds for the implicit conclusion that) the judges interpreting this Constitution must be able to, and hereby do, assert that there is an implied freedom of political communication which in some circumstances will allow the judges to invalidate legislation believed to infringe that discovered implied freedom— as was the case in ACTV itself as the High Court of Australia struck down or invalidated parts of a campaign finance law that limited the buying of election advertisements on television and radio in favour of a scheme that allocated ‘free time’ on a basis that included factors such as how the parties had fared last election.

Now to be perfectly blunt, I like the outcome of this ACTV case; I am at the far end of the spectrum in terms of wanting as much scope as possible for people to speak their minds, including scope to pay for broadcast time to do so in an election campaign. But liking the outcome of a case has nothing to do with thinking that the interpretation of the Constitution that achieved that outcome was even remotely plausible.

Rather, the majority’s reasoning in ACTV was implausible and far-fetched in the extreme. The judges did not ‘discover’ this implied right, as defenders assert, they made it up and did so but four years after the failed 1988 constitutional referendum.

Consider the phrase itself, ‘directly chosen by the people’. Not only were the Framers of the Australian Constitution well aware of America’s First Amendment and well informed when explicitly rejecting a bill of rights, they also were well acquainted with how the US Senate was at that time

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65 This five step reasoning process is most clearly seen in ACTV at 106, 138.
(before the 17\textsuperscript{th} Amendment) indirectly chosen. And they understood how the indirect Electoral College worked.

They simply preferred all legislators to be directly elected, and they set that out in sections 7 and 24, the final draft of the Constitution then being put to all the voters in each State.

My claim is that no OIM originalist (or ‘old originalist’) could have reached the majority result in ACTV. And I think that even most OPM originalists (or ‘new originalists’) would have had a very tough time doing so. The history of the Constitution as a whole, the many references to ‘until the Parliament otherwise provides’,\footnote{See the \textit{Australian Constitution} ss 3, 7, 10, 22, 24, 29, 30, 31, 39, 46, 47, 48, 51(\textit{xxxvi}), 65, 66, 67, 73, 87, 93, 96 and 97. And see too ss 121 and 122.} the clear evidence of the rejection of any bill of rights and morally pregnant free speech right provision, the historical evidence of what ‘directly chosen by the people’ did refer to,\footnote{See Nicolas Aroney, \textit{The Constitution of a Federal Commonwealth}, fn. 1 above, chs. 7 and 8, which canvasses the Australian Framers’ views about ‘representation’ and the impact of those views on ss 7 and 24 of the Constitution.} and more, would categorically foreclose this ACTV-type outcome for an originalist constitutional interpreter.

Sure, there is a scintilla of seductive plausibility for ‘living constitution’ interpreters (even 90 years after the Constitution came into effect) in constructing a connection between electing one’s legislators and the notion or principle of representative government, and then in turn connecting that manufactured moral abstraction to a posited need for a moderately free flow of views back-and-forth from electors to elected MPs, and then in turn using that to ‘find’ (or really to create out of
nothing) a tool — call it an implied freedom, a non-personal, bracketed right, a limit on legislative sovereignty, what have you — that the top judges can use, when they think it appropriate, to strike down legislation.

Or at least it is clear that many non-originalists will find this reasoning seductive. But I do not think any OIM originalist could, whether he or she liked the substantive outcome (as I do) or not.

Put differently, originalist interpretation in our first case study clearly imposes more external constraints on the judiciary and leaves more social policy decision-making on the democratic table.

Our second and third Australian case studies, if this is intellectually possible, are even more egregious and even more illustrative of the comparative absence of constraints of ‘living constitutionalism’.

I will consider these second and third case studies together as both involve what might broadly be thought of as ‘voting rights’ issues, as both implicitly are constructed and dependent on that ACTV case, and as both can point to nothing in the Constitution itself, absolutely no other textual words whatsoever, other than that aforementioned ‘directly chosen by the people’.

I refer to the 2007 High Court of Australia case of Roach\(^ {68}\) and the 2010 High Court of Australia case of Rowe\(^ {69}\). I have discussed these two cases at length.\(^ {70}\) However, for our purposes in this paper I need only make the following points: in the Roach case the High Court of Australia (4:2)

\(^{68}\) Roach v Electoral Commissioner (2007) 233 CLR 162.


struck down legislation that prevented any person serving any full-time prison sentence from voting in federal elections. These Justices held that the then existing legislation which disqualified all prisoners was invalid, however the older legislation that disqualified those serving sentences of three years or more was constitutionally valid and could stand. On top of that (and this applies also to Rowe) it is plain from the majority judgments that legislation can be — indeed was — constitutionally valid at the time of federation and the coming into force of the Australian Constitution (and indeed that the legislation remained so up to 1983 and beyond) but that that same legislation is today, when the Court struck it down, no longer constitutionally valid. There is even the clear and undeniable suggestion in Roach (and Rowe) that if Parliament keeps its hands off and leaves alone old legislation governing when prisoners can vote (or when electoral rolls must close) then that old legislation will be and will remain valid. But where a Parliament in the recent past happens to have legislated to liberalise those rules then no Parliament of even more recent vintage will be able to revert back to the older (and back then constitutionally valid) rules. Not ever.

So in effect the legislature, by passing a new statute that the top judges consider more liberal or more in keeping with transnational standards or changing social mores, can change the Constitution.

Try reaching that sort of conclusion as an originalist! And ask yourself what sort of external constraints (not ones of the variety of ‘I looked inside myself and boy did I feel constrained’ but constraints there for all to see and to be pointed to) are in place if this counts as a persuasive interpretation of an Australian constitutional text that disavows any US-
style bill of rights or voting rights provision, such issues being intended
and at the time understood to be left to the elected Parliament. And I ask
that as someone who is not a ‘lock ‘em up and throw away the key’ sort
of person, someone who (again) does not at all object to the substantive
outcome in this case. And I ask reminding the reader that no relevant part
of the text of the Australian Constitution — the constitution the majority
judges say in the past used to allow the legislature to do something but
now does not — has changed. All that has changed is the scope for
judges to invalidate democratically enacted legislation, largely it seems
because of the passage of time and the current prevailing sentiments of
the judiciary.

Again, I simply cannot see how any honest originalist could have reached
this conclusion. He or she would have been constrained, whatever his or
her substantive preferences or druthers, and the decision would
accordingly have been left with Parliament.

The majority’s reasoning in Roach clearly relies on there being an
implied freedom of political participation somehow linked to the ACTV’s
implied freedom of political communication, though this link is half-
heartedly side-stepped or disguised.\(^{71}\) And when it comes to telling us
why it is that they, the majority Justices, can strike down and invalidate
this statute they have virtually nothing to point to in the Constitution
itself save for a few passing references to ‘directly chosen by the people’
and a huge dollop of implicit and unspoken reliance on the earlier implied

\(^{71}\) See Roach, [43]: ‘[W]hat is at stake … is not so much a freedom to
communicate about political matters but participation as an elector in the central
processes of representative government’ (emphasis mine). I think, and have argued
(see Ibid), that this claim is disingenuous.
rights cases.\textsuperscript{72} That and plenty of talk of how ‘the Constitution makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution’\textsuperscript{73} (finessing, quite blatantly, the crucial question of whether representative government will change through time solely because of decisions made by Parliament — as I think any originalist would be forced to conclude — or with the unelected High Court of Australia having some sort of supervisory role).

In \textit{Roach} (and as we will presently see in \textit{Rowe} as well) the High Court of Australia answers that in its own favour, concluding that the top Australian judges have been given a supervisory role by the Constitution, at least by the year 2007 if not before. It is an answer that cannot point to or rely on original intentions, that cannot point to original understandings, and that requires a remarkably fast-and-loose (even for ‘living constitutionalism’) interpretive approach that deep down appeals only to readers agreeing with the substantive outcome and to vaguely reassuring proportionality-type analyses\textsuperscript{74} nowhere mandated by the Constitution.

If it is possible, this second case study of \textit{Roach} shows the normative attractions — the greater limits on point-of-application interpreters — of originalism even more starkly than our first case study of \textit{ACTV}.

However our third case study of \textit{Rowe} takes the cake. Even a few ‘living constitutionalists’ are embarrassed by it. In \textit{Rowe} (4:3) the High Court of Australia struck down another statute of the former conservative Howard

\textsuperscript{72} For example, the \textit{Lange} decision is relied on at [44] of \textit{Roach}.

\textsuperscript{73} \textit{Roach},[45].

\textsuperscript{74} See \textit{Roach}, [84] – [102].
government. This time the statute had to do with when the electoral rolls (listing who is legally entitled to vote) must close after the calling of an election. In most Westminster systems election dates are not fixed, though there is a maximum time period before which one must be held. In almost all circumstances it is the sitting Prime Minister who decides when the election will be held, though there is the pretence that the Queen’s representative the Governor-General is calling it. This requires a writ to be issued.

The *Rowe* case related to a 2006 Act. The previous 1983 Act had provided a 7 day grace period for people who were legally obliged to be enrolled — indeed who were subject to a legal penalty for failing to enrol — to do so once the election had been called and writ issued. The 2006 Act, the one struck down in *Rowe*, removed this 7 day grace period.

Put somewhat differently, the majority Justices in *Rowe* decided that the Australian Constitution gives them the power to supervise (and indeed gainsay the elected legislature’s decision as to) when the electoral rolls will close. And it does so as regards 7 days, and all the other minutiae surrounding the many competing incentives and disincentives involved in trying to get voters to enrol in a timely fashion. That is the meaning, supposedly, of a bill of rights-lacking Constitution, one that makes repeated references to ‘until the Parliament otherwise provides’.

The majority in *Rowe* make virtually no attempt to point to any constitutional provisions with only a quick recital of the ‘directly chosen by the people’ words. Instead the majority judgments cite and rely on the
earlier *Roach* decision in 29 different paragraphs,\(^75\) which is over 10 percent of all of the paragraphs in the majority judgments.

If this is not a bootstraps operation pure and simple it is certainly the basis on which the majority judges assert they have been empowered to undertake what can be thought of as an extensive proportionality analysis.\(^76\)

And of course *Rowe* mimics *Roach* in standing for the bizarre proposition that old legislation (because a few decades back further than the 1983 Act there had been legislation allowing no grace period for enrolling) will be valid if left alone. But if it is ‘liberalized’, the legislature is then constitutionally foreclosed from returning to what had been a constitutionally valid position. Only this time in *Rowe* the judges use their living Constitution to overrule not when prisoners can vote, but rather the number of days grace that will be given to those who have thus far breached their legal obligation to enrol. The top judges end up supervising a few days, here or there.

As I have said, it seems to me that no originalist could reach such a result. And this point is made in the forceful dissents in both *Roach* and *Rowe* by Justices Hayne and Heydon. Indeed these dissents read very much the

\(^{75}\) See my ‘The Three “Rs” of Recent Australian Judicial Activism’, fn. 70 above.

\(^{76}\) It is described in terms of ‘substantial reason[s]’ or ‘rational connections’ at [161] by Gummow and Bell JJ and in terms of ‘practical effects’ at [78] by French CJ. Personally, I am inclined to agree with Thomas Poole who argues that ‘proportionality [analysis] is plastic and can in principle be applied almost infinitely forcefully or infinitely cautiously, producing an area of discretionary judgment that can be massively broad or incredibly narrow – and anything in between’. Thomas Poole, ‘The Reformation of English Administrative Law (2009) 68 Cambridge Law Journal 142, 146.
way an originalist would expect and would agree with, and would find intellectually compelling.

As I said at the start of this paper, originalism is alive and has a pulse in Australia. It is just that of the seven High Court Justices only two (some would say one\textsuperscript{77}) can be relied on to subject themselves to the external constraints it imposes.

V CONCLUSION

My hope is that ‘living constitutionalism’s’ virtual absence of external constraints — of a lack of limits on the point-of-application interpreter achieving whatever result he or she thinks morally or substantively best — is even more evident in the Australian context than in the US one. Lacking a bill of rights, and being comparatively morally enervated, Australia’s Constitution, and the interpretation of that Constitution, shows clearly, starkly and unmistakably the normative benefits of originalist constitutional interpretation (and obversely the egregious absence of real constraints of ‘living constitutionalism’).

Of course whether someone wants the top judges to be more constrained in the decisions they can plausibly reach is a different matter. So too is the issue of whether someone wants locked-in limits on when the top judges can supervise and overrule the elected branches, or prefers his or her judiciary’s gainsaying role to be fluid, not really much constrained, and able to expand in line with judges’ perceptions of changing social values, of transnational standards, of moral best answers, what have you.

\textsuperscript{77} And a very, very solid originalist (Justice Callinan) retired only a few years back, replaced by a non-originalist.
Those differences of preferences aside, there is a flip side to the conclusion that Australia shows originalism to be more constraining. This is the possible realization one might come to that if originalism and originalist interpretation cannot prevail in Australia then that suggests they are unlikely to keep judges in check in the sort of high-profile bill of rights cases that matter to the Scalias and other normative originalists (including me) who think this is originalism’s biggest selling point. So there are optimistic and pessimistic conclusions one can draw from looking at Australia. And here, if nowhere else, we originalists of an optimistic bent might choose to downplay the facts.
THE MERITS OF THE INHERENT REQUIREMENT TEST FOR REGULATING THE EMPLOYMENT DECISIONS OF RELIGIOUS SCHOOLS UNDER ANTI-DISCRIMINATION LEGISLATION

GREG WALSH*

ABSTRACT

This article evaluates the merits of adopting an inherent requirement test for regulating the employment decisions of religious schools in NSW. The inherent requirement test has some significant advantages over the current approach adopted in NSW especially by adapting the protections provided to religious schools to the particular needs of each religious school. However, the inherent requirement test appears to have at least two significant limitations: it will likely fail in operation to adequately respect the importance of an employee’s compatibility with the school’s religion, and courts will likely experience substantial difficulties in attempting to apply the inherent requirement test to religious schools.

I INTRODUCTION

Under the inherent requirement test an adverse employment decision is not discriminatory if there are aspects of an employment position that are an ‘inherent requirement’ of the position and the person was unable to fulfill those requirements. In the context of religious schools, the inherent requirement test would allow adverse employment decisions to be made

* BSc/LLB, GDLP (ANU), LLM (Syd), Senior Lecturer, School of Law, The University of Notre Dame Australia. The author welcomes commentary on the article, which can be sent to greg.walsh@nd.edu.au
on the basis of a range of attributes but only when conformity to the school’s religion is an inherent requirement of the employment role and an attribute of a person prevents them from fulfilling that requirement.

Due to the wide range of positions that religions adopt on various issues and the different approaches religious schools have to incorporating religion within their schools it is not possible to enact legislation that specifies the inherent requirements of employment positions for all religious schools. Consequently, inherent requirement provisions typically establish a general test for determining the inherent requirements of employment positions and require courts to determine on a case by case basis the inherent requirements of various employment positions at religious schools and whether the person who suffered the detriment was able to meet those inherent requirements.

An example of an inherent requirement test can be provided by the test that was briefly adopted in Victoria. Under the test an employment decision by a religious school is lawful if ‘conformity with the doctrines, beliefs or principles of the religion is an inherent requirement of the particular position’ and ‘the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity means that he or she does not meet that inherent requirement’.  

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*Equal Opportunity Act 2010 (Vic) s 83(3)–(4).* With a change of government the legislation was amended to remove the inherent requirement test before it began operating; *Equal Opportunity Amendment Act 2011 (Vic) s 19.* At the time of writing the Victorian Labor party has indicated that it will reintroduce the inherent requirement test when it next forms government: John Ferguson, 'Labor vows to get
The aim of this article is to assess the merits of introducing an inherent requirement test similar to the Victorian test into New South Wales (NSW). Under the current approach adopted in NSW it is unlawful for a person or organisation when making an employment decision to discriminate on the grounds of race, sex, transgender status, marital or domestic status, disability, a person’s responsibilities as a carer, homosexuality or age. Religious schools, however, are not regulated by most of these provisions due to an exception provided to private educational authorities. A ‘private educational authority’ is defined as:

a person or body administering a school, college, university or other institution at which education or training is provided, not being: (a) a school, college, university or other institution established under the *Education Reform Act 1990* (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or (b) an agricultural college administered by the Minister for Agriculture.

Under the exception religious schools are permitted to make employment decisions that would otherwise be unlawful on the grounds of sex, transgender status, marital or domestic status, disability and homosexuality. No exceptions are provided to religious schools on the grounds of race, age or a person’s responsibilities as a carer. In contrast to the inherent requirement test, under the approach adopted in NSW (the

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2 Anti-Discrimination Act 1977 (NSW) ss 8, 49ZYB, 49V.
3 Ibid s 4 (definition of ‘private educational authority’).
4 Ibid ss 25(3)(c), 38C(3)(c), 40(3)(c), 49D(3)(c), 49ZH(3)(c).
5 Ibid ss 8, 49ZYB, 49V.
‘general exception approach’) there is no test for a court to apply to
determine the legality of an adverse employment decision made by a
religious school.⁶

The article is structured in three parts. It begins with a discussion of the
advantages of an inherent requirement test especially in comparison to
some of the major limitations of the general exception approach. It then
assesses two of the major criticisms of the inherent requirement test.
Firstly, that it may impair the operation of religious schools by failing to
account for the important role that all employees can play in assisting
religious schools achieve their religious objectives. Secondly, the courts
may encounter major difficulties in appropriately applying an inherent
requirement test to employment positions at religious schools.

A range of additional factors would need to be considered to reach an
informed conclusion on the merits of introducing an inherent requirement
test into NSW. Some of these factors would include the right to equality
and religious liberty, the welfare of students, the right to privacy, parental
rights, and freedom of association. Nevertheless, a detailed analysis of the
merits of two of the most significant criticisms of the inherent
requirement test is useful as a determination that these criticisms are valid
would provide a strong indication that the inherent requirement test may
not be an appropriate alternative to the current approach.

⁶ Ibid.
II THE MERITS OF THE INHERENT REQUIREMENT TEST

A central argument in favour of the inherent requirement test is that compared to the general exception approach it provides a much more limited protection for the employment decisions of religious schools. The limited scope of the protections substantially reduces the number of individuals who can be adversely affected by religious schools while still allowing religious schools to be established and operated by religious communities.

A The Protections are Adapted to the Needs of Religious Schools

A major problem with the general exception approach is that legal protections are provided to religious schools that do not need or want the protections, and to non-religious schools that cannot justify receiving the protections (at least not on the grounds of religious liberty). Under the inherent requirement test the protections would only be provided to religious schools rather than to some broader category such as private educational authorities.

Considering the theological perspective of these religious schools it is likely that under the inherent requirement test a court would find that these schools are legally unable to make employment decisions on these grounds. Such an outcome would result in a significant reduction in the provision of unnecessary protections to religious schools that do not want these protections and also reduce the scope for the protections to be fraudulently abused. For example, a principal who decided not to hire a woman for an employment position involving religious leadership on the grounds of her gender would be acting unlawfully if the school’s religion
is committed to gender equality in all roles including those relating to religious leadership.

A further, and more controversial, aspect of the inherent requirement test is that courts are provided with the role of determining the validity of a religious school’s claim that religious compatibility is an inherent requirement of a particular employment position. This aspect of the test is considered by its proponents to be one of its major advantages on the understanding that most employment positions within religious schools—such as teaching positions for non-religious subjects, administrative and maintenance positions—are not typically religious. Rayner, for example, notes that:

[r]eligious bodies argue that limiting blanket exemptions will destroy religious freedoms … [the exceptions are] defended on the basis that any service can be a religious vocation and that a 'religious environment' requires certain pureties of everyone in employment. With respect, it is difficult to see the relevance of the beliefs or lifestyles of, say, a cleaner, gardener or clerk, in an independent, para-religious school.7

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7 Moira Rayner, 'Limiting discrimination won't harm religious freedoms', *Eureka Street* 13 August 2009
Some supporters of the inherent requirement test also find it difficult to understand how a religious school can justify making an adverse employment decision against someone who may act contrary to the teachings of religion in their private life, but do not actively contradict the religion’s teaching in the school environment. Such a view was adopted by Debra James, General Secretary of the Victorian Independent Education Union, who stated:

But does the cleaner have to be a practising Catholic or a practising Jew or a practising Christian? Does the maths teacher? Does the phys. ed. teacher? A person with a private lifestyle that is known by some in the school to be contrary to the teachings of the church, but is not a public lifestyle to students, a person who is otherwise exemplary in their conduct and behaviour, who is not actually agitating for an alternative lifestyle to their students — why is it that that person, if their personal situation were found out, could be in a position of being terminated in their employment or injured in some way in their employment?  

B The Reduced Potential for Persons to be Harmed by Employment Decisions

The substantial reduction of the scope of the protections provided to religious schools under the inherent requirement test is one of its major advantages compared to a general exception approach. The limited scope of the protections would greatly reduce the number of persons who could

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be adversely affected by the employment decisions of religious schools, which would likely assist a substantial number of individuals avoid the serious physical and mental harm that can be suffered from adverse employment decisions.

The major harm that can be caused to an individual from an employer relying on protections such as those provided in the general exception approach is demonstrated in the case of *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park*. The case involved a Christian arts academy that terminated the employment of a music teacher when it was discovered that he was living in a same-sex relationship. In finding against the Christian organisation Basson J held that it ‘would not have been devastating to the church to keep the complainant on in his teaching position … [and] if the church was questioned why they had a work contract with a practicing homosexual, they could have stated that it was required by the Constitution that they not discriminate’. His Honour ordered the church leaders to pay compensation and make an unconditional apology. On the harm that the man suffered from the employment decision Basson J stated:

> being discriminated against on the ground of his homosexual orientation had an enormous impact on the complainant’s right to equality, protected as one of the foundations of our new constitutional order. Likewise his right to dignity is seriously impaired due to the unfair discrimination … his dignity was impaired when his contract was terminated on the basis of his sexual

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10 Ibid [23]–[24].
orientation … he suffers from depression and was unemployed due to the publicity his case has resulted in. He also had to sell his piano and house.\textsuperscript{11}

C  \textit{Appropriate Protection is Provided to Religious Schools}

Although a more limited protection is provided to religious schools under the inherent requirement test compared to the general exception approach, religious schools are arguably still appropriately respected as religious groups can still establish religious schools in fulfilment of their obligations to teach their religious beliefs and to engage in charitable works. It is also important to note that the burden placed on religious schools in complying with the model will often be insignificant as in many situations it will be straightforward for religious schools to demonstrate why a religious component is an inherent requirement of particular employment positions. A substantial number of religious schools, for example, would set aside time during the school term for religious ceremonies for the benefit of students and employees of the school. If the position of the school’s religion was that these ceremonies can only be performed by men then it is very likely that a court would hold that this is an inherent requirement of the position.

Furthermore, under the inherent requirement test a religious school would still be able to regulate the conduct of its staff to ensure that its employees act respectfully towards the religious commitments of the school. An employee who is openly critical of the school’s religious commitments and actively lobbies for change could be disciplined, or even dismissed. In support of this aspect of the inherent requirement test James argued that:

\textsuperscript{11} Ibid [25], [33].
[e]very employee should be aware of their obligations to their employer; the
obligation of fidelity; these things that come with the common law contract
of employment. Wearing a T-shirt that supports abortion is obviously not
going to go down well in a Catholic school, and it would be an employee
who, with peril, would take such an action.\footnote{James, above n 9, 4.}

D \textit{The Limitations of an Inherent Requirement Test}

Few would dispute that the adaptability of the inherent requirement test
has the significant advantage of allowing the protections provided under
anti-discrimination legislation to be adapted to the particular needs of
each school. However, there is a substantial dispute about the claim that a
further advantage of the approach is that it will require religious schools
to satisfy a court that a religious component is an inherent requirement of
a position and that the complainant was unable to fulfill that requirement.
The remainder of the article focuses on the concerns that the inherent
requirement test will likely fail in operation to adequately respect the
importance of an employee’s compatibility with the school’s religion, and
that courts will experience substantial difficulties in applying the inherent
requirement test to religious schools.

III \textbf{THE IMPORTANCE OF MISSION FIT FOR RELIGIOUS
SCHOOLS}

The compatibility of employees with a school’s religion (their ‘mission
fit’) can be of central importance to the operation of many religious
schools. For some religious schools employment positions are considered
to be religious vocations making it essential that an employee has good mission fit. Even when most, or even all, employment positions are not considered to have the characteristic of a religious vocation, the mission fit of employees is still critical considering the central role staff members can play in assisting religious schools achieve their religious objectives and in creating an authentic religious environment within the school.

**A Employment Positions at Religious Schools can be Religious Vocations**

Many of the individuals who work for religious schools do not consider their role as simply an employment position, but rather they understand it as a type of religious vocation that that they have been called by God to fulfill. Durie explains as follows:

> For a secular person, teaching mathematics has nothing to do with religion. However, for a religious person – and indeed for a religious organisation – all actions can be considered to be worship. What distinguishes many religious organisations is that they see their whole activity as a corporate act of worship, done in devotion and service to God, in accordance with the doctrines and principles of their faith. One reason they want to employ people of faith is that they want the whole organisation to corporately serve God through its activities.¹³

The case of *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (‘Hosanna-Tabor’) decided by the United States Supreme Court provides a good example of a religious community that considers that teaching positions—even when they involve teaching non-religious subjects—can be a religious vocations.

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vocation. In *Hosanna-Tabor* a school classified its school teachers into ‘called’ and ‘lay’ teachers. Called teachers, who were given the title ‘Minister of Religion, Commissioned’, were regarded as having been called to their vocation by God and were required to meet certain religious requirements, including completing a course of theological study, and having their position approved by the religious congregation. ‘Lay’ teachers were not required to be trained by the Church, or even to be Lutheran, and were appointed for one-year renewable terms. Both categories of teachers generally performed the same duties, although lay teachers were hired only when called teachers were unavailable.

The respondent, Cheryl Perich, was a called teacher and taught a variety of subjects including maths, social studies, science, gym, art, and music. She also taught a religion class four days a week, led the students in prayer and religious exercises each day, attended a weekly school-wide chapel service, and led the chapel service about twice a year. Perich went on disability leave after developing narcolepsy and the school decided to offer her the option of being released from her ‘call’. Perich refused and after a series of exchanges the relationship deteriorated resulting in the congregation rescinding her ‘call’ and dismissing her from employment.

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16 Ibid 700.
17 Ibid.
18 Ibid.
19 Ibid.
The Supreme Court held that the dismissal was valid and not in violation of laws prohibiting disability discrimination as it was covered by the ‘ministerial exception’—a constitutional prohibition on government limiting the freedom of religious groups to make employment decisions relating to their ministers.\textsuperscript{20} Despite Perich teaching a variety of non-religious subjects, her role being very similar to that of lay teachers and her formal religious duties only occupying approximately 45 minutes of the work day, the Supreme Court held that due to the process she underwent in becoming a called teacher, that she held herself out as a minister of the Church, and her additional religious duties it was appropriate for her to be classified as a religious minister and so covered by the exception.\textsuperscript{21} The Court concluded their judgment stating that ‘[t]he interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission’\textsuperscript{22}

The scope of the ministerial exception was also addressed by the US Court of Appeals for the District of Columbia Circuit in \textit{EEOC v Catholic University of America}.\textsuperscript{23} In the case the Court held that a religious sister teaching theology at the Catholic University of America could not rely on legislation prohibiting gender discrimination to contest a decision by the

\textsuperscript{20} Ibid 701, 710.
\textsuperscript{21} Ibid 707–10.
\textsuperscript{22} Ibid 710. Relying on the ruling in \textit{Hosanna-Tabor} the United States Court of Appeals subsequently held that a music director at a Catholic Church was a ‘minister’ for the purposes of the ministerial defence and so was unable to rely on anti-discrimination legislation to pursue a claim against the Church: \textit{Cannata v Catholic Diocese of Austin}, 700 F 3d 169 (5th Cir, 2012).
\textsuperscript{23} (1996) 83 F3d 455.
University to deny her tenure. The Court found that her role was covered by the ministerial exception and consequently held that State intervention in the employment decision would be in violation of the free exercise clause of the US Constitution. Importantly the Court affirmed that a broad understanding should be adopted regarding who should be regarded as a minister in a religious institution declaring that ‘the ministerial exception encompasses all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission’.

These cases are useful demonstrations of how employment positions at religious educational institutions can appropriately be considered to be religious vocations. Laws that limit or remove the freedom of these religious groups to appoint persons to employment positions as the religious group considers appropriate according to their religious convictions can be a major violation of their right to religious liberty. Under the inherent requirement test this may occur if a court concludes that an employment position at a religious school is essentially non-religious even if the religious groups considers these employment positions to be religious vocations. Such an outcome is especially likely in relation to employment positions that many individuals would consider to be non-religious such as an administrative assistant, a teacher of mathematics or English, or a maintenance officer.

24 Ibid 470.
26 Ibid 463.
B  The Central Role of Employees at Religious Schools

The ability to select employees according to their mission fit is important for religious schools for many of the same reasons that it is important for any organisation. Employees with good mission fit will likely be more effective in their employment roles as they will often have a more detailed understanding of, and commitment to, the organisation’s values and objectives, a higher level of motivation, a greater willingness to work longer hours, and a desire to remain as an employee of the organisation for a longer period of time. These qualities in employees are important not just to religious schools but to all organisations.

Mission fit, however, is particularly important for religious schools considering their focus on religious education and formation. A central reason why religious schools are established is to assist students and others involved with the school to learn about the religion, appreciate its merits, and develop the character necessary to live an ethical, fulfilling life as understood by that religion. Employing persons with good mission fit is essential to achieving this goal as such employees will often have a detailed understanding of, and commitment to, the religion, which will play a key role in helping the school achieve its religious objectives.

The view that religious schools should be able to select employees for mission fit for employment positions involving school leadership (such as the principal), religious education and positions involving the performance of religious ceremonies and other rituals is widely held. Such an approach is supported by strong proponents of the inherent requirement test who consider that courts should recognise a religious
component as being an inherent requirement for these positions.\textsuperscript{27} The Victorian Independent Education Union, for example, stated in its submission to the Victorian government’s inquiry into the merits of exceptions in the \textit{Equal Opportunity Act 1995} (Vic) that anti-discrimination legislation ‘should permit a church to discriminate only in limited circumstances namely in relation to the ordination of religious officials, such as priests or rabbis and probably also in the employment of religious education teachers and faith leaders depending on the circumstances’.\textsuperscript{28}

However, considering the central importance of religious education and formation to many religious schools it is important that religious schools can also employ individuals for both teaching and non-teaching employment positions according to their mission fit. The need to have a broad discretion regarding employment decisions for a range of employment positions is essential considering the impact that all employees can have on a school’s ability to achieve its religious objectives.

1 \textit{The Importance of Mission Fit for Teaching Positions}

The control teachers have over the formal teaching environment provides them with significant influence in developing the knowledge, skills and character of their students. The religious knowledge and commitment of a

\begin{footnotes}
\item[27] See, eg, James, above n 9, 4.
\end{footnotes}
teacher with good mission fit will likely make the teacher more effective in presenting the school’s religion in an accurate and persuasive manner to the students. Considering this influence it is important that religious schools can employ teachers according to their mission fit to assist religious schools in more effectively achieving their religious objectives.

The importance of a teacher’s commitment to the doctrines of a school’s religion, especially in regards to the education of students, was addressed by the European Court of Human Rights in Fernández Martínez v Spain, which concerned the employment of a Catholic priest as a religious education teacher six years after he had decided to marry even though his application to be relieved of the requirement of celibacy had not been approved. Although the authorities of the Catholic Church knew about the man’s personal situation he was allowed to remain in the role, and the decision to not renew his contract was only made after it became widely known that he was involved in a public campaign against a range of doctrinal issues including mandatory clerical celibacy. The Court held that the decision to not renew the applicant’s contract was appropriate due to:

the special nature of the professional requirements imposed on the applicant stemming from the fact that they were established by an employer whose ethos was based on religion … [Moreover] the duty of reserve and discretion was all the more important as the direct recipients of the

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29 Fernández Martínez v Spain (European Court of Human Rights, Chamber, Application No 56030/07, 15 May 2012) [9]–[10].
30 Ibid [10]–[17].
applicant’s teaching were minors, who by nature were vulnerable and open to influence.\textsuperscript{31}

The significance of religious education teachers was emphasised in the case on the basis that there is a special bond of trust between religious authorities and religious teachers. The Court argued that this particular relationship ‘necessarily gives rise to certain specific features that distinguish teachers of Catholic religion and ethics from other teachers … [i]t is therefore not unreasonable to impose a heightened duty of loyalty on religious education teachers’.\textsuperscript{32}

In \textit{William Eduardo Delgado Páez v Colombia} the Human Rights Committee similarly held that religious schools have the freedom to determine whether a religious education teacher should be employed and what they should teach.\textsuperscript{33} The Committee held that the decision by a religious school to remove an employee from the position of a religious education teacher for his unorthodox theological positions did not violate either his freedom of religion or his freedom of expression:

With respect to [freedom of religion], the Committee is of the view that the author's right to profess or to manifest his religion has not been violated … [the State can] allow the Church authorities to decide who may teach religion and in what manner it should be taught … [similarly] the

\textsuperscript{31} Ibid [87]. The decision was upheld by the Grand Chamber of the European Court of Human Rights in \textit{Fernández Martínez v Spain} (European Court of Human Rights, Grand Chamber, Application No 56030/07, 12 June 2014).

\textsuperscript{32} \textit{Fernández Martínez v Spain} (European Court of Human Rights, Chamber, Application No 56030/07, 15 May 2012) [85].

requirement, by the Church authorities, that Mr. Delgado teach the Catholic religion in its traditional form does not violate [his freedom of expression].  

Individuals concerned about the possible harm that can be caused by religious schools through their employment decisions might argue that employing a person according to mission fit might be appropriate for religious education teachers, but it would be inappropriate for teachers of subjects such as mathematics, geography or physics as it is unlikely that issues of faith and ethics would arise in these classes. Such a position is adopted by Tobin who argues that in relation to discussions of matters involving faith and ethics ‘there are very few subjects that would offer such a setting especially in primary schools. It would certainly not arise in any of the key learning areas such as Maths or English — unless the texts being studied gave rise to issues of sexual orientation and marriage’.  

Although it is to be expected that religious issues will mainly be discussed within religious education classes, theological and ethical issues will inevitably arise in a variety of subjects often held to be non-religious. For example, the study of science will often lead to queries regarding the existence of God, and the role God plays, if any, in the natural world; the study of geography can lead to disputes about the

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34 Ibid [5.8]–[5.9]. Although the Human Rights Committee placed importance on the special relationship that existed between the Church and State in Columbia it is unlikely that the Committee would reach a different conclusion in a State without such a relationship considering the centrality of religious education to religious communities and the persuasive influence that decisions such as Fernández Martínez v Spain and Hosanna-Tabor would likely have on the Committee.

proper division of state boundaries between different groups with clear religious identities; the study of history will often cover religiously sensitive topics such as the Reformation or the history of conflicts between religious groups; while the study of literature will often include the presentation of views on theological and ethical issues that have been strongly influenced by the author’s religious commitments. On the need for broad protections to be provided for the employment decisions of religious schools the Islamic Council of Victoria stated:

It is vital that school boards have the freedom and choice of being able to employ the most appropriate person based on their religious belief, because Islamic values touch almost all of the disciplines taught in school and parents consider teachers to be role models for their children. For example, when the concept of interest is taught in maths and commerce, it must be taught that there are alternative methods of banking because Muslims are forbidden to deal with interest.36

Furthermore, for many teachers at religious schools their duties are much broader than simply teaching Maths or English and include assisting with the operation of religious schools in a variety of ways—many of which will inevitably be of a religious character. Martin Dixon, a Victorian Parliamentarian, in a speech to Parliament explained that one of the key reasons why he considered that the proposed inherent requirement test

was flawed was that it failed to appreciate the various ways religion is expressed in the life of religious schools. He argued that:

[t]he vast majority of teachers -- and staff, not just teachers -- working in these schools do not simply teach a particular subject. Many other responsibilities within the school and even within the community come with those jobs. An example of this would be a mathematics teacher who also has a home room. Part of the duties of a home room teacher would be to talk to the students about their behaviour, the values and beliefs of the school and also the various activities the school is taking part in and how they refer to the values and beliefs of that school. Classroom teachers and other staff are also required to attend religious ceremonies associated with the denomination of the school. They are expected not only to attend but also to actually plan, organise and take part in those ceremonies.\(^{37}\)

Although the formal education provided by teachers in the classroom is of significant importance in assisting the religious school fulfil its religious objectives, the influence teachers can have on students and others involved in the religious school through the manner in which they live their lives is likely to be of even greater importance. The capacity of a teacher to act as a religious role model is a key justification for why mission fit should be understood as an inherent requirement for teaching positions at religious schools regardless of the particular subjects that they teach. The significant influence that a teacher can have as a religious role model was emphasised by the Supreme Court of Canada in *Caldwell v St Thomas Aquinas High School*, which confirmed the legality of a decision by a Catholic school to not renew the contract of a teacher of

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\(^{37}\) *Victoria, Parliamentary Debates*, Legislative Assembly, 25 March 2010, 1112 (Martin Dixon).
mathematics and commercial subjects for marrying a divorced person in violation of Catholic doctrine.\(^\text{38}\) The Supreme Court held that:

\[\text{i}t\] is a fundamental tenet of the [Catholic] Church that Christ founded the Church to continue His work of salvation. The Church employs various means to carry out His purpose, one of which is the establishment of its own schools which have as their object the formation of the whole person, including education in the Catholic faith. The relationship of the teacher to the student enables the teacher to form the mind and attitudes of the student and the Church depends not so much on the usual form of academic instruction as on the teachers who, in imitation of Christ, are required to reveal the Christian message in their work and as well in all aspects of their behaviour. The teacher is expected to be an example consistent with the teachings of the Church, and must proclaim the Catholic philosophy by his or her conduct within and without the school.\(^\text{39}\)

Out of all of a school’s employees teachers will often have the closest relationships with students due to the substantial amount of time they spend with students, the theological and ethical significance of many of the topics covered in a variety of classes, and the expectation that many schools have that teachers should aim to develop not just the knowledge and skills of their students but also their character. A teacher’s genuine commitment to the particular religion expressed in formal and informal discussions and in the example they set by their conduct can play a powerful role in positively influencing the views of students — and others at the school — about the school’s religion. Thus Parkinson states

\(^{38}\) *Caldwell v St Thomas Aquinas High School* [1984] 2 SCR 603, 606.

\(^{39}\) Ibid 608.
from a Christian perspective that ‘[m]odelling Christianity within a faith community is as important as teaching Christianity within a classroom or from a pulpit. Indeed it may well be more important and have more impact on people’s lives’.  

Similarly Lenta argues that the importance placed on the ability of teachers to act as role models recognises that:

moral virtue is not simply taught, but is acquired by pupils through their association with teachers who are themselves virtuous, with the corollary that it is wrong to place pupils with teachers who are not virtuous … teachers teach moral values not didactically, as in the case of arithmetic, but through example.

2  The Importance of Mission Fit for Non-Teaching Staff Members

Considering that non-teaching staff positions (other than those involving leadership or religious functions) do not have the same position of authority and ongoing contact as employees in teaching positions many would consider that it would be inappropriate to provide a school with protections for non-teaching positions. Such a position was expressed by Lenta who stated that:

the work of teachers in a religious school includes transmitting the beliefs and values of the school, didactically in the case of those involved in religious instruction and by example in the case of all teachers. This is why it is correct to say that the work of typists or janitors is distant from the religious beliefs of the religious association for which they work, but that

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the activities of teachers of non-religious subjects in a religious school have a close connection to the religious beliefs of the church that runs the school. On this argument, an exemption in respect of all teachers, even those not involved in religious instruction, may be justified, but an exemption in respect of typists and janitors will not be.\footnote{Ibid 855.}

However, mission fit is important not just for teachers but also for non-teaching employees considering the significant role that they can play in assisting religious schools fulfil their religious objectives. A person with good mission fit can be particularly effective in a non-teaching employment position in a religious school due to their understanding of the religion, personal contacts within the religious community, commitment to the religious identity of the school, and ability to assist with religious education through formal and informal discussions. As with teachers at the school, non-teaching staff members can also make a valuable contribution through acting as role models, especially for students, through being able to demonstrate how a committed religious adherent can express their religious convictions in roles other than those of a teacher. As O’Brien states ‘a person who is employed at a school is not just there to teach maths or to cook. They are there as leaders, counsellors, role models, people who guide and shape the ethos of the school’.\footnote{Victoria, Parliamentary Debates, Legislative Assembly, 10 March 2010, 1055 (Michael O’Brien).}

Non-teaching staff members can be even more effective than teachers in educating others about the religion and inspiring them to lead lives that
are more consistent with the religion’s teachings. In an empirical study undertaken by Evans and Gaze on the views of leaders of religious schools regarding anti-discrimination legislation, a principal of a Christian school reflected on the positive and unique religious impact of a Christian cleaner who ‘has a great pastoral heart, has a great gift of pastoring and builds important and very valuable relationships with students, which the teacher, as an authority figure, can’t do’. 44 Similarly, Mr Robert Johnston from the Australian Association of Christian Schools gave evidence in a public hearing held by the Commonwealth Legal and Constitutional Affairs Legislation Committee that ‘a gardener in the school in which I was principal for 27 years … was a very significant player in terms of some of the pastoral work [at the school]’. 45 While Rob Ward, the Victorian State Director of the Australian Christian Lobby, in the evidence he gave in the public hearings held in Victoria by the Scrutiny of Acts and Regulations Committee stated that:

one of my children, who shall remain nameless, received greater pastoral care and made a greater connection in some of his struggles through school with the maintenance guy at the school … There was a chaplain there, there were teachers there and there was pastoral care, but this maintenance guy connected with one of my children and made a huge difference in their life, because he shared the values of the school. 46

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46 Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act — Public Hearing
3  The Adverse Impact of Employees with Poor Mission Fit

A person who is not an adherent of the religion, or is not living a life that is consistent with the religion’s teachings, can still teach maths or science or perform the technical work of a receptionist or a maintenance officer. However, they are unable to be an effective witness for the religion to the students, other employees, and members of the community involved with the religious school. Some supporters of the inherent requirement test reject this view and argue that the worldview of the teacher or their conduct outside the religious school does not matter so long as they accurately present and support the school’s religion in any situation where it arises within or outside of a classroom setting, and avoid saying or doing anything that contradicts the school’s religious commitments. Along these lines James argues that:

a maths teacher who is living in a de facto relationship in a Catholic school might be required to participate in school mass and prayer assembly with students and will be able to do so. In these circumstances, the maths teacher will still be able to get the inherent requirements of the job done in that he/she can teach the students maths and participate in the religious life of the school in relation to its students. It would, therefore, be unlawful to refuse to deny that teacher a job simply on the grounds of his/her marital status.47

The difficulty with the views expressed by James is that they fail to adequately account for the capacity of all employees to act as role models simply through the manner in which they live their life. Even if the staff member attempted to support a school’s religion while in the work environment their views on various aspects of the religion would inevitably be expressed by their actions, omissions and the statements they make to students, staff members and members of the public. Although one staff member with poor mission fit employed for a short period of time may have little impact on a school, multiple staff members employed over many years could have a significant adverse influence on the ability of a religious school to achieve its religious objectives.

The claim that James makes that religious schools can include employees with poor mission fit into the religious life of a school is also deeply problematic. There may be religious restrictions that prevent participation, or at least full participation, by the employee. Even when such prohibitions do not apply, or the person can be accommodated in others ways, involving a person with a different worldview could serve as a distraction from the religious event and a reminder that the claims of the religion are rejected by those outside the religious community.

C The Importance of a Religious Environment

As the inherent requirement test would likely limit the ability to make employment decisions on the basis of mission fit to employment positions with a substantial religious component — such as senior management positions, religious education teachers and those involved in performing religious ceremonies — religious schools would only be able to employ a person for mission fit for a minority of employment positions. If the staff body consisted of a substantial minority or majority
of individuals with different worldviews then it would be difficult for the religious school to create a religious environment where religious adherents were comfortable in organising religious events, discussing religious matters and expressing their opinions on various theological and ethical issues relevant to their religion in a group setting. Such a result is likely to occur when a religious adherent realises that there are individuals within the staff body who are unfamiliar with the teachings of the religion and may have theological or ethical views that strongly conflict with those promoted by the religion.

Moreover, if a substantial number of employees at a religious school have poor mission fit then the school’s identity as an institution that respects and adheres to the teachings of the particular religion can be undermined. For example, if a majority of staff members at a school based on a religion with mandatory dietary restrictions do not adhere to any of the restrictions in the food they consume then the credibility of the school as an authentic religious institution is undermined. The ongoing employment of the staff members by the religious school may even contribute to a view that the dietary restrictions are an optional, or even obsolete, practice of the religion. If a religious school’s identity as an authentic religious community is weakened then the incentive for religious adherents to become involved in the religious school as a way of expressing, developing and promoting their religious beliefs decreases. Such an outcome can be particularly harmful to a religious school when it causes religious adherents to be unwilling both to work for the school and to send their children to the religious school because they are no longer confident that their child will receive a formation that is consistent with
their religion. This point was emphasised in relation to religious organisations in general by Bishop Christopher Prowse in the hearings conducted by the Victorian Scrutiny of Acts and Regulations Committee where he stated that:

weakening or eliminating the religious exemptions would, in effect, force the secularisation of service delivery by religious agencies. The likely effect of such proposals would be a profoundly negative effect on two fronts. It would go to the heart of the religious motivation that leads people to be involved in ownership and governance and as an employee or volunteer. It would also go to the heart of the motivation that leads people, whether Catholic or not, to prefer the services of many Catholic providers. The popularity of Catholic providers is, I suggest, largely attributable to the mission and witness those providers demonstrate in what they do, how they do it and why they do it.48

Smaller religious schools will likely be particularly adversely affected by the inherent requirement test as their limited resources would make it less able to afford to defend any legal action taken against them. Consequently, they will be under significant pressure to avoid claiming mission fit is a requirement for employment roles that do have a substantial religious component but not to such a degree that the school would be confident that a court would find in their favour. Further the smaller size of the staff body would likely mean that employing staff members with poor mission fit would have a more substantial impact on

the religious culture of the school compared to larger religious schools that may be part of an association of schools based on the same religion.

It is important to note that many religious schools do not want to create a staff body consisting solely of adherents of that religion. Many religious schools consider it desirable to have staff members with a variety of different worldviews and attributes considering that it provides many benefits including preparing students and others involved with the school to interact respectfully with the diversity that exists in the community. On the value of employing a diverse staff body a principal of an Anglican school stated:

One thing that is certain is that the 18 year olds that leave here are going to mix and move within a fairly diverse community as soon as they leave school and where they have had the opportunity perhaps to confront a variety of worldviews, if not specifically of lifestyles, their education is going to be more rounded than had they say been educated in a school where all the staff was Anglican.49

This viewpoint was also expressed by some of the Catholic principals who were interviewed for a report produced by the NSW Anti-Discrimination Board entitled ‘Discrimination and Religious Conviction’.50 The ADB stated in the report that ‘[d]espite the high proportion of Catholics on their staffs, most of the principals said that they preferred to see a balance in the teaching staff between the older and

49 Evans and Gaze, above n 45, 416.
younger, male and female, inexperienced and experienced, and Catholic and non-Catholic teachers’.  

A similar situation was found in the Evans and Gaze study with one principal stating that ‘there’s a richness for more young people to have a multi-faith environment’.  

However, the problem with the inherent requirement test is that it is the courts, and not the religious schools, that are given the power to determine whether a religious component is an inherent requirement for a particular employment position. Often the decision will be made by a judge who has only briefly heard evidence on the matter, has only a superficial understanding of the relevant factual and theological issues, and due to their limited knowledge is unable to accurately appreciate the impact their decision may have on the religious culture of the school.

The reality that religious schools often select persons for employment positions despite them not having a strong mission fit raises an interesting issue. Supporters of the inherent requirement test use these employment practices as evidence that mission fit is not important for many employment positions at religious schools as the schools are able to operate effectively with such persons as employees. James, for example, argued that ‘[i]t is an undisputed fact that there is a diverse range of employees working in schools … The schools have not fallen over, as the religious authorities would put to this committee. They do not fall over because they currently employ non-Catholic staff or non-religious staff’.  

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51 Ibid.  
52 Evans and Gaze, above n 45, 419.  
53 James, above n 9, 3.
The diverse employment practices of religious schools should not be seen as evidence of the limited importance of mission fit for employment positions at religious schools. As discussed, a person’s mission fit is important for religious schools as it allows them to play a more effective role in religious education, to act as a positive role model for students and others involved with the school, and to promote the identity of the schools as authentic religious institutions. A person with poor mission fit may be able to effectively perform the technical aspects of various employment positions, but they will be limited in their ability to contribute to these religious aspects of the employment role, and may even have a detrimental impact on them. A religious school still committed to its religious identity may employ someone with poor mission fit due to operational necessity or because they consider that some diversity in the staff body will not have a significant adverse impact on the religious environment of the school. However, these decisions by religious schools should not be considered to be evidence that mission fit is not important for teaching and non-teaching employment positions at religious schools.

D The Likely Interpretation of the Inherent Requirement Test

The view that the inherent requirement test will fail in operation to adequately respect the importance of mission fit for the operation of religious schools is based on the understanding that a strict interpretation of the meaning of ‘inherent requirement’ will be adopted by the courts so that a religious component will not be an inherent requirement for most employment positions at religious schools. However, the possibility that the inherent requirements of a position can extend beyond a person’s
ability to perform the merely technical aspects of an employment role is well established. Such a view was approved by the High Court of Australia in *Qantas Airways Ltd v Christie*, which considered the meaning of an ‘inherent requirements’ provision in the context of a rule adopted by some countries that prohibited from their airspace planes flown by persons who had reached 60 years of age.\(^5^4\) On the appropriate approach to adopt in determining the ‘inherent requirements’ of an employment position Brennan CJ held that:

> [t]he question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.\(^5^5\)

Confirmation of the appropriateness of this approach was provided in *X v The Commonwealth*, a case that addressed whether a soldier with HIV was able to meet the inherent requirements of his employment.\(^5^6\) On the scope of the inherent requirement test McHugh J stated that:

> the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment … [t]hat is because employment is not a mere physical activity in which the employee participates as an automaton. It takes place in a social, legal and economic context. Unstated, but legitimate, employment requirements may stem from this context. … in determining what the inherent requirements of a particular employment are, it is

\(^{54}\) (1998) 193 CLR 280, 292.
\(^{55}\) Ibid 284.
\(^{56}\) (1999) 200 CLR 177, 177.
necessary to take into account the surrounding context of the employment and not merely the physical capability of the employee to perform a task.\textsuperscript{57}

Further support for the possibility that courts would adopt a broad approach to the meaning of ‘inherent requirement’ in religious organisations may also be provided in the actual wording of the provisions used to introduce the inherent requirement test. For example, section 83(4) of the \textit{Equal Opportunity Act 2010} (Vic) required that ‘[t]he nature of the educational institution and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining what is an inherent requirement’ for employment positions at religious schools. If a similar provision were introduced into NSW it would provide support to courts in holding that mission fit is an inherent requirement for a wide range of employment positions at particular religious schools.

In light of these sources it is possible that courts when considering the scope of the inherent requirement provisions could adopt a broad approach to its coverage and consistently uphold claims made by religious schools that mission fit is an inherent requirement of most, if not all, of the employment roles at their schools. However it is unlikely that such a broad approach to the inherent requirement test would be adopted in NSW. The inherent requirement test is an approach that is being strongly promoted by individuals who consider that a narrow approach to the scope of the inherent requirement test should be adopted that would focus exclusively on the technical requirements of most employment

\textsuperscript{57} Ibid 187–9.
positions at religious schools. This can clearly be observed by the examples such individuals use of employment positions for which they consider mission fit should be irrelevant including teachers of non-religious subjects, administrative positions and maintenance staff.\textsuperscript{58}

Even if a narrow approach to the inherent requirement test were not clearly expressed in the legislation introducing the test, it is likely that courts would interpret any ambiguities in such a way that a narrow approach was adopted. Such an outcome is likely as courts when considering how to interpret any ambiguity contained in the inherent requirement provision will be strongly influenced by the support for a narrow approach that will likely be found in various extrinsic materials including the second reading speech of the Minister introducing the inherent requirement test and the various reports of parliamentary inquiries produced before the test was implemented. The Victorian parliamentarian, Jill Hennessy, for example, stated the following about the merits of the inherent requirement test:

where an attribute such as religious adherence was relevant … then discrimination, where it was reasonably required, would be lawful. However, in circumstances where discrimination was not reasonably required it would not be lawful. An example might be that for a gardener working in a religious school it would not be an inherent requirement of the role for them to be an adherent to the particular religious principles or philosophy of that school.\textsuperscript{59}

\textsuperscript{58} See, eg, Rayner, above n 8 and accompanying text.
There is also support in case law in Australia that a narrow approach should be adopted in relation to the religious component of employment positions. Some support for advocates of a narrow approach could be provided by *Walsh v St Vincent de Paul Society Queensland [No 2]*, which held that the Society had discriminated on the ground of religion by requiring a person to be Catholic if they held the position of President.\(^{60}\) The complainant was successful in the discrimination complaint as the employment role was not considered to have had a sufficiently religious content despite it being a leadership position with religious duties in an organisation with spiritual aims. The Tribunal concluded that the Society was unable to rely on an exception for religious bodies and that being Catholic was not a genuine occupational requirement of the employment role.\(^{61}\) The Tribunal held that:

> the fact that a conference president performs some functions (such as leading prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, [does not mean] that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves ‘religious observance or practice’.\(^ {62}\)

Further support for proponents of a narrow approach can be provided by *Hozack v Church of Jesus Christ of Latter Day Saints*.\(^ {63}\) The case concerned the legality of a decision to dismiss a member of the Church working as a receptionist at the Church’s national office after she breached an express term of her employment contract that required her to

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\(^{60}\) [2008] QADT 32, [125]–[127].  
\(^{61}\) Ibid [70]–[78]; [79]–[126].  
\(^{62}\) Ibid [77].  
\(^{63}\) (1997) 79 FCR 441.
comply with the doctrines of the religion. The complainant breached this term of the contract by entering into a sexual relationship while she was separated but not divorced from her spouse, and by refusing to agree with Church leaders that her conduct was inappropriate.

The essential issue for the case was whether dismissing the complainant on the ground of religion was a valid reason connected with ‘the employee's capacity’ or ‘based on the operational requirements of the undertaking’. The court adopted a narrow approach to the meaning of ‘operational requirement’ holding that adherence to the religion’s doctrine could not be considered an operational requirement as the Church employed non-adherents in various employment roles, the role of a receptionist was not ‘a position from which anyone would normally expect any particular leadership or example’, and employment positions such as a receptionist are not intrinsically religious in nature. Similarly the term ‘capacity’ was narrowly construed to refer only to the functional requirements of an employment position with the court stating that ‘Ms Hozack was not a minister of her religion. No one doubted her ability to do her work as a receptionist. Her “capacity” … was not wanting’.

Even if a broad interpretation were adopted resulting in the courts regularly deferring to the claims of religious schools that mission fit is an inherent requirement of all of their employment roles, it is likely that the proponents of an inherent requirement test would intervene and amend the legislation. A failure by proponents to intervene to ensure a stricter

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64 Ibid 442–3.
65 Ibid.
66 Workplace Relations Act 1996 (Cth) s 170DE(1).
67 Hozack v Church of Jesus Christ of Latter Day Saints (1997) 79 FCR 441, 452.
68 Ibid 452–3.
approach was taken would result in the inherent requirement test failing to produce the desired result of limiting the protections to those roles that are considered by the proponents to be substantially religious.

Considering these factors if the inherent requirement test were introduced into NSW it is likely that a strict approach would be adopted in the legislation introduced by Parliament or through the interpretation of any ambiguities in the legislation by the courts. Such an interpretation would damage the religious identity of many schools, impair their ability to provide effective religious education and formation, and undermine the operation of those schools that understand that at least some of their employment positions are religious vocations.

IV THE DIFFICULTIES COURTS WILL FACE IN APPLYING THE INHERENT REQUIREMENT TEST

The adoption of an inherent requirement test for religious schools will likely cause courts to encounter significant difficulties when they attempt to determine the entity responsible for the adverse employment decision, the religion on which the decision was allegedly based, and the relevant ‘doctrines, beliefs or principles’ that should be understood as forming a part of the religion.

A The Allocation of Responsibility for the Employment Decision

A preliminary step for a court in determining the merits of a defence based on the inherent requirement test would be to identify the school and
the persons or bodies that established, directed, controlled or administered the school. In many situations this will not be difficult, but in other cases it may be a highly complex issue for a court to resolve. As Evans notes: ‘complications arise because many religious entities have complex administrative and legal structures, that may not be “bodies” in the legal sense, and which can make it difficult to identify who the respondent should be in any discrimination claim’. 69

A useful example that demonstrates the difficulties that courts can face in determining the relevant entities is OW & OV v Members of the Board of the Wesley Mission Council (‘Wesley Mission’), which concerned a Christian adoption agency’s refusal to provide adoption services to a same-sex couple on the grounds that it would be contrary to their religious beliefs. 70 The case was appealed and reheard multiple times with the courts experiencing great difficulty in determining the appropriate respondents in the matter. 71 The initial finding of the Administrative Decisions Tribunal (ADT) on the appropriate respondents was appealed, on appeal their finding was set aside, and even after the matter returned to the ADT the resolution of the issue of the appropriate respondents still resulted in the ADT devoting half of their judgment to

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69 Carolyn Evans, Legal Aspects of the Protection of Religious Freedom in Australia (2009) [4.4.1].
70 OW & OV v Members of the Board of the Wesley Mission Council [2010] NSWADT 293 [34].
71 OV v OW v QZ [2006] NSW ADT; OV v QZ (No.2) [2008] NSWADT 115; Members of the Board of the Wesley Mission Council v OW and OV [2009] NSWADTAP 5; Members of the Board of the Wesley Mission Council v OV and OW (No 2) [2009] NSWADTAP 57; OW & OV v Members of the Board of the Wesley Mission Council [2010] NSWCA 155; OW & OV v Members of the Board of the Wesley Mission Council [2010] NSWADT 293. For the purposes of the article the cases will be collectively referred to as the ‘Wesley Mission’ case.
the issue.\textsuperscript{72} Admittedly, the determination of how the law should operate in relation to complex organisations is a common task for courts. However, few of the proponents of the inherent requirement test would realise how complex this initial step in applying the test could be if the inherent requirement test were to be introduced.

Once the relevant persons or bodies have been identified another issue may arise in relation to the further requirement that the school be an educational institution conducted in accordance with religious doctrines, beliefs or principles. A complainant may argue that a school cannot rely on the inherent requirement defence as the school is essentially a non-religious commercial enterprise conducted according to secular considerations.

An argument along these lines was successfully made by the complainant in \textit{Cobaw Community Health Services v Christian Youth Camps Ltd} (‘\textit{Cobaw}’), a case that held that that Christian Youth Camps had breached the \textit{Equal Opportunity Act 2010} (Vic) by refusing to provide weekend accommodation to a welfare organisation aimed at helping same-sex attracted youth.\textsuperscript{73}

There were a range of grounds on which Christian Youth Camps Ltd could have been found to be a religious organisation including that it was

\textsuperscript{72} \textit{OV v QZ (No.2)} [2008] NSWADT 115, [6]–[67].

\textsuperscript{73} \textit{Cobaw Community Health Services v Christian Youth Camps Ltd} [2010] VCAT 1613 [211]–[356]. The decision of the Tribunal was affirmed in a majority judgment by the Victorian Supreme Court of Appeal in \textit{Christian Youth Camps Limited v Cobaw Community Health Service Limited} [2014] VSCA 75. Special leave to appeal the matter to the High Court of Australia has been sought by Christian Youth Camps.
established by the Christian Brethren, there were multiple references to it being a Christian organisation in both structure and function in its constitution, the common religion of staff members was Christian Brethren and staff members were required to subscribe to a statement of faith.\textsuperscript{74} Despite these factors, Hampel J held that the respondent was not a body established for religious purposes as religion was rarely, and sometimes not at all, mentioned on their website or on their promotional material and strategic planning documentation.\textsuperscript{75} Furthermore, the accommodation facilities were provided to non-religious groups without any religious supervision or there being any requirement for a religious component to be incorporated into their activities.\textsuperscript{76}

Similarly in \textit{Walsh} the attempt by the St Vincent de Paul Society to rely on a provision that excluded the operation of the \textit{Anti-Discrimination Act 1991} (Qld) for religious bodies was unsuccessful. The Tribunal held that the organisation is:

\begin{quote}

a Society of lay faithful, closely associated with the Catholic Church, and one of its objectives (perhaps its primary objective) is a spiritual one, involving members bearing witness to Christ by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. That is not enough, in my opinion, to make the Society a religious body.\textsuperscript{77}
\end{quote}

\textsuperscript{74} \textit{Cobaw Community Health Services v Christian Youth Camps Ltd} [2010] VCAT 1613 [231]–[255].

\textsuperscript{75} Ibid [240]–[254].

\textsuperscript{76} Ibid [240]–[254]. This finding was confirmed in \textit{Christian Youth Camps Limited v Cobaw Community Health Service Limited} [2014] VSCA 75 [158] (Maxwell P); [441] (Redlich JA).

\textsuperscript{77} \textit{Walsh v St Vincent de Paul Society Queensland [No 2]} [2008] QADT 32, [76].
Although Cobaw and Walsh dealt with the religious identity of organisations providing accommodation and charitable services, a similar argument could be made that in a discrimination action against a particular school that it should not be able to rely on the defence as it is not conducted in accordance with religious doctrines, beliefs or principles. Such an argument could be supported through focusing on the extent, if any, that a school mentions religion on its website, in its promotional material and annual reports, the lack of religious commitment among staff members and students, any decisions made to hire out its facilities to non-religious groups during school vacations, and in the general operation of the school.

While such an argument could be raised in a discrimination complaint against a religious school it is unlikely to be an issue that courts will be required to frequently resolve. For most schools based on a religion there will normally be sufficient religious components incorporated into their structure and operation to satisfy the requirements that the school is conducted in accordance with a religion. Furthermore, if a religious school has become secularised then it is unlikely that the authorities of the religious school would want to rely on the inherent requirement defence for their employment decisions. However, some situations may arise where school authorities of a secularised school do attempt to justify an employment decision that was made on the basis of a relevant attribute through relying upon the protections provided to religious schools. In these cases a further challenge that courts would have to face in applying the inherent requirement test is whether the claim made by the school
authorities that their school is religious can be accepted considering that the school is substantially secular in operation.

B *The Identification of the Religion of the School*

Another essential task for a court applying the inherent requirement test is to determine whether the school is based on a religion, and if so, the religion of the school or other relevant body controlling the school. In most situations this will not be difficult due to the school having a simple organisational structure controlled by a religious organisation that clearly identifies as belonging to a particular religious tradition. For example, courts will have little difficulty in concluding that a school that is part of the Catholic school system is based on Catholicism.

However, for many other schools the courts will face a significantly more difficult task in determining the religion on which the court should hold that the school is based. If a school simply identifies its religion using a broad label — such as Christian or Jewish — then a court will be faced with a dilemma. One approach would be to hold that the school is a generic Christian or Jewish school. However, considering the great diversity of beliefs within the Jewish and Christian religions such an approach would create difficulties for the court when trying to determine the religious ‘doctrines, beliefs or principles’ of the school. Alternatively the court could conduct a more detailed analysis of the school’s origins, history, marketing material, staffing profile, and any other relevant issue to allow the court to situate the school within a particular denomination or branch. Sometimes such a detailed review will overwhelmingly support a particular conclusion, while in other situations there may be conflicting documents and evidence from key witnesses leaving the court
with the difficult task of determining in which particular religious group or sub-group the school should be situated.

This difficulty was confronted in *Wesley Mission* as the Christian organisation attempted to rely on a provision in the *Anti-Discrimination Act 1977* (NSW) that provides a defence to an act of a religious organisation ‘that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion’.

The respondent provided a number of different descriptions of their religion, but the ADT held that the respondent was claiming that their religion was ‘the religion of the Uniting Church as practised by Wesley Mission’. The ADT rejected the respondent’s claim and held that the Act did not recognise Christian denominations and that the relevant religion for the purposes of the Act was Christianity, but that even if the Act did recognise denominations the relevant religion was the ‘religion of the Uniting Church’ and that the further specificity argued for by the respondent could not be accepted.

On appeal the Tribunal’s approach was rejected and the Appeal Panel held that the relevant religion for the purposes of the provision was Wesleyanism, a term the Appeal Panel used to refer to the more precise religious beliefs of the respondent. On a further appeal to the NSW Court of Appeal the use of the label ‘Wesleyanism’ or any religious label was considered inappropriate with their Honours holding that the preferable approach

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78 *Anti-Discrimination Act 1977* (NSW) s 56(d).
79 *OV v QZ (No.2)* [2008] NSWADT 115, [88].
80 Ibid [89]–[121].
81 *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 57, [18], [40].
was to simply focus on the religious commitments of the respondent at the time of the decision to not provide foster care services.\(^{82}\) When the matter was reheard by the ADT detailed evidence was given about the respondent’s religious beliefs at the time of the decision, the influence of the teachings of John Wesley, and the position of the respondent’s religious commitments within the broader Uniting Church.\(^{83}\) The case is a useful example of how the apparently simple task of determining an organisation’s religion can in reality be a complex and time consuming endeavour for the court and parties.

C The Determination of the Doctrines of the Religion

If the inherent requirement test were implemented it would require a court to address a range of theological issues including the validity of the religious school’s claims that a particular doctrine, belief or principle was a part of their religion, whether the religious commitment could validly be held to be an inherent requirement of a particular employment position, and why the particular attribute(s) of the complainant meant that they were unable to conform to that requirement. Requiring courts to engage in this kind of analysis is problematic as judges will often lack the necessary knowledge and training to properly understand the religious sources of authority and the acceptable methods for their interpretation. As the development of expert knowledge of any religion will often take years to develop, a court will be in a position of hearing (often conflicting) lay and expert evidence regarding the nature of the religion

\(^{82}\) *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155, [53]–[55].

\(^{83}\) *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, [18]–[20].
and having to reach a conclusion regarding the actual position of the religion on the basis of a superficial understanding.

Even in the rare situations where judges do have expertise in a particular religious tradition, the correct interpretation of a religious text is often an issue upon which agreement cannot be reached even by theological experts who have devoted their lives to the study of the religion. Expecting judges to provide certainty regarding the actual position of a religion on a particular theological issue is not just inappropriate for a secular body but also unrealistic considering that there may be an ongoing conflict between religious experts on the correct theological position.

The US Court of Appeals for the District of Columbia Circuit addressed the substantial difficulties such cases can create for courts in *EEOC v Catholic University of America*. Particular emphasis was placed on the difficulties the Court would encounter in assessing the conflicting theological evidence regarding the lecturer’s qualifications given by eighteen witnesses in the case including fourteen who were clergy or members of a religious order.\(^\text{84}\) The Court quoted with approval a statement of the trial judge who stated that ‘[t]here are such competing expert opinions as to the quality and, necessarily, the religious substance of [the appellant’s] writings in this record. I find and conclude that it is

\(^{84}\) Ibid 465.
neither reasonably possible nor legally permissible for a lay trier of fact to evaluate these competing opinions on religious subjects’.\textsuperscript{85}

For those religions with a decentralised approach to religious authority where there is a greater focus on individual adherents determining for themselves the correct interpretations of holy texts and other religious sources the task of determining the religion’s teachings on a particular issue will create even greater challenges for the courts. Durie comments on these challenges stating that ‘for some “religions” this will be a big ask … A lot of people will be interested to discover from our courts' rulings what is the doctrinally correct Anglican, Baptist, Unity Church or Lutheran position on gay marriage’.\textsuperscript{86}

A related concern is that courts might use the views of other religious adherents as evidence to reject the validity of the religious understanding of the respondent in a discrimination complaint, especially in situations where the judge considers that they all belong to the same religion. The legitimacy of such a concern is supported by Wesley Mission in relation to the attempt by the adoption agency to rely on the statutory defence for conduct that was ‘necessary to avoid injury to the religious susceptibilities of the adherents of that religion’.\textsuperscript{87} In the case the

\textsuperscript{85} Ibid 465. See also Watson v Jones (1871) 80 US 679, 729, which addressed a contractual and property dispute between adherents of a Presbyterian Church. On the comparative incompetence of secular courts to determine theological issues compared to the relevant religious authorities Justice Miller appropriately stated that different religious bodies ‘each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so’.

\textsuperscript{86} Durie, above n 14.

\textsuperscript{87} Anti-Discrimination Act 1977 (NSW) s 56(d).
Tribunal held that the religion on which the adoption agency was based was Christianity and that due to widespread disagreement within Christianity on the significance of homosexuality the adoption agency could not rely on the protection. The Tribunal further held that even if it were appropriate to regard the religion of the adoption agency as Uniting Church, rather than a generic Christianity, the same result applied due to similar disagreements over the issue of homosexuality occurring within the Uniting Church. In support of this further finding the Tribunal referred to the practice of a different religious group noting that:

a designated agency operated by the Uniting Church (not Wesley Mission) has authorised as ‘authorised carers’ persons who are openly homosexual and placed children in their care. There is no evidence that this has caused injury to the religious susceptibilities of the members of the Uniting Church.

A further difficulty that would arise from the inherent requirement test is that religious groups can change their views on the significance of various attributes. In particular, many Christian denominations underwent profound changes in their social teachings in the twentieth century with many adherents of different denominations rejecting previous theological positions and deciding that according to a correct interpretation of the Bible there are no significant theological or ethical differences between persons on the grounds of attributes such as gender or sexuality.

88 OV v QZ (No.2) [2008] NSWADT 115, [142].
89 Ibid [143].
90 Ibid.
A relevant example to demonstrate the difficulties that a change in theological views can have is a situation where the near universal view of adherents of a particular religious group is that only men can perform religious ceremonies and teach religious education in the schools established by the religion. A female applicant is unhappy about being denied an employment position as a religious teacher at the school, but her complaint is rejected by the courts as the position regarding gender is held to be a belief of the religion. However, some adherents of the religion begin to challenge this belief and are successful in slowly changing the views of the majority of the community. Female applicants periodically launch legal challenges against the position of the school, and courts are faced with the difficult task of determining when the belief can no longer be appropriately held to be a part of the religion. Particular difficulties would be faced in situations where the overwhelming majority of adherents no longer consider gender to be a significant factor, but a minority of believers who continue holding this belief are the ones holding leadership positions and controlling the religious group’s assets. A court would have to resolve the complex issue of deciding whether to favour the majority of the adherents or the minority who have the leadership roles, financial control of the relevant organisations, and the weight of tradition in support of their position.

The reverse of this situation could also occur where a minority of adherents of a religious group believe gender to be significant for religious leadership positions, and over time their view becomes the one held by a majority of adherents. Such a situation is not fanciful as often those religious adherents who have traditional views on issues such as gender and sexuality have a much higher birth rate than those adherents who do not consider the variations in these attributes to be significant.
For example, the more traditional Haredi Jews, a minority in most Jewish communities, typically have a much higher birth rate than other Jewish groups and are rapidly increasing as a percentage of the Jewish population.  

Not only would such a change in a religious community pose similar problems for a court as the previous situation, but it would also pose problems for employees at religious schools whose employment positions could become increasingly insecure as the viewpoint about the significance of gender increases in popularity within the religious community.

The difficulty of deciding the theological position that can properly be attributed to a religion was confronted in *Wesley Mission*. The respondent argued that the relevant doctrine for the religious susceptibilities test was the belief that monogamous heterosexual marriage is both the norm and ideal of the family.  

However, in light of the considerable diversity of opinions regarding sexuality among adherents of Christianity, and more specifically the Uniting Church, the Tribunal held that this could not be held to be a doctrine of the Christian religion, nor could the theological views of the respondent be evidence of the existence of the doctrine as it was not possible to regard the respondent’s views as those of the religion of the Uniting Church.  

This conclusion was overturned on appeal and when the matter was reheard the ADT focused specifically on the religious beliefs of the respondent and held that a valid defence applied to

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92 *OV v QZ (No.2)* [2008] NSWADT 115 [122].
93 Ibid [127]–[132].
the claim as the respondent’s position that they were unable to provide foster care services to a gay couple conformed to a doctrine of their religion.94

Another case that illustrates some of the challenges courts can encounter when they attempt to determine the doctrines of a religion is *Griffin v Catholic Education Office*.95 The case concerned a refusal by the NSW Catholic Education Office of the Archdiocese of Sydney to approve a woman’s application for classification as a teacher in Catholic schools on the basis that her high profile activism for gay rights was contrary to the teachings of the Catholic Church.96 The Commissioner of the Australian Human Rights Commission rejected the Catholic Education Office’s evidence obtained from Catholic experts who supported the theological appropriateness of the employment decision by the NSW Catholic Education Office.97 Instead the Commissioner, after referring to various Catholic documents, held that being a lesbian and an activist against discrimination was not inconsistent with Catholic teaching, that there was no evidence that she was engaging in homosexual activity, and therefore there were no grounds to hold that she did not meet the inherent requirements of a teaching position.98 Further any injury caused to religious adherents by the Catholic Education Office employing Ms

94 *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, [18], [34].
96 Ibid 5.
97 Ibid 16–19.
98 Ibid.
Griffin would not be relevant as ‘it would be not an injury to their religious susceptibilities but an injury to their prejudices’.99

The decision of the Commissioner to reject the submissions of Catholic experts regarding the theological appropriateness of the CEO’s decision indicates some of the problems that can arise when courts are required to determine the doctrines that should be assigned to religions. The Commissioner in the case was clearly familiar with the various official documents of the Catholic Church, and consequently was able to reach an informed conclusion about the merits of the theological submissions. However, his decision to prefer his own understanding of the doctrines of Catholicism and their relevance to the case resulted in the undesirable situation of a secular body rejecting the views of expert theologians of a religion and determining for itself the doctrines that should and should not be ascribed to the religion. The approach adopted by the Commissioner led Evans to describe the case as ‘a startling decision, particularly the notion that a secular body is competent to determine the real teachings of a Church’.100

Another example of the problems that can be encountered when courts attempt to assess whether a particular belief can legitimately be held to belong to a certain religion is the case of Islamic Council of Victoria v Catch the Fire Ministries Inc (Final).101 The case involved a complaint made by the Islamic Council of Victoria that comments made by Pastor Daniel Scot at a seminar organised by Catch the Fire Ministries breached

99 Ibid 22.
100 Evans, above n 71, 161.
the *Racial and Religious Tolerance Act 2001* (Vic).\(^{102}\) The judge in the case decided to evaluate whether particular claims made by Christian pastors about Islam were accurate.\(^{103}\) The attempt by the judge to determine which beliefs could legitimately be held to belong to a particular faith was widely criticised including by some of the judges who heard the matter on the appeal to the Victorian Supreme Court.\(^ {104}\)

D  *The Impact of the Operation of Courts on Religious Organisations*

The requirement under the inherent requirement test for courts to decide on whether a particular religious doctrine can appropriately be ascribed to a religion can significantly undermine the operation of religious organisations by interfering with their freedom to determine for themselves the correct interpretations of their sources of religious authority. The test can further undermine religious organisations due to the pressure that it will place on religious communities to limit the religious freedom of their members. If theological disagreements between members of a religious community are used by courts to justify rejecting a claim by a religious body concerning the inherent requirements of an employment position then it will create a disincentive for the religious community to be tolerant of diversity in religious views among religious adherents.

\(^{102}\) Ibid [33]–[81].

\(^{103}\) Ibid [383]–[395].

\(^{104}\) *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 [36]. For another example of a case involving judges rejecting the understanding of religious adherents that a particular view is a doctrine, belief or principle of their religion, see, *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 [263]–[307].
The inherent requirement test could also encourage religious schools to strengthen their religious identity through employing fewer, if any, employees of different faiths, and to integrate the religion more fully into every employment position to avoid courts relying upon a diverse staff body or a lack of substantial religious content in employment positions as evidence to reject a claim regarding the inherent requirements of employment positions. Consequently, the introduction of the inherent requirement test might, instead of encouraging diversity, tolerance and respect for minorities, actually lead to the opposite result by producing religious schools that have less diversity among their employees and are even more committed to emphasising the particular religious commitments of the school.

A further issue of concern is that a court decision to reject the theological claims of a religious group on the basis that it is part of a broader religious group that disagrees with those claims could create a powerful incentive for the smaller religious group to formally separate from the larger religious group in order to protect its religious freedom. Thus Durie argues that the inherent requirement test:

could have the effect of pressuring denominations to be less diverse in their theology: otherwise they might only receive the 'lowest common denominator' exception, which will be the minimum needed by their least rigorous adherents. The legal processes triggered off by the new Act [introducing an inherent requirement test] could increase pressures on
denominations like the Anglicans or the Uniting Church to divide rather than continue to tolerate their internal theological diversity.\textsuperscript{105}

Considering the various issues that courts will have to address in applying the inherent requirement test religious schools will rarely be in a position where they will be confident that a court will uphold a claim that mission fit is an inherent requirement of a particular employment position. The uncertainty regarding the likely outcome of a court hearing will place pressure on religious schools to adopt a restrictive approach in relation to the employment positions claimed to have a religious component in order to avoid devoting substantial resources to defending a discrimination complaint that may result in a court finding in favour of the complainant. The pressure to adopt a restrictive approach in relation to the inherent requirements of employment positions—with the accompanying loss to the school’s ability to provide effective religious education and formation—will likely be particularly felt by schools managed by smaller religious communities as their limited resources will make them even less able to meet the costs involved in unsuccessfully defending a claim for discrimination. McConnell warns of the dangers of excessive judicial review of the employment decisions of religious organisations arguing that if:

difficult personnel decisions are subject to constant judicial second-guessing, the risks of liability and the financial and morale costs of litigation are sufficient in themselves to substantially erode autonomy

\textsuperscript{105} Durie, above n 14.
rights. The mere threat of litigation may thus be sufficient to chill [the] exercise of legitimate autonomy rights.\textsuperscript{106}

The possibility that providing courts with a role in determining theological issues might have an adverse impact on the operation of religious groups was recognised by the United States Supreme Court in \textit{Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos}.\textsuperscript{107} The case concerned a decision by the managers of a religiously affiliated gymnasium to dismiss an employee on the basis that he did not conform to the requirements of the Mormon religion.\textsuperscript{108} On the potential adverse impact Justices Brennan and Marshall argued that:

\begin{quote}
[w]hile a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation.\textsuperscript{109}
\end{quote}


\textsuperscript{107} \textit{Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos} (1987) 483 US 327.

\textsuperscript{108} Ibid 330, 337.

\textsuperscript{109} Ibid 343–4.
V CONCLUSION

The inherent requirement test has some significant advantages over the general exception approach especially as it appropriately limits protections provided under anti-discrimination legislation to religious schools and only to those religious schools that want protections for their employment decisions. However, the claim that is often made by proponents of the inherent requirement test that a further advantage of the approach is that it appropriately requires religious schools to prove that religious compatibility is an inherent requirement of particular employment position should not be accepted as a significant benefit of the approach.

The inherent requirement test would significantly undermine the freedom of religious schools in NSW to employ individuals who are supportive of their religious commitments. This freedom to hire individuals with good mission fit is of central importance to the operation of some religious schools considering that employment positions at these schools can be regarded as religious vocations by religious groups. Furthermore, all teaching and non-teaching employees at religious schools can play a significant role in determining the religious culture and identity of schools and in influencing the religious commitment of students, staff and other persons involved in the schools.

Requiring courts to determine the validity of a religious school’s claim regarding the religious content of employment positions is problematic. Judges will rarely have an adequate theological understanding of the relevant religion, and, even when they do, the correct interpretation of a religious text is often an issue upon which agreement cannot be reached even by theological experts who have devoted their lives to the study of
the religion. There are further problems that can be caused by the inherent requirement test, especially the pressure that it can place on religious groups to respond to the legal threat by becoming more doctrinally orthodox and even dividing from a larger religious group that permits theological diversity.

It is important to recall that there are many other factors that need to be considered in order to reach an informed conclusion about the merits of the inherent requirement test. However, these other factors would need to be strongly supportive of the merits of the inherent requirement test considering that it appears to suffer from two major flaws.
CYBERBULLYING – WHEN DOES A SCHOOL AUTHORITY’S LIABILITY IN TORT END?

ROBERT PELLETIER *, BORIS HANDEL+, JESSICA KHALIL ** AND TRYON FRANCIS #

ABSTRACT

Cyberbullying in schools is increasing on an alarming rate. The development of the Internet and smartphone technology have increased the potential scope of a school authority’s duty of care for its students. A question frequently asked by educators is “Where does a school authority’s duty of care end in the interconnected, 24/7 world of the Internet?” This paper argues that a duty of care will be owed where the school is in a school/student relationship with its students. That relationship can exist outside the school gates and outside of school hours.

There are no decisions of senior appellate courts that deal with a school authority’s liability for cyberbullying. The authors, therefore, analyse the nature of the relationship to identify the key features that must be present to establish the existence of a duty of care. Three features are identified as critical to the existence of the duty of care outside of the normal school hours. They are the extent to which the school authority controls or ought to control a given

* BA (USyd), LLB (Hons) (USyd), LLM (UNSW), B Theol (MCD), GCUT (UND); Director of the Macarthur Legal Centre; Part-time Lecturer at the School of Law at The University of Notre Dame Australia in Sydney.

+ BEd (Hon), MEd (Cowan), PGCertEdSt (Melb), EdD (Syd); Associate Professor at the School of Education at The University of Notre Dame Australia in Sydney.

** LLB (Hon)/BA (UNDA), GDLP (ANU); Research Assistant at the School of Education at The University of Notre Dame Australia in Sydney; Admitted as Solicitor of the Supreme Court of NSW.

# BSc(Hons)/BEd (W. Aust), LLB (UNDA), GDLP (ANU); Lecturer at the School of Education at The University of Notre Dame Australia in Sydney.
situation, the extent to which it has encouraged students to participate in a particular activity and the extent to which a school authority is aware or ought to be aware of risks associated with the relevant activity of its students.

I  INTRODUCTION

At 5am on 5 February 2010, 17 year old Allem Halkic ended his life by jumping from Melbourne’s West Gate Bridge. He had been receiving threatening text messages from his friend Shane Philip Gerada. Gearda pleaded guilty to stalking and was placed on an 18 month Community Based Order. He reflected on what had happened saying: ‘I did not realise the effect of my words’.

Welcome to the terrifying reality of cyberbullying. Cyberbullying is the deliberate, repeated and hostile use of information and communication technologies that seeks to intimidate, control, manipulate, put down or humiliate a victim. It extends from situations of petty nastiness or cruelty through to identity theft, harassment, stalking, and threats of physical harm.

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3 Kelly Tallon et al, ‘New Voices / New Laws : school-age young people in New South Wales speak out about the criminal laws that apply to their online behaviour’ (Research Report, National Children’s and Youth Law Centre and Legal Aid NSW, November 2012) 14-5.
In practical terms, today’s school bullies participate in all the traditional physical and psychological schoolyard bullying that generations of school kids have indulged in or struggled to survive. But the advent of mobile phones and the World Wide Web have increased their arsenal: school bullies create wikis and blogs; circulate emails, post images, message texts and images, upload, download and network unsociably to harm their victims. In short, they use all the tools that are their inheritance as internet natives to hurt and humiliate their victims or, simply, to have fun at others’ expense. This is the brave new world of cyberbullying where the bully has the advantage of anonymity. With a few keystrokes the harm is done. From the bully’s perspective, it is a bloodless sport. The online bully cannot see the bleeding nose or the despair in the eye of his or her victim.

As with all bullying, there is a perceived or actual power imbalance. The victim’s perception is that he or she is less powerful than the bully. In traditional bullying, the imbalance may be caused by the bully’s greater strength. In cyberbullying the relative physical strength of those involved

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is relevant. The imbalance may be caused by the bully’s greater technological skills.\(^7\)

Cyberbullying does not recognise geographical boundaries: school gates cannot keep it out and the victim’s home is no refuge. Once posted to the internet, cyberbullying is up and running 24/7.\(^8\) Perhaps, most disturbingly, once on the internet, the hurtful post or the humiliating image has indefinite virtual life and the potential audience is exponential – especially if the bullying post, video or image goes viral.\(^9\) It is little wonder cyberbullying is causing school authorities, teachers, parents and guardians increasing concern and despair.

\section*{II \ THE ELEMENTS OF NEGLIGENCE}

How are school authorities supposed to react to the continually evolving world of bullying on the internet? Is it possible to draw clear lines of legal responsibility? Where and when, for example, does a school’s duty of care to its students start and finish?

A school authority’s liability in tort is based on the duty of care it owes to those who have a relationship with it. It is the nature of the relationship that determines the extent and scope of the duty. A school authority, for example, owes a duty of care to its students for situations that can be said to be part of the duty relationship of school and student.\(^10\) However, the

\begin{footnotesize}
\begin{enumerate}
\item Srivastava and Boey, above n 6, 305.
\item Marilyn Campbell, Des Butler and Sally Kift, 'School's Duty to Provide a Safe Learning Environment: Does this Include Cyberbullying,' (2008) 13 \textit{Australian and New Zealand Journal of Law and Education} 21, 22.
\item Phillip T Slee and David C Ford, 'Bullying is a Serious Issue - it is a Crime' (1999) 4 \textit{Australia & New Zealand Journal of Law & Education} 23, 33; \textit{The Commonwealth of Australia v Introvigne} (1981) 150 CLR 258.
\end{enumerate}
\end{footnotesize}
following discussion indicates that the existence of that relationship is not necessarily limited to when the student is on school premises during school hours or at a school event.\footnote{Geyer v Downs (1977) 138 CLR 91; Commonwealth v Introvigne (1982) 150 CLR 258; and Reynolds v Haines (SC(NSW) Common Law Division, McLaughlin M, 27 October 1993, unreported); Katherine A. Lindsay, ‘After the Bell: School Authorities’ Duty of Care to Pupils After School Hours Case Note’ (1997) 2 Australia & New Zealand Journal of Law & Education 101.}

Of course, the existence of a duty of care is a necessary but not a sufficient condition of liability in negligence. Having established that a duty of care exists, a court must establish that:

1. the school authority breached its duty to the student;
2. the breach caused harm to the student; and
3. the harm was not too remote\footnote{RP Balkin and JLR Davis, Law of Torts (LexisNexis Butterworths, 5th ed, 2013) 192.} to find that a school authority is liable to the student in negligence. A close reading of the cases indicates that the questions of the existence of the duty of care, the breach, causation and remoteness are very closely related and considerations of them by the Courts tend to blur.\footnote{Prue Vines, Peter Handford and Carol Harlow, ‘Duty of Care’ in Carolyn Sappideen and Prue Vines (eds), Fleming’s The Law of Torts (Lawbook, 2011), 151, 152.}

However, the precondition of the school authority being legally responsible for the effects of cyberbullying only arise once the existence of a duty of care has been established. Therefore, focus should be placed on understanding the factors that limit a school authority’s duty of care in
the minefield created by the internet. In particular focus should be placed on the existence and scope of the duty of care owed by a school authority for events that occur outside of school hours and away for school premises. Causation and remoteness are beyond the scope of this article.

There has not yet been a decision by an appellate court in Australia on the duty of school authorities for cyberbullying. Therefore, we have to go back to basic principles to establish the limits of a school authority’s liability and apply those principles to cyberbullying. We also draw on analogies from the law of workers’ compensation to see where the Courts have found that an employment relationship exists – outside of the work environment and outside of work hours. The use of these analogies is, this paper argues, justified because the rapidly evolving nature of the employment relationship has raised very similar issues – albeit in a different context to the school authority/student relationship.

The authors’ conclusion is that there is no hard and fast guide to where the duty relationship starts and finishes outside the school gates and outside of school hours. There are, however, factors that increase the risk that a school authority may be held responsible that can be distilled from the cases. The risk that a school authority owes a duty of care will be greater where the school authority:

- has knowledge or ought to have knowledge that a risk of harm to its students exist;
- has control or ought to have control of a particular situation; and

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14 Campbell, Butler and Kift, above n 10, 25.


- has induced or encouraged its students to take part in a particular activity.

Critical to the law’s thinking in relation to the existence of a duty of care, is the awareness that students are particularly vulnerable; given their age and inexperience, students are prone to mischief. As a result they depend on the school authority to provide a safe environment for the student to work and socialize in when the relationship of student and school exists.

A  Back to basic: The school authority’s duty of care

In this ever-morphing environment, it is not possible to draw absolutely clear lines of legal responsibility. The duty of care relationship, which is the foundation of liability in negligence, arises in situations where the relationship of school and student exist.\(^\text{15}\) In particular, that relationship exists in situations where the school has control or ought to be exercising control to ensure that its students’ learning and social environment are safe.\(^\text{16}\) Or, to look at it from the students’ or their parents/‘guardians’ perspective, a duty will arise in situations where it is legitimate for the student or his or her parents/guardians to depend on the school to provide a safe learning and social environment – regardless of whether the relevant activity takes physically place at the school or on the internet. The greater the obligation of the school authority to control a given


situation, the more likely it is that a court will find that a duty of care exists.\textsuperscript{17}

In the older duty of care cases there is often a physical connection between the school and the student: when a school opens its gates to students,\textsuperscript{18} takes them on excursions or stages an event for its students,\textsuperscript{19} the cases make clear that the school authority owes a duty of care to its students. The internet and mobile phones, however, potentially extend the school/student relationship way beyond the physical boundaries of a school or the location of an excursion and way outside of school hours.

While many cases of cyberbullying lack this physical connection, there are useful principles that can be drawn from the older school negligence cases that shed light on the extent on the limits of liability of school authorities for cyberbullying in negligence. The duty of a school authority to provide a safe environment for its students has been described as a ‘personal duty’ that cannot be delegated to another person or entity.\textsuperscript{20} This means that, even if the school authority engages another person or entity to discharge its duties, it is legally responsible for the consequences of that other person or entity’s negligence even if it has little, if any, control, over how that other person or entity carries out the work. It still has a duty to ensure that a safe environment is provided to its students.\textsuperscript{21}

The non-delegable nature of the duty arises because of the vulnerability

\textsuperscript{17} Ibid.
\textsuperscript{18} \textit{Commonwealth v Introvigne} (1982) 150 CLR 258.
\textsuperscript{20} Campbell, Butler and Kift, above n 10, 25.
of the students and their dependence on the school authority to ensure that a safe environment is provided.\textsuperscript{22}

A school authority can be directly responsible for its own failure to provide a safe environment for its students.\textsuperscript{23} Examples of the potential for direct liability occurs when a school authority employs an unsuitable teacher without carrying out proper reference checking, fails to supervise its staff properly or fails to ensure that its policies on internet use and appropriate behaviour are complied with and a student is harmed as a result.\textsuperscript{24}

In addition to the personal responsibility of a school authority, it can be legally responsible for the negligence of its staff provided that the negligence occurred in the course of the staff member’s employment. In \textit{Ramsay v Larsen},\textsuperscript{25} Kitto J said that:

\begin{quote}
...a schoolmaster's power of reasonable chastisement exists, at least under a system of compulsory education, not by virtue of a delegation by the parent at all, but by virtue of the nature of the relationship of schoolmaster and pupil and the necessity inherent in that relationship of maintaining order in and about the school.\textsuperscript{26}
\end{quote}

His Honour went on to explain that a school authority is liable for the failure of its staff to take due care of a student. This is the notion of

\begin{footnotes}
\item[22] \textit{New South Wales v Lepore} [2003] HCA 4, [100] (Gaudron J).
\item[25] \textit{Ramsay v Larsen} [1964] HCA 40.
\item[26] Ibid [7].
\end{footnotes}
vicarious liability.\textsuperscript{27} Because of this principle, a school authority may be liable for those whom it employs to care for its students.\textsuperscript{28} His Honour’s focus is on the nature of the relationship of schoolmaster and pupil and the school master’s obligation to maintain order as the heart of the duty relationship.

Justice Taylor emphasized the importance of the student becoming subject to the ‘care and authority of masters’.\textsuperscript{29}

As argued in the rest of this paper, later cases are consistent and that the duty of care arises when the relationship of teacher/school authority and student exists. Authority is based on control. So, it can be said, in situations where a school authority exercises or should exercise control based on their authority – a duty of care will arise.

Students’ immaturity and their talent for getting up to no good are key considerations. According to Mason J, children’s talent for trouble imposes a ‘special responsibility on a school authority to care for their safety, one that goes beyond a mere vicarious liability for the acts and omissions of its servants’.\textsuperscript{30} The same point was made by Murphy J: ‘The standard of care must take into account the well-known mischievous propensities of children, especially in relation to attractions and lures with obvious or latent hazards.’\textsuperscript{31}

\textsuperscript{27} Martin Davies and Ian Malkin, \textit{Torts} (LexisNexis Butterworths, 6th ed, 2012) 633.
\textsuperscript{28} \textit{Ramsay v Larsen} [1964] HCA 40, [10].
\textsuperscript{29} Ibid [38].
\textsuperscript{31} Ibid [2].
The leading Australian case on the duty of care owed by a school to its students is *Geyer v Downs*. It is clear from that decision that the school can create the relationship irrespective of whether or not a particular activity occurred in school hours. Justice Stephen pointed out that the duty owed by a teacher (or a school authority) to a pupil arises from the relationship between them. It is not determined by school hours but by reference to periods when the student is entrusted to the school ‘for the purpose of his education.’ His Honour went on to say that:

> The temporal ambit of the duty will, therefore, depend not at all upon the schoolmaster's ability, however derived, effectively to perform the duty but, rather, upon whether the particular circumstances of the occasion in question reveal that the relationship of schoolmaster and pupil was or was not then in existence. If it was, the duty will apply. It will be for the schoolmaster and those standing behind him to cut their coats according to the cloth, not assuming the relationship when unable to perform the duty which goes with it.

What is critical is that the duty goes with the relationship and that is not dependent on the negligence occurring in school hours.

Significantly, Stephen J also emphasised that the duty arises when the student is ‘beyond the control and protection of his parent.’ His Honour’s warning to schools that they should not extend their duty of

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32 *Geyer v Downs* [1977] HCA 64.
34 *Geyer v Downs* [1977] HCA 64, [6].
care to relationship to situations where they are unable to provide a safe environment is excellent advice.

The scary reality is that, in the messy world of cyberbullying, students, as internet natives, may be beyond the control of his or her parents and his or her school.

Justices Murphy and Aicken, in their joint judgment, made a vital point that the nature and extent of the duty of care relationship is, in large part, determined by the culture in which the relationship arises:

... What may be a useful guide [from the nineteenth century cases on the nature and extent of the duty of care] applicable to a village or a small country school cannot be of direct assistance in the case of a large city or suburban school with some hundreds of children attending it. 36

In other words, the social context in which the schooling is carried out plays a key role in determining the extent and scope of the duty of care. Consequently, the nature of the duty changes as the cultural context changes.

This has obvious relevance to nature and extent of a school authority’s potential liability in the internet and smart phone age. The key point being that a school authority’s duty or care maybe extended to include maintaining proper supervision, having appropriate policies and training of any website, blog, wiki or other internet wonderland that it created or is responsible for.

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36 *Geyer v Downs* [1977] HCA 64, [18].
If the duty is not dependent on the negligence occurring in school hours, it is also clear that the existence of the duty is not dependent on the negligence occurring in school premises or on a school sponsored event.

In 1996, the New South Wales Court of Appeal in *Trustees of the Roman Catholic Church for the Diocese of Bathurst v Koffman and anor* considered the liability of a school authority for injuries sustained by a 12 year old student who, after his school day had finished, walked 300 to 400 meters to the bus stop.37 While waiting for the bus, students from a state high school adjoining the bus stop, harassed and threw objects at the plaintiff injuring him in the eye. Building on *Geyer v Downs*, Mahoney P, dissenting, was prepared to extent the school’s duty of care beyond the school boundaries:

… the obligation of the school to do things for the safety of the pupil, will require to be done will depend upon the circumstances. Thus, if it is plain to the school that, immediately outside the school premises, there is a busy and therefore dangerous road, the school will ordinarily have an obligation to shepherd pupils of a young age across the road. But if, in the course of walking from school to home, the student has reason to cross a busy road two kilometres from the school, it does not follow that the obligation of the school to take precautions for the safety of the student will involve that it shepherd the student across the road.38

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The fact that the school has the capacity to influence what happens ‘immediately outside the school premises.’\(^{39}\) The further the student is from the school and therefore the more outside the school’s control, the less likely it is that a duty of care will arise. However, the distance may not rule out the existence of a duty of care where the school has particular knowledge of risks:

I do not mean by this that a school may not have some obligations in respect of pupil safety even two kilometres from the school. Thus, if the school was made aware that, at that place, the student was habitually molested, it might arguably have an obligation, inter alia, to draw that matter to the attention of the parents, the police or others. I have referred to these examples to illustrate that what the obligation to take precautions in respect of a pupil's safety will require the school to do will vary according to the circumstances of time, place and otherwise.\(^{40}\)

Mahoney P’s analysis blends the questions of whether or not a duty of care exists with the question of what that duty requires. Once the school is aware of risk of a particularly dangerous situation immediately outside the school premises, it probably has obligations to supervise students in that unsafe situation. Indeed, according to Justice Mahoney, it is arguable that the school may have obligations that extend beyond the immediate vicinity of the school if it is aware of a particular risk.

Although Mahoney P dissented, in broad terms, his view that a school’s duty is not limited by the school gates, was accepted by the rest of the

\(^{39}\) Ibid.

\(^{40}\) Ibid.
Court of Appeal. Justice Sheller was of the view that the nature and extent of the duty is not dependent on the student being on school grounds:

I do not think the relationship of teacher and pupil begins each day when the pupil enters the school ground and terminates when the pupil leaves the school ground. Undoubtedly however a particular duty of care arises because of the pre-existing relationship.

In my opinion the extent and nature of the duty of the teacher to the pupil is dictated by the particular circumstances. I do not think its extent is necessarily measured or limited by the circumstance that the final bell for the day has rung and the pupil has walked out the school gate. 41

At its broadest, Koffman suggests that, if teachers are aware of a risk to their students, there may be a duty to take preventative steps or warn parents of the risk, even when it arises outside school grounds and outside of school hours.

This has obvious implications for life on the internet where the school may be aware that a particular student has either been at risk of bullying or been a perpetrator of internet bullying. The school may also be aware that inappropriate posts or images are being placed on sites that it is responsible for. The knowledge of the risk in those circumstances is more

likely to give rise to the existence of a duty on the school to mitigate or eliminate any risks to its students in those situations.

Priestly JA agreed that a duty of care existed. For his Honour, the existence of a duty of care depends on the particular circumstances of the situation rather than the limit of school hours.42

However, there are limits to this extended duty. As Justice Shellar pointed out, an employer is not liable to ensure that an employee’s bathroom floor is not slippery.43 Similarly, the school’s duty is limited in scope and depends on the circumstances. His Honour gave the following example:

The circumstances of a small country high school located beside a quiet street and a primary school located on a busy highway in a big city may be contrasted. In the first case older children leave the environs of the school in comparative safety. In the second small children emerge from the school into a situation of immediate danger.44

The consistent emphasis on the importance of the particular circumstances of the school and the student is a consistent theme in these judgments. They echo the stress placed by Murphy and Aicken JJ on cultural context in Geyer v Downs to understand the nature of the duty of care relationship.45

In 2001, the decision of the New South Wales Court of Appeal in Graham v The State of New South Wales demonstrated that there are

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42 Ibid 63593.
43 Ibid 63597.
44 Ibid.
45 Geyer v Downs [1977] HCA 64, [30].
limits to the duty of care. The Court considered the case of a young High School student with poor eye sight and balance. This student was severely injured crossing a busy road on her way home from High School.

Generally her mother would walk her home. Her mother asked the school to provide the student with transport if she was unavailable. The school declined to do so and notified the mother that it would not provide transport. On the day of the accident, the plaintiff’s mother did not walk home with the plaintiff. The plaintiff was injured crossing the busy road on her way home. She sued the State of New South Wales as the relevant school authority for her loss. She relied on Koffman to argue that the school owed a duty to transport her home if her mother was not available to walk her home.

The Court of Appeal dismissed the appeal. According to Meager JA:

No doubt the school had a duty to take reasonable steps to protect the child whilst it was at school, and this it apparently did. There may also have been a duty to inform Miss Graham's parents that neither taxi nor bus was running, and this it certainly did. There is no duty, in my opinion, to go further to take precautions to escort a pupil like Miss Graham to her home. Except in exceptional circumstances the master/pupil relationship ceases to exist at the school boundary.  

48 Ibid [5].
Relevant factors where the plaintiff’s age, she was a twelve year old High School student, the school was aware of her difficulties but had let the parents know that it could not provide transport. Mason P said that:

It doesn't really do anything, on the facts of this case, to assist the plaintiff in showing that the considered decision not to make available this added form of protection was one which was unreasonable in the circumstances.⁴⁹

The important point for schools to take from this case is that they need to be very clear about what they will take responsibility for and what they will not. The Court made clear that it is only in rare cases that the duty of care will extend beyond the school gate.

B  Duty of Care and scope of the duty must be considered together

It is unreal to isolate the question of the existence of the duty of care from the other elements that must be established in a negligence claim. In Roads and Traffic Authority of New South Wales v Dederer,⁵⁰ Gummow J observed that:

...duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden.

⁴⁹  Ibid [9].
⁵⁰  Roads and Traffic Authority of New South Wales v Dederer [2007] HCA 42.
Regarding the first point, a duty of care involves a particular and defined legal obligation arising out of a relationship between an ascertained defendant (or class of defendants) and an ascertained plaintiff (or class of plaintiffs).51

The existence of the duty of care always has a particular scope that is made up of a number of “particular and defined” legal obligations that are summarised in the obligation to take reasonable care. This is what we saw in Koffman where each judge of the Court of Appeal analysed the existence and scope of the duty of care owed by the School authority together.

So, for example, the scope of the duty that is owed to a primary school child will be different from the duty owed to a High School student. As the student gets older, the demands of the duty of care change. Thus in Camkin v Bishop and another Goddard LJ held that:

Boys of 14 and 16 at a public school are not to be treated as if they were infants at creches, and no headmaster is obliged to arrange for constant and perpetual watching out of school hours.52

Justice Steytler in the West Australian Supreme Court cited this passage from Goddard LJ in Gugiatti v Servite College Council Inc.53 His Honour, giving the Court’s judgment, held that the School authority was

51 Ibid [42]–[44].
not negligent in was not reasonable to expect one of its teachers preventing a sixteen year old on a school leadership camp from jumping over a modest creek and thereby injuring himself.  

1 Employment analogies

Analogies can be drawn from the law of employment where the law has had a similar struggle to keep abreast of rapid developments in working relationships. Caution needs to be applied in working with these analogies because the cases we consider involves adults – who are not as vulnerable as children and can, therefore, be expected to be more responsible for their own safety. They are also concerned with the interpretation of the relationship based on construction of relevant statutes as opposed to the common law notion of a duty of care.

Bearing those very important caveats in mind, the legal issues of where does the employment relationship end and, consequently, what are the limits of an employer’s liability, are very similar to that posed by the school authority/student relationship. These issues have been considered in the context of workers' compensation cases.

In Hatzimanolis v ANI Corp Limited, the High Court considered whether an injury sustained by a worker on a sightseeing journey on his day off was sustained in the course of his employment for the purpose of section 9 of the Workers Compensation Act 1987 (NSW). According to the joint judgment of Mason CJ, Deane, Dawson, Toohey and McHugh JJ, an activity is within the course of employment even though it is outside a period of actual work if ‘the employer, expressly or impliedly,

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54 Ibid [24].
has induced or encouraged the employee to spend the interval or interlude at a particular place or in a particular way.\textsuperscript{56}

Their Honours noted an injury sustained in an interval between periods of actual work (eg, during a lunch break) is more likely to be interpreted as occurring in the course of employment than an injury occurring between two discrete periods of work.\textsuperscript{57}

The continued relevance of this test was considered by the High Court in \textit{Comcare v PVYW (PVYW)}.\textsuperscript{58} The respondent in that case was an employee of a Commonwealth Government agency. She provided training at a regional office of the agency. She stayed overnight in a hotel and had sexual intercourse with an acquaintance in the hotel room. Whilst making love, either she or her acquaintance, pulled a light fitting from its mount striking the respondent on the head – causing her physical injury and psychological harm. She argued that the injury occurred in the course of her employment under the Commonwealth’s \textit{Safety, Rehabilitation and Compensation Act 1988}.\textsuperscript{59}

The High Court reiterated the \textit{Hatzimanolis} test so that the employer is liable provided the employee is ‘… doing the very thing that the employer encouraged the employee to do, when the injury occurs.’\textsuperscript{60} Merely requiring an employee to be present at a place is insufficient.

\textsuperscript{56} Ibid [16].
\textsuperscript{57} Ibid [15].
\textsuperscript{58} \textit{Comcare v PVYW (PVYW)} [2013] HCA 41.
\textsuperscript{59} Section 5A(1)(b).
\textsuperscript{60} PVYW [35]; see Eric L Windholz, ‘Comcare v PVYW: Are Injuries Sustained While Having Sex on a Business Trip Compensable’ (2014) 36(2) \textit{Sydney Law Review} 345.
Requiring the respondent to be present at a regional centre to conduct training where this necessitated her stay overnight did not attract liability if the employer had not also expressly or impliedly encouraged or induced the employee to engage in the very activity that caused the injury. Consequently, the injury did not occur in the course of the respondent’s employment.\textsuperscript{61}

Applying this to a school authority, this paper argues that if the school authority has expressly or impliedly encouraged or induced a student to engage in the online activity that caused the injury, this may be taken as an indication of an assumption of legal responsibility by the school. In this context, the school should be confident that the activity it encourages is risk free or, at the very least, it has done what is reasonably required to mitigate that risk by, for example, properly educating its students, having clear policies in place or moderating the activity.

Of course, the question is always one of degree and what is appropriate will be determined by the nature of the activity and the student’s involvement in it. If the school is aware of particular risks of the online activity it is encouraging, then it should mitigate those risks or cease encouraging its students to take part in the activity.

\textsuperscript{61} Ibid [46]–[49]. Eric Windholz in a very useful case note points out the significance of the different statutory provisions giving rise to workers’ compensation liability in different Australian jurisdictions (see ‘Comcare v PVYW: Are Injuries Sustained While Having Sec on a Business Trip Compensable’ (2014) 36(2) \textit{Sydney Law Review} 345, 347.
C The duty is to do what is reasonable - breach of the Duty of Care

Having said that, schools are not required to eliminate risk altogether.\(^{62}\) The law does not impose strict liability whereby a school authority may be liable for damage sustained by a plaintiff regardless of whether or not it acted reasonably.

The decision of the High Court in *Roman Catholic Church v Hadba*,\(^ {63}\) for example, makes clear that the school authority is not obliged to provide constant supervision in all possible places of risk. According to the joint judgment:

Nor is it reasonable to have a system in which children are observed during particular activities for every single moment of time - it is damaging to teacher-pupil relationships by removing even the slightest element of trust; it is likely to retard the development of responsibility in children, and it is likely to call for a great increase in the number of supervising teachers and in the costs of providing them.\(^ {64}\)

In determining what is reasonable, and thereby concluding whether or not the school authority has breached the duty of care it owes to students, in New South Wales the Court must apply section 5B of the *Civil Liability Act, 2002* (NSW). This section states that:

\(^{63}\) *Roman Catholic Church v Hadba* [2005] HCA 31.
\(^{64}\) Ibid [25]–[26].
(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm. 65

According to Ipp J, the lead designer of the wave of tort reform that hit Australia in 2002, 66 this section was designed to embody the common law principles that come from Lord Reid in Wagon Mound No 2 [1967] AC 388:

If a real risk is something that would occur to the mind of a reasonable man in the position of the defendant’s servant and

65 Civil Liability Act 2002 (NSW) s 5B.
which he would not brush aside as far-fetched, and if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involving no disadvantage, and required no expense.\textsuperscript{67}

Lord Reid’s dicta was picked up by Mason CJ in \textit{Wyong Shire Council v Shirt}:

\ldots when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful.\textsuperscript{68}

Having determined that a duty of care exists, Mason CJ explained that:

\ldots it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man’s response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant’s position.\textsuperscript{69}

\textsuperscript{67} \textit{Wagon Mound No 2} [1967] AC 388, 643-4.
\textsuperscript{68} \textit{Wyong Shire Council v Shirt} [1980] HCA 12, [13].
\textsuperscript{69} Ibid [14].
This has come to be known as the calculus of negligence.\textsuperscript{70} Essentially, school authorities have to carry out a risk assessment – a process with which we are all familiar from work health and safety requirements. The measure against which a school authority’s performance is judged is what a reasonable school authority would do in the circumstances.

Therefore, the existence of a duty of care owed by a school authority to a student does not require perfection; it does not require the school authority to prevent injury to its students at all costs but it does require the school to take and enforce steps that are reasonable.

An excellent decision on how section 5B is applied is the decision of the New South Wales Court of Appeal in \textit{State of New South Wales v Mikhael}.\textsuperscript{71} The plaintiff in that case was the victim of a serious assault by T, a fellow year 8 student, at a High School operated by the State of New South Wales. The plaintiff sustained brain damage as a result of the assault by T following an argument in a class.

The plaintiff alleged that his injury had been caused by the negligence of the school in failing to warn relevant teachers that T had a propensity for violence. The plaintiff alleged that the failure of the school to implement its own policy of informing all relevant teachers of potential risks had been the cause of this assault and his injuries. Specifically, the plaintiff argued that the school failed to take reasonable care for him in circumstances where early male teenage students are known to be


\textsuperscript{71} \textit{State of New South Wales v Mikhael} [2012] NSWCA 338.
potentially violent and T, in particular, was known to be potentially violent.\textsuperscript{72}

Justice Beazley gave the decision of the Court. She emphasised the importance of foreseeability of risk of injury.\textsuperscript{73} Applying Mason CJ’s test of foreseeability from Wyong Shire Council, even a risk that is “quite unlikely” can be foreseeable provided it is not far-fetched or fanciful.\textsuperscript{74} Given that T had carried out a serious assault only some weeks before he assaulted the plaintiff, the risk of injury was clearly foreseeable.\textsuperscript{75} Her Honour found the risk of harm was not insignificant and were such a reasonable person in the school’s position would have taken precautions to deal with the risk.

Having satisfied the conditions set out in section 5B(1), her Honour applied the factors set out in sub-section (2). These factors are to be applied to “the extent that they are relevant”.\textsuperscript{76} The School had come to the conclusion that there was a low risk of T reoffending. However, if he did reoffend, the potential consequences could be and were very serious – they were certainly not potentially insignificant such that no precautions were necessary.\textsuperscript{77}

The Court must then consider the burden of taking precautions. As her Honour points out, the burden is not to be analysed solely in economic terms. In this case, the obvious precaution was proper communication to

\textsuperscript{72} New South Wales v Mikhael [2012] NSWCA 338, [70].
\textsuperscript{73} Ibid [76].
\textsuperscript{74} Ibid.
\textsuperscript{75} Ibid [77].
\textsuperscript{76} Ibid [80].
\textsuperscript{77} Ibid [81].
relevant teachers who might have responsibility for T of his propensity for violence. To calculate the burden, it is legitimate to take into account “factors such as time or distance or communication”.\textsuperscript{78} Weighing the inconvenience of effective communication against T’s right to privacy, Justice Beazley said of this consideration that:

It was the privacy concerns that had dictated that part of the school's procedures which created the risk of harm. Privacy concerns were appropriate and relevant considerations. However, a different or more sensitively calibrated privacy policy, having regard to particular circumstances, was required, so as to balance the concerns of the physical safety and emotional security of all students at the school.\textsuperscript{79}

Given the serious risk of harm, the privacy policy had to be dealt with in a more considered manner. Ultimately, the potential risk was of such seriousness, that it was vital that the school should have ensured that all relevant staff members were informed of the risks created by T’s propensity for violence.

Knowing these risks of injury exist that go beyond far-fetched or fanciful risks, schools must carry out a risk assessment – considering all the factors set out in section 5B. Having carried out that assessment it must do what a reasonable school authority would do in the circumstances. In carrying out that risk assessment, as discussed earlier, schools must be aware of the propensity of their students for mischief and, as Mikhael illustrates, if the school is aware of the potential risks created by particular students, it must manage those risks effectively. So the risk

\textsuperscript{78} Ibid [82].
\textsuperscript{79} Ibid [83].
assessment that schools are required to do must be done in full awareness of Murphy’s law that what can go wrong probably will go wrong - especially when dealing with students.

III CONCLUSION

In summary, a duty of care will only arise in circumstances where the relationship of school and student or teacher and student arises. This relationship exists pre-eminently on school grounds when the school is open for business. However, as Koffman illustrates, the duty can arise outside the school grounds and outside of school hours – especially in situations where the school is on notice of the risks or ought to be on notice.

The duty and this teacher/student relationship arises in situations where the school has control and the students legitimately depend on the school, its delegates, teachers or staff to be looking after the student. The Courts will be reluctant to hold that a duty exists in situations where the school has no control and the student is under the supervision of others. If for example, the student is in his or her home, the expectation will be that the parents or guardians of the student will have responsibility.

The problem is, as discussed earlier, that the internet and smart phones do not respect front doors, or other boundaries. Lines of control and responsibility become blurred.

Where the school clearly exercises control, it is clear there is a duty present. For example, If the school authority is responsible for a website, a blog, wiki or other social networking site, it will be expected to
establish proper principles for the use of the internet, to educate its staff and students as to what is appropriate and what the limits are and to supervise what occurs on those sites.

Similarly, schools will be expected to have clear and effective policies about the use of smart phones, tablets and other internet devices while students are under the control of the school. They will be expected to police those policies effectively.

Where they are on notice that a particular student is vulnerable to bullying, they need to be alert to the needs of that student. Similarly, when a school is aware of the risks created by a particular student, it needs to take steps to mitigate or eliminate that risk if it is anything more than a far-fetched or fanciful one.

The Courts have consistently drawn attention to the need of school authorities to have regard to students’ vulnerability and their propensity for mischief. They also need to bear in mind that the young can be ignorant of the effect of what they do on others.

Bearing in mind that children are immature, school authorities should take particular care in relation to any online activities they encourage students to take part. We have seen in the employment cases, that Courts have been inclined to extend an employer’s responsibility to include situations that it has encouraged an employee to take part. There is no reason why the same kind of reasoning could not be applied to school authorities and students.

The good news for school authorities is that its duty does not require it to moderate sites 24/7 or to wrap its students in internet free bubble wrap. A school can only do what is reasonable in the circumstances. This does not
mean that a school should be content with doing what it has always done or what looks okay. Schools should not be content with drafting internet policies and allowing them to gather dust on the IT shelves of the library or store them in some musty directory that no one ever refers to.

Because children are immature and therefore vulnerable, school authorities owe a personal duty to their students. This duty arises because the student is dependent on the school to deliver the safe environment. So, while the requirements of the duty do not extend to creating a risk free haven, school authorities are best advised to discharge their duties by looking for and adopting best practice in their supervision of their own online facilities and in what they allow students to get up to using their own devices on school property.

Young people do silly things – a bit like adults really. They have a propensity for mischief. The young man, Shane Gereada, who sent the menacing text messages to his friend, Allem Halkic, did not realise the consequences of his words and was, no doubt, appalled when they led to his friend taking his own life. School authorities need to educate those in their care about good internet citizenship and always be aware and watchful for the risk of harm that exists in this brave new world. With the tragic increase in youth suicides, the need for proper care by school authorities could never have been be greater.
THE TASMANIAN DAM CASE AND SETTING ASIDE PRIVATE LAND FOR ENVIRONMENTAL PROTECTION: WHO SHOULD BEAR THE COST?

GLEN MCLEOD

ABSTRACT

This article will examine some fundamental legal issues arising from setting aside private land for the protection of the natural environment, by the use of laws, policy measures and administrative practice (environmental and planning measures). In particular, what limits apply to the use of environmental and planning measures before compensation is payable by the State or its agency, where the objective of those measures is to protect the environment? At what point does the use of environmental and planning measures become so inconsistent with the nature of private property that they effectively constitute a taking of an interest in land for which the law can require the State to pay the owner just compensation? The starting point for finding an answer to these questions will be the High Court decision in Commonwealth v State of Tasmania and others (Tasmanian Dam Case); not because it was the first time the issue had arisen in Australia, but because of its contextual significance in regard to the growth of environmental law in this Country. Our examination of these issues will primarily be concerned with the effects of environmental and planning outside of the established statutory means of claiming compensation.

* Principal, Glen McLeod Legal; Adjunct Professor, School of Law, Murdoch University. My thanks to Angus P McLeod LLM for research assistance, Hanna Scott, Carol Dymond and Rory McLeod for editorial suggestions.

I  INTRODUCTION

Unlike the United States Constitution where its Fifth Amendment directly empowers citizens to protect their interest in property, citizens’ property rights are only indirectly addressed in the Commonwealth Constitution. The Commonwealth of Australia is empowered to make laws for the acquisition of property subject to the provision of just terms. The High Court of Australia has held, in a number of decisions, that the emphasis in the Constitution is not on taking or extinguishing of private property, but on its acquisition, for the purposes of the Commonwealth. This dichotomy occurs because an acquisition must confer a benefit on the acquiring authority, in addition to taking an interest. That effectively narrows the scope of the ‘just terms’ proviso by shifting the emphasis to what has been gained by the public authority and away from the dispossessed party. The intended beneficiary of the proviso was presumably not the public authority but that is the result of the meaning ascribed to the term ‘acquisition’ by the High Court.

The Constitutional requirement of ‘just terms’ in a Commonwealth acquisition law, can be characterised as a manifestation of a fundamental or core legal right of the kind sought to be protected in the Universal Declaration on Human Rights and the Constitution of the United States of America, with an ancestry that dating back at least to the Magna Carta

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2 Commonwealth of Australia Constitution Act 1901 (Cth).
3 Commonwealth of Australia Constitution Act s 51(xxxi)
4 See, eg, Tasmanian Dam case 158 CLR 1, 144-5 (Mason J).
5 Ibid.
of 1215. This year, in commemorating the 800th anniversary of the Magna Carta, we can ask: to what extent should the Magna Carta apply to contemporary Australia, in particular to the relationship between environmental and planning measures and citizens’ property rights? This is not a simplistic dilemma about private property verses the environment. On the contrary, the protection of the environment is unarguably in the public interest. The pertinent questions are, when does the protection of that public interest impinge upon a private person’s property rights and how far can that intrusion go before the owner or former owner of the interest is entitled to compensation from the State for any loss caused by the impingement?

The State and Commonwealth manifestations of these issues differ to some extent, but the same underlying principles apply in both jurisdictions. References to the Magna Carta persist in leading High Court Cases concerning the Commonwealth’s power to appropriate land and in Western Australia, the Magna Carta, still forms part of the State’s law, according to the State’s Law Reform Commission. The part still in force contains a requirement that the State will not take the property except by ‘due process of law’. The long tradition in English common

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8 The Law Reform Commission of Western Australia United Kingdom Statutes in Force in Western Australia Project No. 75 Report (1994) 6, 21, 27 (LRC UK Statutes Report) 1.9. In particular Chapter 29 of that Magna Carta applies, enacted in 1297 by Act 25 Edward I; and enhanced by 28 Edward III in 1354. The 1354 Statute added a requirement that land may only be taken by ‘due process of law’, which is a component of and possibly the progenitor of the ‘just terms’ guarantee in the Commonwealth Constitution. See also Gerard Carney, The Constitutional Systems of the Australian States and Territories (Cambridge University Press, 2006) 140.
law, which invests in the citizen some property rights, was received into and forms part of the common law of Western Australia.\(^9\) Can the fundamental principles derived from these sources apply as a buffer between the citizen and environmental and planning law measures?

The whole area of compulsory takings and compensation in the context of environmental law was opened up by the Tasmanian Dam case, exposing for examination fundamental legal concepts in constitutional law, as well as deeper common law principles.

The growth in environmental law and policy at the Commonwealth and State levels, witnessed since the *Tasmanian Dam* case, may result in increased tension between environmental protection and property rights associated with land. Accordingly, there may be a concomitant increase in the application of the fundamental principles mentioned earlier in relation to the protection of property rights in land, in the context of environmental and planning measures.

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9. *Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors v State Energy Commission* (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC 8800828 and relevantly approved and quoted in *R v. Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova* (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia). See also Carney, above n 8, 138.
II THE GROWTH OF ENVIRONMENTAL AND PLANNING MEASURES SINCE THE 1980S—WHO PAYS?

Until the early 1980s Australian land use regulation was the preserve of town planning law and policy. Land use planning and environmental law were primarily State matters.

If land was required for a public purpose, it was either reserved or taken compulsorily under a ‘Public Works Act’. Compensation was payable by the acquiring authority. On private land, there was little statutory regulation of the clearing of native vegetation, although clearing would have required planning approval.\(^{10}\)

The regulation of land use today remains a planning matter, but it is now overlaid with environmental laws and policies. The boundaries between planning and environmental law are no longer distinct. This is without even considering more recent concepts such as sustainable development and the emerging use of that concept, with intergenerational equity and the precautionary principle, in climate change law.\(^{11}\)

The complexity of environmental and planning measures has muddied the simple concepts of reservation or taking for public use. Environmental and planning measures can sterilise the economic value of land, without any clear avenue to compensation for the landowner. Examples at the

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\(^{11}\) See for example Taralga Landscape Guardians v Minister for Planning [2007] NSWLEC 59; David, Parry, ‘Ecologically Sustainable Development in Western Australian Planning Cases’ (2009) 26 EPLJ 375.
Federal level include the Commonwealth Department for the Environment’s Environmental Offsets Policy. In practice it is being administered to require large areas of land to be surrendered free of cost as the price for authorisations under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). Landowners are usually forced to agree or face delays or refusals from approval agencies. The areas demanded can bear little or no relation to the environmental issues relevant under the EPBC Act. If the power exists under the EPBC Act to demand offsets then questions arise as to whether 'as a legal and practical matter' what is being done amounts to the taking of land otherwise than on just terms. The operation of this Act has the potential to sterilise much undeveloped urban land, without a clear mechanism through which landowners may claim compensation.

In Western Australia, some examples of environmental and planning measures include:

1. Various wetland policies and conditions applied to clearing permits under the *Environmental Protection Act 1986* (WA) (EP Act), which

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13 Section 519 of the EPBC Act provides for the payment of reasonable compensation where the operation of that Act would result in the ‘…acquisition of property that would be invalid because of paragraph 51(xxxi) of the Constitution….’. The compensation can be claimed by an application to the Federal Court. The scope of this provision is not clear. As it depends for its application on the meaning ascribed to the term ‘acquisition’ in section 51(xxxi), its application in practice may be problematic for the reasons examined later in respect of that word.

14 The effect will not only cost landowners but potentially, over a period of time, could lead to higher inner city land prices at a time when urban consolidation and denser development are regarded as important antidotes to the effects of car use and other activities on climate change.

15 Examples include the: Western Australian Government, *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*, Gazette No 55, 8 April
can effectively sterilise substantial areas of land free of cost or at least to sterilise those areas by constraining their productive use.

2. The widest of these measures is the State Planning Policy 2.8\textsuperscript{16} which provides that conservation areas, in addition to land to be ceded free of cost for public open space, ‘will be generally set aside free of cost’, for the purposes of urban bushland conservation\textsuperscript{17} and not be taken into account in the calculation of the developable area for the calculation of a public open space contribution.

3. Town planning schemes may contain reserves which are dressed up as zones.

4. Conservation areas may be created by the operation of the environmental assessment process under Part IV of the EP Act. Sometimes developers are simply forced to give up land for environmental protection purposes free of cost in the subdivision process, to avoid protracted arguments with approval authorities.

A \textit{Significance of the Growth of Environmental and Planning Law Measures}

The environmental objectives and effectiveness of these measures is not in question in this article. The principal issues are legal and economic, in particular the extent to which the measures mentioned, are lawful, when no provision, or no adequate provision, is made to compensate affected

\textsuperscript{16}Prepared under section 26 of the Planning and Development Act 2005 (WA), Government Gazette, WA, 22 June 2010, 2743 (SPP 2.8).

\textsuperscript{17}Clause 5.1.2.2 (vii) of SPP2.8.
landowners for the economic effects of the measures. These phenomena are not confined to Western Australia and the Commonwealth.\(^{18}\)

Many, environmental and planning law measures are not legislative in nature. They rely on the exercise of broad discretions and implicit power. It is the practical operation of the law, through environmental and planning measures, more than its legal form, which is often significant in this context. This does not diminish the legal consequences of the measures impugned, as was seen earlier in this article. There is generally no reference to established legal processes for takings or reservations, and in Western Australia the landowners have no independent merits-based appeal rights. Their only recourse is to apply for relief in the courts. It is no exaggeration to suggest that the circumstances are somewhat resonant with the excesses of King John, which were in part responsible for the Barons forcing him to agree to and seal the Magna Carta.\(^{19}\) By a 1354 amendment to and enactment of the Magna Carta, there was an added requirement that property can only be taken by ‘due process of law’.\(^{20}\)

The growth in environmental and planning law measures and the related issue of compensation for landowners was referred to by the Hon. Ian Callinan AC QC in an article in *The Australian Newspaper* on 3 January

\(^{18}\) See for example Suri Ratnapala ‘Constitutional Vandalism Under Green Cover’ (2009) Speech published on website of Property Rights Australia.

\(^{19}\) In their book *1215 The Year of the Magna Carta* Danny Danziger and John Gillingham (Hodder and Stoughton 2004) 123 explain how the declarations by the King that large areas of England were 'forests' effectively sterilised productive land and led to unrest.

\(^{20}\) See n 8 above and n 85 below.
2008. In speculating on what might be the major new legal issue of the coming years, and the capacity of our system to deal with it, he said:

I see the cost, and who should bear it, of environmental, town planning and heritage measures as the most likely candidate. I have heard it said that if you wish to do your neighbours a bad turn, apply to have their property heritage-listed. This, I emphasise, is not an argument against heritage listing. It is just a plea for sharing its financial burden.

Continuing, he said:

It has always been the common law that the owner of freehold land owns every tree on it. To combat the greenhouse effect, land clearing, the felling of trees for forest timber, grazing or cultivation will in places be forbidden, all of this again in the acknowledged and, it is said, necessary public interest.

It is a legitimate question: will proper compensation be available for the consequent involuntary reduction in value to freehold owners?

A key issue referred to by The Hon. Ian Callinan AC QC was the ambiguity surrounding the means of ‘acquisition’. In this regard he said:

‘The High Court has tended to regard acquisition as an unduly narrow concept. The Tasmanian Dam case is, to adapt the hydrological theme, the high-water mark of that narrowness.

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This is not an argument against the preservation of that pristine waterway, the Franklin River, but simply against the exoneration of the Australian public from paying to Tasmania the cost of its preservation.

This followed from the rejection by the High Court of an argument that compensation was due from the Commonwealth. The result, he said, is need for reform law, which he put as follows:

The reluctance of governments to provide for compensation, and of the High Court to acknowledge that an erosion of property rights for the benefit of others does constitute a taking in an era of increasingly intrusive legislation, is a matter that urgently needs addressing.

Not just adjacent people but also the public generally always do acquire something of value when another person's right to use their property in a way that would not cause a legal nuisance is reduced. English law has long recognised restrictive covenants, agreements by which an owner agrees not to exercise a lawful proprietary right in order that a neighbour may have an enhanced enjoyment of their own property.

Not surprisingly, restrictive covenants can be worth a great deal of money. There is a clear analogy between a legislatively imposed involuntary restriction on a land owner and one given for value and noted on the title.

Each is equally a matter of public record and has all other relevant qualities in common. Yet under Australian law rarely does the former give rise to a right to compensation.22

22 Ibid. See also his dicta in Commonwealth v Western Australia (1999) 196 CLR 392, 488, [282] (Callinan J).
Despite this plea, there has been no substantive law reform in this area. As the Hon. Ian Callinan AC QC said, the issue is not about the desirability of conservation, but who should pay for the value which our society places on conservation.\textsuperscript{23}

III \textbf{THE COMMONWEALTH: ‘JUST TERMS’}

\textbf{B \textit{The Tasmanian Dam Case}}

The historical context of the Tasmanian Dam Case is significant because it heralded over subsequent decades the development of Australia’s current environmental law system.

Tasmania and much of the rest of Australia were divided socially and politically in 1982 and 1983\textsuperscript{24} by a proposal to dam the Gordon River in Tasmania’s South West. The dam was called the Franklin Dam and the project, ‘Gordon below Franklin’. The effect would be the destruction of a large area of wilderness forest.

In 1983, the newly elected Hawke Government sought to prohibit the construction of the dam and set aside for conservation 14,125 ha of the forest, which had previously been recognised as national park under the \textit{National Parks and Wildlife Act 1970} (Tas). In August 1982 the area was excised from the national park and vested in the Hydro-Electric

\textsuperscript{23} See: \textit{Commonwealth v Western Australia} (1999) 96 CLR 392, 458 [186].

\textsuperscript{24} It was central in a battle for the leadership of the Australian Labor Party between Bob Hawke and Bill Hayden, and played a part in Bob Hawke leading the Australian Labor Party to victory in the 1983 Federal election.
Commission of Tasmania under the *Gordon River Hydro-Electric Power Development Act 1982*. There was a landmark High Court challenge to the State of Tasmania’s enabling legislation, brought by the Commonwealth, which came to be known as the *Tasmanian Dam Case*.

We will examine the relevance of the *Tasmanian Dam Case* to an aspect of contemporary environmental law, namely the use of environmental and planning measures to set aside land for conservation purposes, without the payment of compensation. Other strands of argument and findings of the Court will not be examined here, but have been the subject of extensive examination, particularly in connection with the external affairs power of the Commonwealth Constitution.\(^{25}\)

The battle lines were drawn in March 1983 when the *World Heritage (Western Tasmanian Wilderness) Regulations* (Cth) (Wilderness Regulations) came into effect. They prohibited, without ministerial consent, the construction of a dam or associated works, within that same 14,125 ha. The regulations were expressed to bind the Crown in right of the Commonwealth and State of Tasmania. Their primary purpose was to enforce the listing of the relevant land as a World Heritage Conservation Area.

In May 1983 the Commonwealth passed the *World Heritage Properties Conservation Act 1983* (Cth). Among other things, that Act contained provisions relating to the payment of compensation to a claimant from

whom the property was acquired by the operation of a scheme of legislation which included that Act and the Wilderness Regulations.

In the action brought in the *Tasmanian Dam Case* the Commonwealth sought to restrain the State of Tasmania and others from acting contrary to the Wilderness Regulations. The defendants counterclaimed that the legislation was beyond power and accordingly invalid. Among other things, it was argued by the State of Tasmania that the legislation in reality acquired land without providing for the payment of compensation on just terms and thereby contravened section 51(xxxi) of the Constitution. Various questions were referred to the Full Court of the High Court for determination.

By a majority of four to three the High Court held that the Commonwealth legislation was valid partly on the basis of the Commonwealth’s external affairs powers under section 51(xxix) of the Constitution. The Tasmanian legislation, to the extent that it was inconsistent with the Commonwealth legislation was invalid under section 109 of the Constitution of the Commonwealth. The minority of 3 held that the Commonwealth legislation was invalid.

For now, we will concentrate on an aspect of the majority's decision. Because they held the legislation to be valid under external affairs power, they had to decide, unlike the minority, whether the legislation offended section 51(xxxi) of the Constitution, which is an express grant of power to the Commonwealth to make laws with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws.
Of the majority who had to decide on the application of section 51(xxxi), three held that the legislation was within power under section 51(xxxi). They said it was not an acquisition, merely a taking. In their view no interest was actually 'acquired' because the legislation under attack was simply a restriction on the use of property. No benefit accrued to the Commonwealth. The legislation may have sterilised the land, but the Commonwealth did not acquire anything. Section 51(xxxi) accordingly did not apply. The majority, therefore, did not have to decide whether the terms of the alleged taking were 'just'.

Deane J said that provisions of the World Heritage Properties Conservation Act 1983 (Cth) and Wilderness Regulations offended section 51(xxxi). The interest 'acquired' was the benefit of the prohibition on developing the land. Further, the acquisition was not on 'just terms' because section 17 of the World Heritage Properties Conservation Act delayed unfairly the payment of compensation.

Of the others in the majority, Murphy J did not consider the section 51(xxxi) point in any detail. Mason and Brennan JJ gave the question more consideration. These judges concluded there had been no acquisition, therefore the 'just terms' provisions did not apply. Their views are representative of one stream of reasoning in the High Court as to what constitutes ‘acquisition’. Deane J represents a contrary line of thought, as will be seen.

Tasmania had submitted that although the legislation does not attempt to divest title from the State to the Commonwealth, it so restricts the rights of the State and confers such rights on the Federal Minister, that there was in effect an acquisition of property. The State argued that there is a distinction between 'taking' property and 'regulation', this having been
developed in the United States and discussed by Stephen J in the Australian High Court case of *Trade Practices Commission v Tooth & Co Limited*.\(^{26}\)

This was rejected by Mason J on the basis that just because Tasmania had rights which were extinguished or ‘taken’ it does not follow that there was an acquisition within the meaning of that term in the Constitution.

Like other Judges who have considered this question in the High Court, before and since the *Tasmanian Dam Case*, Mason J referred to the judgements of Holmes and Brandeis JJ in the United States case *Pennsylvania Coal Co v Mahon*.\(^{27}\) In their oft-quoted judgements, Holmes and Brandeis JJ held that a restriction on the use of property deprives the owner of some right previously enjoyed, and is therefore an abridgement of rights in property without compensation. The consequence is that if the regulation of property goes too far, it constitutes a taking. There is no set formula to decide when regulation becomes a taking. It depends upon the 'facts and necessities' of each case.

Mason J\(^ {28}\) said, in the *Tasmanian Dam* case, that the American jurisprudence has no direct relevance to section 51(xxxi). In common with other judges who have considered this point in the High Court, he referred to *Penn Central Transportation Co v New York City*,\(^ {29}\) in which

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\(^{27}\) *Pennsylvania Coal Co v Mahon* (1922) 260 US 393, 415, 417.

\(^{28}\) *Commonwealth v. State of Tasmania and others* (1983) 158 CLR 1, 144-145.

\(^{29}\) *Penn Central Transportation Co v New York City* (1978) 438 US 104.
The Pennsylvania Coal case was explained on the footing that a State statute, that substantially furthers important public policies, may so frustrate distinct investment backed expectations as to amount to a 'taking'. The relevant provision in the Fifth Amendment of the US Constitution is:

Nor shall private property be taken for public use without just compensation.

The emphasis in the Constitution, however, is not on taking or extinguishment of private property but on acquisition of private property for the purposes of the Commonwealth. It is a power giving provision with a proviso that acquisition must be on just terms. The emphasis is not on the right of the individual but the power of the State. There must, according to this Australian line of argument, be an acquisition whereby the Commonwealth or another gains an interest in property, however slight or insubstantial it may be. The majority of the judges who considered the section 51(xxxi) issue in the Tasmanian Dam Case said that there had been such an acquisition.

The interest need not be a recognised class of interest in property law and extends to 'innominate and anomalous interests' and includes the assumption and indefinite continuance of exclusive possession and control for the purposes of the Commonwealth.\(^{30}\)

Deane J devoted some 10 pages of his judgment in the Tasmanian Dam case to the question of whether section 51(xxxi) had been breached. He

\(^{30}\) See the later discussion on Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another (1997) 190 CLR 1, 513; Commonwealth of Australia v WMC Resources Limited 194 CLR 1.
said that section 51(xxxi) has assumed the status of a Constitutional guarantee.  

He agreed with the majority that there is a difference between restrictions on the use of property and the acquisition of property. He went on to say, however, that:

The benefit of land can, in certain circumstances, be enjoyed without any active right in relation to the land being acquired or exercised: see, e.g., Council of City of Newcastle v Royal Newcastle Hospital. Thus, if the Parliament were to make a law prohibiting any presence upon land within a radius of 1 kilometre of any point on the boundary of a particular defence establishment and thereby obtain the benefit of a buffer zone, there would, in my view, be an effective confiscation or acquisition of the benefit of use of the land… notwithstanding that neither the owner nor the Commonwealth possessed any right to go upon or actively to use the land affected.

He referred to the judgment of Stephen J in Trade Practices Commission v Tooth & Co Limited. In particular, he quoted Stephen J as saying:

… far-reaching restrictions upon the use of property may in appropriate circumstances be seen to involve such an acquisition. That the American experience should provide guidance in this area is testimony to the universality of the problem sooner or later encountered whatever Constitutional regulation of compulsory acquisition is sought to be...

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32 Commonwealth v State of Tasmania and others (1983) 158 CLR 1, 284

33 Above, n 17.
imposed upon the free enjoyment of property rights. In each case the particular circumstances must be ascertained and weighed and, as in all questions of degree, it will be idle to seek to draw up precise lines in advance.\textsuperscript{34}

Deane J proceeded to adopt this approach in the \textit{Tasmanian Dam Case}.

In referring to the legislation, in particular the Wilderness Regulations, he said:

They effectively preclude development and what would, in an ordinary context, be described as 'improvement' of the land without the Minister's consent: no building or other substantial structure can be erected; no tree can be cut down or removed; no vehicular track can be established; no works can be carried out. The regulations apply indefinitely. The land remains vested in the HEC. The HEC, however, is not only prohibited, in the absence of a consent which there is every reason to believe will not be forthcoming, from building the proposed dam; it is, without such consent, effectively excluded from putting the land to any active use at all.\textsuperscript{35}

Deane J’s description from twenty-five years ago seems ahead of its time. As discussed earlier in this article, through delegated legislation and government policies of various kinds, there are now many people who have had conservation areas imposed on them to their detriment.

Deane J said that if restrictions of the kind, imposed in the Commonwealth legislation in this case, did not amount to an acquisition of property, ’the safeguard of section 51(xxxi) would be ineffective to

\textsuperscript{34} Ibid 414-5.

\textsuperscript{35} \textit{Commonwealth v State of Tasmania and others} (1983) 158 CLR 1, 286.
preclude the Commonwealth from effectively dedicating the property of others to its purposes without compensation whenever such dedication could be achieved by the imposition of carefully worded restrictions upon the owner's use and enjoyment of his land.

He then went on to liken the environmental and planning measures in question to restrictive covenants:

The benefit of a restrictive covenant, which prohibits the doing of certain acts without consent and which ensures that the burdened land remains in a state which the person entitled to enforce the covenant desires to have preserved for the purposes of his own, can constitute a valuable asset. It is incorporeal but it is, nonetheless, property. There is no reason in principle why, if 'property' is used in a wide sense to include 'innominate and anomalous interests', a corresponding benefit under a legislative scheme cannot, in an appropriate case, be regarded as property.\footnote{Ibid 286-7; See also Commonwealth v Western Australia (1999) 196 CLR 392, 488 [282], where Callinan J applied similar reasoning.}

This, of course, resonates with what the Hon. Ian Callinan AC QC was saying in his article, quoted earlier.

Deane J went on to say in the \textit{Tasmanian Dam Case}:

The 'property' purportedly acquired consists of the benefit of the prohibition of the exercise of the rights of use and development of the land which would be involved in the doing of any of the specified acts. The purpose for which that property has been purportedly acquired is the
'application of the property in or towards carrying out' Australia's obligations under the Convention.\textsuperscript{37}

Having decided that there had been an acquisition, Deane J went on to consider whether the acquisition was on 'just terms'. What he said in this regard is interesting. Clearly, not every compensation provision will be 'just'. The formula in the Tasmania \textit{v} Dam Case did not involve a judicial process for the ascertainment of the compensation. The assessment provisions would have been hard to apply and would take a long time to complete in practice. They would have provided a considerable barrier to obtaining compensation. Deane J said:

There is not, of course, anything intrinsically unfair in the Parliament providing a procedure for determining the quantum of compensation outside the ordinary judicial process. There is, however, something intrinsically unfair in a procedure which, in effect, ensures, unless a claimant agrees to accept the terms which the Commonwealth is prepared to offer, he will be forced to wait years before he is allowed even access to a court, tribunal or other body which can authoritatively determine the amount of the compensation which the Commonwealth must pay.

He held that the consequence of the failure to provide just terms rendered the regulations invalid.

In summary in regard to the Tasmanian Dam case, there is no doubt that the majority of the judges who considered section 51 (xxxi), took a conservative view of the scope of the provision when considered as a

\textsuperscript{37} Commonwealth \textit{v} State of Tasmania and others (1983) 158 CLR 1, 286-7. The Convention to which Deane J is referring is the World Cultural and Natural Heritage Convention for the Protection of the World Cultural and Natural Heritage.
constitutional guarantee. The effect of that majority view would be to create a ‘high bar’ for anyone wishing to argue that particular regulation crosses the line between regulation and taking or ‘acquisition’. However, such a view would lack nuance if it did not take into account other considerations, including:

- extinguishment or restrictions on rights in property may be analogous to a restrictive covenant;

- there is a difference between positive constitutional rights like the Fifth Amendment of the Constitution of the United States of America and legislative power dispensing provisions like section 51(xxxi) of the Australian Constitution;

- despite these differences, provisions such as the ‘just terms’ guarantee are derived from the same underlying principles from the Magna Carta and the common law.

Several other Commonwealth cases since the Tasmanian Dam case should be considered, before turning to the law and practice in Western Australia.

B The Newcrest case

Another wilderness, this time the Kakadu National Park, was the subject land in Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another. The High Court in that case applied the Tasmanian Dam Case and considered a number of other authorities in

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which section 51(xxxi) was relevant. The Court found in favour of the plaintiff and struck down legislation under section 51(xxxi) of the Constitution.

The Commonwealth, by two proclamations made under the National Parks and Wildlife Conservation Act (1975) (Cth) (Commonwealth Act) included the plaintiff's mining leases within the area of the Kakadu National Park. The Commonwealth Act prohibited the carrying on of operations for the recovery of minerals. The same Act purported to exempt the Commonwealth from liability to pay compensation to any person by reason of that Act. Newcrest contended that the leases were still in force, and that therefore the Act was invalid.

Consistent with the Tasmanian Dam Case, the Court held by a majority of 4:3, that section 51(xxxi) operated as a fetter on the Commonwealth's ability to make laws for the purpose of discharging Australia's international treaty obligations, including the extension of the Kakadu National Park. A further and more substantial majority (6 to 1) held that the extension of the National Park over Newcrest's leases constituted 'sufficient derivation of an identifiable and measurable advantage [to the Commonwealth] to be an ‘acquisition' for the purposes of section 51(xxxi). In doing that, they specifically referred to dicta of Brennan J's decision in the Tasmanian Dam Case.\(^{39}\) This dictum is substantially the same as that of Mason J, which I have quoted above.

In the Newcrest case Brennan J also said, among other things:

> The Commonwealth's interest in respect of the minerals was enhanced by the sterilisation of Newcrest's interests therein. In my opinion, by the

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force of the impugned proclamations, the Commonwealth acquired property from Newcrest . . . the property consisted not in a right to possession or occupation of the relevant area of land nor in the bare leasehold interest vested in Newcrest but in the benefit of relief from the burden of Newcrest's right to carry on 'operations' for the recovery of minerals.  

Gummow J in Newcrest likewise, in quoting Dixon J in Bank of New South Wales v Commonwealth said that Newcrest had been deprived of the 'reality' of proprietorship. He went on to say that '...here there was an effective sterilisation of the rights constituting the property in question.'  

The constraints 'as a legal and practical matter’ denied Newcrest of the exercise of its rights under the mining tenements.’  

Dawson and Toohey JJ came to similar conclusions. The dissenter on this point, McHugh J, took a restrictive view; that there was no gain to the Commonwealth and therefore no acquisition to trigger section 51(xxxi).

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40 Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another (1996) 190 CLR 1, 530.
41 Bank of New South Wales v Commonwealth (1948) 76 CLR 1, 349.
43 Ibid 635.
Finally, in regard to Newcrest, the judgment of Kirby J is significant because it resonates with statements of principle in a Western Australian case, considered later in this article.44

Kirby J in the Newcrest case was in the majority. Early in his judgement he describes the effect of the Commonwealth legislation and the proclamation referred to above and then says:

Pause for a moment to reflect upon the result of the impugned legislation, if valid. It is one thing to expand a National Park for the benefit of everyone who will enjoy its facility. It is another to do so at an economic cost to the owners of valuable property interests in sections of the Park whose rights are effectively confiscated to achieve that end. Ordinarily, at least under Federal law, the expansion of areas for public use is carried out at the price of compensating justly those private individuals who lose their property interests in order to contribute to the greater public good. It is possible that the operation of the Constitution and the applicable Federal legislation might result in such an uncompensated acquisition. That, after all, could certainly occur, so far as the Constitution is concerned, in respect of the acquisitions of property under State law which is not subject to the 'just terms' requirement of section 51 (xxxix) . . . if the correct interpretation of the Constitution requires such a result, this court must give effect to it. It must do so whatever opinions might be held concerning the justice or fairness of obliging selected property holders to suffer uncompensated losses for the benefit of the community as a whole.

Nevertheless, the result of such a course is so manifestly unjust that the mind inclines against an interpretation of the Constitution which has that consequence. At least it does so if another interpretation, which avoids it, is available.\textsuperscript{45}

Kirby J then went on to refer to an interpretive principle, namely, that where the Constitution is ambiguous:

"This court should adopt the meaning which conforms to the principles of fundamental rights rather than an interpretation which would involve a departure from such rights.

Australian law, including its Constitutional law, may sometimes fall short of giving effect to fundamental rights. The duty of the Court is to interpret what the Constitution says and not what individual judges may think it should have said. If the Constitution is clear, the Court must (as in the interpretation of any legislation) give effect to its terms . . . however, as has been recognised by this court and by other courts of high authority, the inter-relationship of national and international law, including in relation to fundamental rights, is 'undergoing evolution'. To adapt what Brennan J said in \textit{Mabo v Queensland [No.2]} [1996] 491, the common law, and the Constitutional law do not necessarily conform with international law. However, international law is a legitimate and important influence on the development of the common law in Constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of

\textsuperscript{45} \textit{Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another} (1996) 190 CLR 1, 639 – emphasis added.
government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.

One highly influential international statement on the understanding of universal and fundamental rights is the Universal Declaration of Human Rights. That document is not a treaty to which Australia is a party. Indeed it is not a treaty at all. It is not part of Australia's domestic law, still less of its Constitution. Nevertheless, it may in this country, as it has in other countries, influence legal development and Constitutional interpretation. At least it may do so where its terms do not conflict with, but are consistent with, a provision of the Constitution. The use of international law in such a way has been specifically sanctioned by the Privy Council when giving meaning to express Constitutional provisions relating to 'fundamental rights and freedoms'. Such jurisprudence has its analogies in the courts of several other countries. The growing influence of the Universal Declaration upon the jurisprudence of the International Court of Justice may also be noted.

The Universal Declaration states in Art. 17:

'Everyone has the right to own property alone as well as in association with others.

No one should be arbitrarily deprived of his property.'

While this Article contains propositions which are unremarkable to those familiar with the Australian legal system, the prohibition on the arbitrary deprivation of property expresses an essential idea which is both basic and virtually uniform in civilised legal systems. Historically,
its roots may be traced back as far as the Magna Carta 1215, Art.52 of which provided:

To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgement of his equals, we will at once restore these.\(^{46}\)

He then referred to similar declarations in the French constitution, the United States constitution, the Indian constitution, the Malaysian constitution, the Japanese constitution and South African constitutions.

Kirby J went on to say:

In effect, the foregoing constitutional provisions do no more than reflect universal and fundamental rights by now recognised by customary international law. Ordinarily, in a civilised society, where private property rights are protected by law, the government, its agencies or those acting under authority of law must not deprive a person of such rights without a legal process which includes provision of just compensation . . . when the foregoing principles, of virtually universal application, are remembered, it becomes even more astonishing to suggest that the Australian Constitution, which in 1901 expressed the unexceptionally recognised and gave effect to the applicable universal principle, should be construed today in such a way we should limit the operation of that express requirement in respect of some laws made by its Federal Parliament but not others. Where there is an ambiguity in the

\(^{46}\) *Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another* (1996) 190 CLR 1, 657-9. This provision was later extended by Statute: 28 Edward III in 1354. The 1354 Statute added a requirement that land may only be taken by ‘due process of law’. See above, n 8.
meaning of the Constitution, as there is here, it should be resolved in favour of the upholding of such fundamental and universal rights.47

This dicta is aligned with more recent High Court dicta, particularly that of French CJ in Fazzolari Pty Ltd v Parramatta City Council.48

The legal conclusions which can drawn from the Newcrest Case are similar to those which can be drawn from the WMC Resources Case, an exposition of which follows.

C The WMC Resources Case

Not long after the Newcrest case was decided, the High Court was given another opportunity to consider these issues. In the Commonwealth of Australia v. WMC Resources Limited49 an exploration permit had excised from it, by the operation of the impugned Commonwealth legislation, an area in the Timor Strait, pursuant to a treaty between Australia and Indonesia. The case was decided by a 4-2 majority in favour of the Commonwealth. This was essentially the same High Court which decided the Newcrest case. This time Kirby J dissented with Toohey J. The majority held that the legislation was not a law for the acquisition of property. Essentially, the majority followed a line of cases which reflected the reasoning of the majority in the Tasmanian Dam Case.50

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47 Newcrest Mining (WA) Limited and another v The Commonwealth of Australia and another (1996) 190 CLR 1, 661. See also below, n 59.
48 Fazzolari Pty Ltd v Parramatta City Council (2009) 237 CLR 603, 610. See also above n 21, 22.
The decision they made in that case as to whether there had been the acquisition for a property right which benefited the Commonwealth right, which benefited the Commonwealth, differed from the call made in the Newcrest case. The majority held that the rights extinguished were not of a proprietary nature. The rights had no existence apart from the statute and were susceptible to modification or extinguishment. The rights extinguished did not create a reciprocal liability to the Commonwealth which would be converted into an advantage upon the rights being extinguished. Newcrest was distinguished on the basis that the rights under its mining lease were substantial rights, allowing the Company to use Commonwealth land for the extraction of minerals. Extinction of that right enhanced the property of the Commonwealth.\textsuperscript{51}

Toohey J in dissent said that Commonwealth legislation granted immunity in favour of the plaintiff. It was a ‘right’. It was identifiable, assignable, exclusive and valuable. Its extinguishment benefitted the Commonwealth.\textsuperscript{52}

Gummow J noted that for a claim to be truly a 'right' it must not depend for its existence on the sufferance of the party against whom it is asserted.

He said that the analysis of whether or not the provisions attracted the Constitutional guarantee 'must proceed from a consideration of the nature


\textsuperscript{52} Commonwealth of Australia v WMC Resources Limited (1998) 194 CLR 1, 17 (Brennan CJ).
and function of such permits, the structure of the . . . Act and the immunity the permits conferred . . .53

Kirby J did not agree with the conclusion of Gummow J. He referred to the legislative scheme:

. . . conforming to what one would expect in national legislation of a country freshly claiming sovereign rights over its continental shelf and seeking to induce risk capital to explore for and exploit petroleum reserves as yet unknown. Introducing the Bill which became . . . the Act, the Attorney General . . . told the Parliament:

Today the exploration of Australia's offshore petroleum resources is a reality, or very soon it will be a substantial reality. For Government this has meant the devising of appropriate new legislative machinery.

He acknowledged expressly the need for assurances to investors if they were to be attracted to the nationally important task of petroleum exploration within the Australian continental shelf.54

Kirby J noted that every judge in the Federal Court in this matter had determined against the Commonwealth. He said that the right in question was 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and [had] some degree of permanence and stability'. It therefore had the attributes of property.

He went on to enunciate principles relevant to section 51(33xi), which may be summarised as follows:

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53 Commonwealth of Australia v WMC Resources Limited (1998) 194 CLR 1, 73.
1. It is a Constitutional guarantee.

2. Rigid approaches to interpretation which would defeat the operation of
   the guarantee should be avoided.

3. The Commonwealth may not do indirectly what section 51(xxxi) would
   forbid if done directly.

4. The Court will look at the practical operation of the law as well as its
   legal form.

5. There is a danger in dissecting the words, that the achievement of the
   purposes of the paragraph as a guarantee, may be lost.

6. Interests which are inherently defeasible, 'however innominate and
   anomalous' can partake of the quality of 'property'.

7. A clear object of the Act which created the rights was to give the
   permittees a stable 'title' to the property rights.

He said that the existence of the permits is an impediment to the
implementation of the treaty and removing the permit was an identifiable
benefit or advantage to the Commonwealth. The sterilisation was
imposed on the exercise of the respondent's rights in that area and was
indistinguishable from the attempt to extinguish rights in the Newcrest
case.

IV RETROSPECTIVE ON THE CASES - THE RESTRICTIVE
VERSUS THE LIBERAL

It can be seen that since the Tasmanian Dam case there has been
effectively two lines of thought within the High Court, one restrictive and
the other more liberal. In both the Tasmanian Dam case and the Newcrest cases, the High Court applied the principle that to come under section 51(xxxi) legislation must result in the acquisition of a positive benefit. Precisely what this means differs depending on who is applying the principle.

A factor affecting the divergence of views in particular cases is the approach the judges take to statutory interpretation. The passages quoted from the judgment of Kirby J in the Newcrest case show that he has a strong contextual approach. In *Shu-Ling Chang v Laidley Shire Council*[^55] he described this approach as follows:

> Traditionally, the English law and its derivates (including in Australia) adopted a fairly strict, textual, literal, or 'grammatical' approach to interpretation. However, in more recent years, in part because of a growing understanding of how ideas and purposes are actually communicated by words this Court, English Courts and other courts of high authority throughout the common law world have embraced a broader contextual reading of statutory language and other texts having legal effects.

> Specifically, this Court has accepted that it is an error of interpretive approach to take a word or phrase in legislation and to read the word or phrase divorced from its immediately surrounding provisions.[^56]

Although the High Court in its approach to section 51(xxxi) Court has generally leaned towards a restrictive approach, in particular in regard to the meaning of the term ‘acquisition’, there is a strong liberal stream

[^55]: *Shu-Ling Chang v Laidley Shire Council* [2007] HCA 37.

[^56]: Ibid [43]-[44].
favouring the landowner, which may conceivably prevail as an incident of the development of the purposive, contextual approach to legislative interpretation, championed by Kirby J and others.

The liberal approach to statutory interpretation complements and reinforces the application of the liberal and traditional approach to property rights reinforced more recently by French CJ in the *Fazzolari v Parramatta City Council*.\(^{57}\)

On the same theme Kirby J in the *WMC Case* said:

> One of the institutional strengths of the Australian economy is the Constitutional guarantee of just terms where the property interests of investors are required under Federal law. This Court should not undermine that strength by qualifying the guarantee. Neither the Court's past authority nor economic equity requires such a result. If it can happen here it can happen again and investors will draw their inferences.\(^{58}\)

Similarly in *Smith v ANL Ltd*, where he said:

> The imposition of the imitation of power of the Parliament to enact laws with respect to the acquisition of property was a deliberate one. Generally speaking it has not been given a narrow construction. I judge the approach of the Court to the meaning of section 51(xxxi) not only to accord with the text of the Constitution but also with universal

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\(^{57}\) *Fazzolari v Parramatta City Council* (2009) 237 CLR 603, 610. See above n 19, 20 and 37.

\(^{58}\) *Commonwealth of Australia v. WMC Resources Limited* (1998/99) 194 CLR 1, 102.
principles of human rights [Newcrest Mining 1997, 190 CLR 513 at 657-661] and, I believe, the expectations of citizens.\(^59\)

A similar sentiment was expressed by Gleeson CJ in *Smith v ANL Ltd*,\(^60\) when he said:

> The guarantee...is there to protect private property. It prevents expropriation of property of individual citizens, without adequate compensation, even where such expropriation may be intended to serve a wider public interest. A government may be satisfied that it can use the assets of some citizens better than they can; but if it wants to acquire those assets in reliance upon the power given by section 51(xxxi) it must pay for them, or in some other way provide just terms for compensation.\(^61\)

Differences in the nature of the impugned legislation also plays a part. The *Tasmanian Dam Case* was relevantly concerned with the sterilisation of land. The *Newcrest* and *WMC Cases* concerned different types of mining tenement.

The High Court was not prepared in a majority decision to regard as acquisitions the replacement of groundwater ground water bore licences with an aquifer licence\(^62\) or the absence of space in packaging caused by the extinguishment of trademarks and other ‘get up’ in tobacco packaging.\(^63\)

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\(^{59}\) *Smith v ANL Ltd* (2000) 204 CLR 493, 530 [104].

\(^{60}\) *Smith v ANL Ltd* (2000) 204 CLR 493.

\(^{61}\) *Smith v ANL Ltd* (2000) 204 CLR 493, 501 [9].

\(^{62}\) *ICM Agriculture v Commonwealth* (2009) 240 CLR 140.

Smith v ANL Ltd Global concerned the extinguishment of an entitlement to claim damages after six months from the commencement of a statute. The majority of four characterised the legislation, to paraphrase Kirby J as extinguishing the rights of some and commensurately advantaging others. The dissenters, Hayne and McHugh JJ held that there had been no ‘legal or practical compulsion’ for there to have been an acquisition.

The nature of the right in question, particularly if it has been created by statute can therefore be significant.

The explanation for the apparent inconsistency between the cases perhaps also lies in the oft-quoted passage from the US Pennsylvania Central case, which also appears in the judgment of Brennan J in the Tasmanian Dam Case:

‘This Court quite simply, has been unable to develop any `set formula' for determining when `justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.’

A similar view idea was expressed by Kirby J in Smith v ANL Limited when he said:

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64 Smith v ANL Ltd (2000) 204 CLR 493, 530 [106].
Finding a touchstone to distinguish legislation which falls within, and that which falls outside, the requirements of s 51(xxxi) is not easy. No verbal formula provides a universal criterion.

In conclusion, in the *WMC Case*, Kirby J distilled the application of section 51(xxxi) into seven principles. The factual differences between the cases only assist to some extent in explaining the different outcomes. There is no set formula of general application which could assist in explaining the outcomes of all cases. Nevertheless the deeper principles and that underlie section 51 (xxxii) can be identified. It will be seen that they resonate with deeper principles applicable in State jurisdictions.

V  **STATE CONSTITUTIONS, JUST TERMS AND THE MAGNA CARTA**

State Constitutions do not carry the same just terms guarantee as the Commonwealth Constitution. However, fundamental rights do not necessarily stem solely from Statutes, constitutional or otherwise. As Kirby J said in the *Newcrest* and *Smith v ANL Ltd* cases, the Constitutional guarantee in the Commonwealth Constitution is arguably the expression of fundamental rights of the kind reflected in the *Universal Declaration on Human Rights*, with an ancestry that dates back at least to the Magna Carta. The Magna Carta itself was a restatement of English law as it existed at that time and therefore the rights it expresses were

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67 *Smith v ANL Ltd* (2000) 204 CLR 493, 529 [100].
68 Standing Committee on Public Administration and Finance, Western Australian Legislative Council, It is not entirely clear that at a State Level, fundamental rights cannot operate to deny the legislature power in extreme circumstances, however specific the legislation may be. See Gerard Carney above n 8, 108-13. See also Law Reform Commission *The impact of State Government Actions and processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia Report No 7* (May, 2004).
69 *Smith v ANL Ltd* (2000) 204 CLR 493,529 See above n 46.
more ancient than 1215. Blackstone said in his Commentaries that the right to unmolested private ownership of property has been affirmed over the past millennium since the Magna Carta, including in the Confirmatio Cartarum 1297 (25 Edw 1); the Bill of Rights 1689 (W&M2, c2) and more recently the Act of Settlement 1701 (12 & 13 WIII c2). Winston Churchill in The History of the English Speaking Peoples said of the Magna Carta:

Throughout the document it is implied that here is a law which is above the King and which even he must not break. This affirmation of a supreme law and its expression in a general charter is the great work of Magna Carta; and this alone justifies the respect in which men have held it.

For the King, the contemporary reader should read 'the State': that is, the executive arm of Government.

These principles, as they apply to modern land ownership, have recently been affirmed by French CJ and Kirby J in the passages referred to earlier.

The Magna Carta still stands as a statement of the law in Western Australia, according to the Law Reform Commission. English common law (and statutes) where relevant, were received into and forms part of

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72 See Churchill above n 70.
73 The Law Reform Commission of Western Australian, United Kingdom Statutes in Force in Western Australia, Report, Project No 75 (October 1994) [1.9].
the law of Western Australia.\textsuperscript{74} In any event, as affirmed by Kirby J in \textit{Newcrest}, the common law is arguably not static and may express fundamental rights from international measures such as the \textit{Universal Declaration on Human Rights}.\textsuperscript{75}

Western Australia has a distinguished analysis of the common law in \textit{Della-Vedova v State Planning Commission and the SEC}.\textsuperscript{76} In that case, Pidgeon J (at first instance, which was upheld and approved on appeal) said that:

\begin{quote}

The common law principles are reflected in s 51(xxxi) of the Australian Constitution empowering the Commonwealth to make laws with respect to the acquisition of property on 'just terms'. While this does not bind the State to do the same it shows a consistency with the common law principles. The common law principles would apply in this State unless abrogated by statute, which gives rise to the canon of construction
\end{quote}

\textsuperscript{74} Gerard Carney, Op Cit, 138-40.

\textsuperscript{75} United Nations, General Assembly, \textit{The Universal Declaration of Human Rights} (10 December 1948), Resolution 217 A (III). Also affirmed by Kirby J in \textit{Commonwealth v. Western Australia} (1999) 96 CLR 392. An objective of the 'just terms' requirement is to reflect ‘a basic principle of fundamental civil rights’: 196 CLR 392, 461 [194].

\textsuperscript{76} Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors. v State Energy Commission (1998), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC8800828 and relevantly approved and quoted in \textit{R v Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova} (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia).
referred to by Lord Atkinson in Central Control Board (Liquor Traffic) v. Cannon Brewery Co Ltd [1919] AC 744, 752:

That canon is this: that an intention to take away the property of a subject without giving to him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms.

The Public Works Act does not detract from these common law principles. On the contrary, it aims to give effect to them in their widest sense and I would interpret this as the policy and intention of the Act [referring to the Public Works Act 1902].

He proceeded to examine particular statutory provisions relating to the taking of land or interests in land relevant to that case, against the background of the above principles. He said that statutory provisions cannot deprive a landowner ‘of a right they have at common law when the legislature has not abrogated the common law’.

Pidgeon J went on to hold that the claimants could claim compensation under the relevant statutory scheme, and importantly:

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77 Batista Della-Vedova & Ors. v State Planning Commission; Batista Della-Vedova & Ors v State Energy Commission (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC8800828 at 29 – emphasis added.

78 Batista Della-Vedova & Ors v State Planning Commission; Batista Della-Vedova & Ors v State Energy Commission (1988), unreported decision of the Compensation Court of Western Australia: 22 December 1988 BCC8800828 29 and approved and quoted in R v Compensation Court of Western Australia; ex parte State Planning Commission & Anor; re Della-Vedova (1990) 2 WAR 242, 253 (Wallace J) (unanimous judgment of Full Court of Supreme Court of Western Australia).
If for any reason it could be considered that the Act [referring to the Public Works Act 1902] does not extend to incorporating this aspect of the claim in question then I consider it would exist at common law and has not been abrogated by statute. The common law is that if land is taken there is a right to compensation (A-G v De Keyser’s Royal Hotel [1920] AC 508). The principles and method of compensation is determined by the Public Works Act which embraces the common law principles making it unnecessary in normal circumstances to consider them in compensation claims. The common law provides that where the statute authorising the taking does not provide a special tribunal to assess the amount of compensation it can be claimed in an action: (Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd (supra) at 752 and Bentley v Manchester Sheffield and Lincolnshire Railway Co [1891] 3 Ch 222).

Later in his judgment he applied the common law in coming to his decision.79

The principle which can be derived from the analysis of Pidgeon J in the Compensation Court,80 is that the State cannot take property without compensating the owner of the property, on just terms, unless by statute Parliament specifically and clearly provides to the contrary. This is a fundamental right entrenched in the common law of the State and arguably forms part of its unwritten Constitution.

Why was such a fundamental right not expressly set out in the State Constitution? Although a full answer to that question could justify an

80 The Compensation Court’s jurisdiction was subsumed by the State Administrative Tribunal in 2005.
examination beyond the scope of this article, there are two reasons which immediately present themselves. First, in comparison with the Commonwealth Constitution, the approach to drafting the State Constitution was understated. Some attribute the whole task to the then Governor Sir Frederick Napier Broome. A ‘more nuanced suggestion’ is that the work was done by the Governor and a number of eminent politicians, including the then Colonial Secretary in London.\(^81\) Whoever it was, the process was not well recorded and the drafters were apparently not celebrated constitutional scholars.\(^82\) It could be speculated that a drafting process dominated by leading members of the colonial executive may not by its nature be inclined to champion individual rights enforceable in the courts. Secondly, it is a feature of the state constitutions that generally, no attempt was made ‘to incorporate all of the fundamental institutions and principles of the Westminster system of government’. Such an attempt would have been viewed as ‘embarrassingly gauche’.\(^83\) It was left to the Courts to apply the fundamental principles of the system.

An examination of relevant High Court and House of Lords cases shows that the themes adopted by Pidgeon J in the *Della-Vedova* case, which are reflected in the decisions of Kirby J in the *Newcrest* and the *Commonwealth v Western Australia*\(^84\) cases have antecedents in a number

\(^81\) Lee Harvey ‘Western Australia’s Constitutional Documents: A Drafting History’ (2013) 36(2) *University of Western Australia Law Review* 49, 50.

\(^82\) Ibid.

\(^83\) Gerard Carney, *Op Cit* 29.

\(^84\) *Commonwealth v Western Australia* (1999) 96 CLR 392. See also Callinan J in the same case.
of other High Court, Privy Council and House of Lords cases. These cases strongly support, as we have said, the entrenched common law rights to property with a guarantee against acquisition, otherwise than on just terms.

The principle mentioned by Pidgeon J is that for the common law rights to be revoked or varied, the legislation must be quite specific. This has been confirmed a number of times by the High Court, classically in *Clissold v Perry (Minister for Public Prosecutions)*. As we have seen, the same presumption in favour of entrenched rights, was affirmed by Kirby J in the *Newcrest* case and French CJ in the *Fazzolari* case.

In *Minister of State for the Army v Dalziel*, Starke J said that where there is a gap in a regulation in that it does not provide for the payment of compensation which is reasonable and just, the government would nevertheless be liable to pay compensation by application of the common law principles. Presumably, this dictum would have application where the relevant legislative provisions do not exclude the common law. Starke J repeated this principle in *Johnston Fear, Kingham and the Offset Printing Co Pty Ltd v the Commonwealth*.

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85 *Australian Apple & Pear Marketing Board & Anor v Tonking* (1942) 66 CLR 77, 104 (Rich J) with whom Latham CJ formed the majority and Latham CJ appeared to have agreed on these points (see 98, 99). Williams J appears to have endorsed this reason in *Johnston, Fear and Kingham and the Offset Printing Co Pty Ltd v the Commonwealth* (1944) 68 CLR 261, 291. The same principle was approved in *Minister of the State for the Army v Dalziel* (1944) 68 CLR 261, 291. The same principles were adopted by Starke and McTiernan JJ in the *Johnston Fear* case referred to above (at 327, 329). Similar principles have been expressed by English judges, in particular *A-G v De Keysers Royal Hotel* [1920] AC 508; *Burmah Oil Co Limited & Ors v Lord Advocate* [1965] AC 75.

86 *Clissold v Perry (Minister for Public Prosecutions)* (1904) 1 CLR 363, 373-4.

87 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 291.
Printing Co v The Commonwealth.\textsuperscript{88} Whether the relevant statute does or does not exclude the common law will be a matter for the construction of the particular statutes. The cases cited stress that the exclusion must be clear and unequivocal.

There is, therefore, a significant body of authority which would support the contentions that the common law provides the rights I have mentioned\textsuperscript{89}. As can be seen from the passage quoted above by Pidgeon J in Della Vedova, the rights can be asserted by an action in the State Supreme Court.\textsuperscript{90}

Questions will always arise, of course, as to whether there has been a taking, and how compensation is to be calculated.\textsuperscript{91} There could be disputes over the facts as to whether or not the subject matter is property and whether or not there has been a taking. In the 2003 Western Australian case of Cornell v Town of East Fremantle\textsuperscript{92} it was held that restrictive heritage provisions in a town planning scheme, which effectively prohibited development except in unusual circumstances, constituted a prohibition on development for no purpose other than a public purpose and could therefore be the subject of a claim for injurious affection compensation under section 36 of the then Metropolitan Region Town Planning Scheme Act 1959 (WA). When this decision, together

\textsuperscript{88} Johnston Fear, Kingham and the Offset Printing Co v The Commonwealth (1941) 36 CLR 128. The same principle was affirmed in Mabo v Queensland (No 2) (1992) 175 CLR 1, 111.

\textsuperscript{89} Many of the cases are referred to in K Gray, ‘Can Environmental Regulation constitute a taking at common law?’ (2007) 24 EPLJ 161.

\textsuperscript{90} See above n 78, 79.

\textsuperscript{91} See above n 50, 78 and text reproduced in respect of to that footnote.

\textsuperscript{92} Cornell v Town of East Fremantle [2003] WASC 163.
with examples such as buffer areas and others (cited for example by Deane J in the *Tasmanian Dam Case* and other judges, who have held that sterilisation constitutes acquisition)\(^93\) are examined together, it is arguable that many of the policy and legislation-based restrictions in Western Australia to which I have referred may constitute a taking.

The common law rights referred to above are more akin to the entrenched right entrenched in the Fifth Amendment to the USA Constitution rather than the constitutional guarantee in the Australian Constitution because the common law principles are not in the nature of a power-giving provision subject to a condition, as in the case of section 51(xxxi) of the Constitution, for the benefit of the State. Rather, they are entrenched legal rights in favour of the individual, usually in opposition to the State.\(^94\) This law binds the State, unless Parliament very clearly enacts otherwise. We have not yet seen these principles argued recently in a major Court case, let alone in the High Court, in regard to the de facto taking of land by Government for conservation areas. But given the economic importance which can attach to these issues, it may be just a matter of time before we have more case law on this subject.

### VI CONCLUSION

The problem stated at the beginning of this article can be summarised by the following remarks of the Hon. Ian Callinan AC QC:

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\(^93\) For example Callinan J in *Commonwealth v Western Australia* (1999) 196 CLR 392, 480 [267]. See also his comments at 484 where he refers to diminution in value being an acquisition.

\(^94\) It was suggested by Kirby J in the *Newcrest* case and Pidgeon J in the *Della Vedova* case that section 51(xxxi) is a particular expression more than a fundamental right.
Restrictions on reasonable usage, obligations of preservation, insistence on expenditure for no or little return, and on planting or replanting, are all potentially expensive. I see the crafting of a means of ensuring a fair and equitable sharing of this expense as a real challenge to the legislatures and the courts, including the High Court as the constitutional court.

Some of the issues relevant to this challenge have been referred to in this article. The limits applicable to the use of environmental and planning measures and determining when compensation is payable by the State, are unlikely to be straightforward and no set formula can provide guidance at the Commonwealth or State levels. There are, however, fundamental principles which are common to the Commonwealth and State jurisdictions which could be applied through their differing constitutional frameworks, to compensate landowners for loss in the value of land caused by environmental and planning measures.

We can be reasonably certain that with the continuing importance and likely growth of environmental law and policy at the State and Federal levels, there will be a need to revisit some fundamental principles relating to the citizen and private property.

In a number of cases the High Court has grappled with the question of when do environmental and planning measures become an acquisition of property. The High Court cases deal with the questions of whether legislation provides for an acquisition of property, and if so, was it on just terms. The application of concomitant principles under state law requires a resort to more fundamental common law principles which arguably underlie the operation of the Commonwealth and State law. The
common foundation is the principle in the Magna Carta and the Universal Declaration on Human Rights, to quote Callinan J:

Acquisition on just terms is synonymous...with acquisition according to justice and that means justice as administered by a court or tribunal fully and properly equipped to adjudicate on all matters and not subject to a truncated review or appellate process.\textsuperscript{95}

This resonates with the 1354 statutory addition to the Magna Carta which required the taking of property to be in accordance with the due process of law.\textsuperscript{96}

\textsuperscript{95} Commonwealth v. Western Australia (1999) 196 CLR 392, 491 [291], [292]

\textsuperscript{96} 28 Edward III. The 1354 Statute added a requirement that land may only be taken by ‘due process of law’ See n 8 above.
AVOIDING UNNECESSARY DIVORCE AND RESTORING JUSTICE IN MARITAL SEPARATIONS - REVIEW OF THE FAMILY LAW ACT 1975 (FLA)

CHRISTOPHER BROHIER* AND AUGUSTO ZIMMERMANN+

ABSTRACT

The concept of no-fault divorce which became law in Australia in 1975 was part of a revolution in divorce law reform which swept through the western world in the late 1960s and 1970s. It was predicated on a notion that the law should aim to buttress marriage, but if the marriage was finished in fact, the law should “enable the empty legal shell to be destroyed with the maximum fairness, and minimum bitterness, distress and humiliation.” Property would be divided on a “once for all” basis, the children, though not physically divided, would be apportioned between a “custodial” parent and an “access” parent, and the parties could start afresh. However, the last 40 years have shown that the assumption that the parties could be autonomous after divorce was wrong. The development of family law has shown that while a marriage may be dissolved, parenthood is indissoluble. The idea of the “enduring family” has emerged. However, there has not been a corresponding re-evaluation of concept of no-fault divorce or of the basic grounds for divorce. It is time this was done.

* LLB (Hons), Adelaide, GDLP, S.A.I.T.
+ LLB, LLM, PhD (Mon.); Professor of Law (adjunct), The University of Notre Dame Australia Sydney; Senior Lecturer in Constitutional Law and Legal Theory, Murdoch Law School.
I INTRODUCTION

The concept of no-fault divorce which became law in Australia in 1975 was part of a broader revolution in divorce law reform which swept through the western world in the late 1960s and 1970s.\(^1\) It was predicated on a notion that the law should aim to buttress marriage, but if the marriage was finished in fact, the law should ‘enable the empty legal shell to be destroyed with the maximum fairness, and minimum bitterness, distress and humiliation’.\(^2\)

Regrettably, many countries, Australia included, became part of this revolution without properly considering the financial consequences.\(^3\) Writing perceptively in 1985, a British academic Pamela Symes noted that amidst all the debate in relation to divorce law reform, a question that was not considered was how was it all to be paid for?\(^4\)

Further, a philosophical underpinning of the no-fault revolution was that after the divorce, the parties could make a fresh start to their lives. There would be, in addition to the divorce, a once for all settlement of property

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\(^1\) FLA section 48-irretrievable breakdown on marriage if the parties have lived separately and apart for a continuums period of not less than 12 months.


matters and even in relation to matters involving children. The courts not only allocated property, but children, and that on a binary basis. One parent was granted “custody” and the other limited visiting rights or “access.” Once those issues were settled, the parties could be autonomous.\(^5\)

The past 39 years have shown that the rise in divorce has thrown a significant and probably unsustainable burden on the public purse in the areas where the Australian (and other western nations) budgets are most vulnerable – namely the issues of aged care, health and youth affairs. Those years have also shown that the assumption that the parties could be autonomous after divorce was wrong. The development of family law has shown that while a marriage may be dissolved, parenthood is actually indissoluble. The idea of the “enduring family” has emerged.\(^6\) However, there has not been a corresponding re-evaluation of concept of no-fault divorce or of the basic grounds for divorce. It is time this was done.

This paper discusses the costs of divorce and the imperative that those costs have created for government policy to be aimed at avoiding unnecessary divorces. It then discusses the reality of the enduring family and the impact that should have on family policy. Finally, it discusses some ideas for avoiding unnecessary divorces, including a deviation from the concept of no-fault divorce.

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\(^5\) Parkinson, above n 3, 4.

II THE COSTS OF DIVORCE

Divorce is a matter of private law. Why then should governments be interested in lessening divorces? The answer, which may not have been appreciated at the start of the no-fault revolution, is that the costs imposed by family breakdown are being borne by the public purse. According to Professor Patrick Parkinson:

A British study found the costs of family breakdown were £41.74 billion in 2011, or £1,364 for every taxpayer. A Canadian study, published in 2009, estimated the costs in that country as 7 billion Canadian dollars per year. A US study estimated the costs of family breakdown and unmarried parenthood in 2008 as being at least $112 billion per year. There is of course plenty of scope for argument about the detail, but the broad picture is clear. Such calculations do not include the less measurable costs such as the intergenerational impacts considered in this Article. The human costs are, of course, immeasurable.⁷

No doubt the same order of costs, per capita, will apply in Australia. Accordingly, and especially in times of budgetary constraints, where all sides of politics accept that there need to be structural savings in Australia’s budgetary situation (a matter which is in common with all western nations) it is eminently proper that avoiding unnecessary divorces becomes a public policy objective.

There are tremendous costs all around when marriages break up. First, divorce increases economic vulnerability of adults and children, reducing

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⁷ Parkinson Above n 4, 23.
many of them to poverty and deprivation. According to Matthew Bambling, a relationship expert from the University of Queensland, divorce is a primary source of poverty among the working people. Because of divorce, Dr Bambling explains, ‘people may be required to rely in greater part on the social welfare system, [and] there is the potential for court costs borne through the government-funded system’.

Indeed, figures from Monash University’s Centre for Population and Urban Research reveal that family break-up constitutes the primary cause of the current rise in poverty levels in Australia. The Centre’s research has found an undeniable link between single-parent families and the prospect of poverty. This is fully confirmed by Canberra University’s National Centre for Social and Economic Modelling, which carried a research concluding that divorce generally leaves both partners

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much worse off economically, although women tend to experience the biggest fall in disposable outcome.\textsuperscript{12}

There are therefore significant economic consequences of the ‘divorce revolution’. Social indicators released by the \textit{Australian Bureau of Statistics} indicate that more than half of all the single parents in the country live on government welfare. In other words, they depend on the state’s financial assistance to maintain their most basic living standards.\textsuperscript{13} According to the information released by the federal Attorney-General’s Department, in conjunction with the Department of Human Services and the Department of Social Services, in the last financial year alone the Commonwealth Government spent $12.5 billion on support payment to single parents, including rent assistance and other government-funded benefits.\textsuperscript{14} These family breakdowns cost the Australian economy more than $14 billion a year, with each Australian taxpayer paying about $1,100 a year to support families in crisis.\textsuperscript{15}

This article now examines 3 areas where costs are imposed on the public purse by divorces: the areas are aged care, health and youth affairs.

\textsuperscript{12} S Anon, ‘Divorce Shrinks Income’, \textit{The Herald Sun}, Melbourne, April 6, 2005, 29.
\textsuperscript{13} Quoted from S Baskett, ‘Half of Single Parents on Welfare’, \textit{The Herald Sun}, Melbourne, June 20, 2000, 8.
III Aged Care

The *Australian Institute of Family Studies* paper entitled ‘The Consequences of Divorce for Financial Living Standards in Later Life’\(^\text{16}\) found that; ‘on average, having been divorced has negative consequences for income and financial circumstances in older age. However, the negative financial impacts of divorce are substantially reduced by remarriage’.\(^\text{17}\) However, as the rates of re-marriage have fallen significantly,\(^\text{18}\) the ameliorative impact of remarriage may not be available to many divorced people.

The adverse financial impacts of divorce were reflected in lower rates of home ownership for those who have been divorced as against those who have never divorced, and in a finding that ‘divorced singles were more reliant on the public pension than those who had not divorced…’\(^\text{19}\). Further, the study found that the increased reliance on the pension by divorced singles ‘has important implications for the financing of retirement incomes in Australia in coming decades and the extent to which the taxpayer will have to bear the costs of providing for retirement incomes’.\(^\text{20}\)

The lower rates of home ownership will also impact on the costs of providing aged care, as it increases the likelihood of those person having

\(^{17}\) Ibid (ix).
\(^{19}\) Above n 7, (xi).
\(^{20}\) Ibid.
to be cared for in institutions at greater cost to the community and decreases the number of persons who are able to pay bonds to aged care institutions, to make some contribution toward the cost of institutional care. These findings are obviously unsurprising since the inevitable effect of divorce is that two households are created when before there was one. As Professor Parkinson points out:

People cannot go from one household into two households, with a duplication of housing costs, furnishings and appliances, and other such expenses, without suffering a significant loss of living standards.21

Professor Parkinson also points to another aspect in which divorces increase the costs of aged care, albeit in a hidden way. That is that divorce reduces the capacity of adults in mid-life to care for the older generation. The support given to elderly parents is multifaceted and of common knowledge. It takes to form of assisting with shopping, cleaning, paperwork, finances and medical appointments to name but a few. Such informal support is vital in ‘reducing the necessity for the elderly to go into institutional care, or in delaying that eventuality’.22

This burden of care for the elderly has often fallen on women.23 However, as separated and divorced women have taken an increased role in the workforce in the last two decades to be the sole breadwinner for the family (as well as caring for the children), their capacity to care for their elderly parents has decreased. Finally, of course, divorce also removes

21 Parkinson, above n 4, 11–12.
22 Ibid 19.
much of the sense of obligation one party may have had to care for their parents-in-law.\textsuperscript{24}

This means that the burden of providing the services to keep people in their own homes, or the greater burden of providing institutional care, falls more on the public purse. At a time when the costs of aged care including the pension are one of the largest items in the budget,\textsuperscript{25} it is imperative that efforts be made to ameliorate these financial impacts of divorce.

\section*{IV HEALTH}

Australian research has found that there are large health differences between married men and women and men and women who are separated or divorced or widowed.\textsuperscript{26} The latter have greater mortality rates, more acute symptoms and mental health problems than the former.\textsuperscript{27} As one researcher said:

I’m pretty sure that one reason men live approximately eight years longer if they are married (and are otherwise healthier in various ways)

\begin{flushright}
24 Parkinson, above n 4, 20–21.
27 Ibid.
\end{flushright}
is that their wives tell them what to do and they do some of what their wives tell them.\textsuperscript{28}

No doubt this operates vice-versa. There are considerable health issues for women caused by marriage breakdown. Researchers affiliated with the University of New South Wales, the University of Sydney and Griffith University have concluded that, compared to their married peers, single mothers are almost twice as likely to report health conditions.\textsuperscript{29} After reviewing 111 relevant studies conducted between 1999 and 2010, these researchers empirically determined that both divorce and sole motherhood are directly associated with higher levels of depression and poor health among women. These researchers conclude that awareness that women who have experience divorce and sole motherhood are most at risk of depression, ‘is vitally important’.\textsuperscript{30} Whilst stating that depression is often attributable to financial stress provoked by marriage dissolution, they observe that being in a stable relationship provides women a much better protection against depression and poor health. According to them:

For all age groups and stages of life, trauma and stressful life events were consistently associated with depression. … In addition findings concluded that separation and divorce is associated with depression; as is sole motherhood. However, being in an intimate relationship provides protection against depression.\textsuperscript{31}

\begin{itemize}
\item \textsuperscript{28} Scott M Stanley (2005) What is it with men and commitment anyway’  
\textit{Threshold} 83:4-11; noted in Andrews above n 11, 36.
\item \textsuperscript{30} Ibid.
\item \textsuperscript{31} Ibid 4.
\end{itemize}
Similarly, a 2009 study has linked lower blood pressure readings to being married, compared to those who are not married.\textsuperscript{32} The differential is particularly evident in suicide rates. Kate Fairweather-Schmidt et al in their significant study ‘Baseline factors predictive of serious suicidality at follow-up: findings focussing on age and gender from a community based study’\textsuperscript{33} found that the risk of suicide among the divorced, separated and widowed is about 75\% more than for the married. Such findings are common in the research field determining whether ‘relationship breakdown is one of the major causes of suicide worldwide’\textsuperscript{34}

Again, these findings are unsurprising since the emotional trauma associated with divorce means that the parties are often under severe distress. Further, the adverse financial impact caused by divorce inevitably means that those involved have less to spend on health and related matters.

\section{YOUTH AFFAIRS}

There is now widespread consensus that children who live with their two biological married parents do better across the board than children in other forms of families. An American academic, Professor Susan Brown recently reviewed the evidence and concluded:

Over the past decade, evidence on the benefits of marriage for the wellbeing of children has continued to mount. Children residing in two-

\textsuperscript{32} ‘Aisle lowers the blood pressure’ (2009) \textit{Threshold} 97:4; referred to in Andrews above n 11, 34.
biological-parent married families tend to enjoy better outcomes than do their counterparts raised in other family forms. The differential is modest but consistent and persists across several domains of well-being. Children living with two biological married parents experience better educational, social, cognitive, and behavioral outcomes than do other children, on average. Variation in well-being among children living outside of two-biological-parent married families (e.g., married step, cohabiting, and single-parent families) is comparatively low and often negligible. The benefits associated with marriage not only are evident in the short-term but also endure through adulthood.35

According to Professor Paul Amato, a leader in this field of research, ‘research during the last decade continued to show that children with divorced parents, compared with children with continuously married parents, score lower on a variety of emotional, behavioral, social, health, and academic outcomes, on average’. According to him, ‘[a]lthough many of these studies replicate earlier findings, they are useful in showing that the links between divorce and forms of child well-being have remained relatively constant across decades’.36 In a seminal 2005 study entitled ‘The Impact of Family Formation Change on the Social, Cognitive and Emotional Well-Being of the Next Generation”, Professor Amato commented:

36 P. Amato, Research on Divorce: Continuing Trends and New Developments, 72 J. Marriage and Family 650, 653 (2010). McLanahan and Percheski have reported that: “A large body of research indicates that living apart from a biological parent (typically the father) is associated with a host of negative outcomes that are expected to affect children’s future life chances or ability to move up the income ladder.” Sara McLanahan and Christine Percheski, Family Structure and the Reproduction of Inequalities, 34 Annual Rev. Sociology 257, 264-265 (2010). Notes 25-27 are referred to in Parkinson above n 4, 27.
In 2002 there were about 29 million children in the United States between the ages of twelve and eighteen—the age range covered in table 1.68 Table 2 indicates that nearly 7 million children in this age group will have repeated a grade. Increasing the share of adolescents living with two biological parents to the 1980 level... suggests that some 300,000 fewer children would repeat a grade. Correspondingly, increasing the share of adolescents living with two biological parents to the 1970 level... would mean that 643,264 fewer children would repeat a grade. Finally, increasing the share of adolescents in two-parent families to the 1960 level suggests that nearly three-quarters of a million fewer children would repeat a grade. Similarly, increasing marital stability to its 1980 level would result in nearly half a million fewer children suspended from school, about 200,000 fewer children engaging in delinquency or violence, a quarter of a million fewer children receiving therapy, about a quarter of a million fewer smokers, about 80,000 fewer children thinking about suicide, and about 28,000 fewer children attempting suicide. Seen from this perspective, restoring family stability to levels of a few decades ago could dramatically affect the lives of many children.37

These statistics raise great concern once it is realised that they represent young lives. These lives are fully documented in the landmark 25 year study of children of divorce by Professor Judith Wallerstein et al entitled

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The Unexpected Legacy of Divorce.38 One such ‘child of divorce’ stated:

We define ourselves as children of divorce. … I guess you might say that our parents’ divorce was the formative event of our lives…The divorce is a permanent part of me and in some ways I’ll never get over it.39

The effect of divorce in these young people is not only in relation to issues like school performance, but in their ability to enter into solid relationships in their own adult lives. The same young person said:

Look at it this way. I grew up unprepared for adult relationships especially for being a woman with a man. No one taught me what I could expect or ask for.40

Professor Wallerstein is a psychologist and a leading authority on the long-term effects of divorce on children in the United States. She began her empirical research in the early 1970s, initially assuming that the effects of divorce on children were short-lived. To her own dismay, her empirical study led Professor Wallerstein to conclude that serious emotional problems follow the children from divorced parents throughout their adolescence and even adulthood. Indeed, almost half of these children are ‘worried, underachieving, self-deprecating and sometimes angry’.41 She sobbingly concluded:

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39 Ibid 291.
40 Ibid.
National studies show that children from divorced and remarried families are more aggressive toward their parents and teachers. They experience more depression, have more learning difficulties, and suffer from more problems with peers than children from intact families. Children from divorced and remarried families are two to three times more likely to be referred for psychological help at school than their peers from intact families. More of them end up in mental health clinics and hospital settings ... Numerous studies show that adult children of divorce have more psychological problems than those raised in intact marriages.  

As with the other issues discussed above, these findings should not surprise anyone. They are the logical result of legal and sociological theories coming into conflict with the irreducible realities of our human nature or the natural law. In such a conflict the natural law must always prevail. Accordingly, efforts to ease these consequences by coerced child support regimes, while ameliorative to some extent, do not address the issue. First, because they are costly (in Australia it costs 34.6 cents to the Government for every dollar collected in child support through the Child Support Agency). Second, because most of those who have to pay child support are on moderate to low incomes and often cannot contribute much if anything. Third, because maintaining two homes from an

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42 Above n 38, xxvii.
44 ‘In Australia, for example, about 20% of all those with an obligation to pay child support are themselves on welfare benefits. The incomes of other non-resident parents are not high. In June 2009, the median income of all parents liable to pay child support was only $31,000. Taking account only of those who had a taxable income, the median was $40,677. In May 2009, full-time adult earnings were over
income that previously had to support one, inevitably means there is less for all and so less opportunities for the children and finally, and most importantly, the natural biological benefit of a father and mother both present is irreplaceable. As Justice Paul Coleridge, a senior Family Division Judge in the United Kingdom has stated:

What is a matter of private concern when it is on a small scale becomes a matter of public concern when it reaches epidemic proportions…. I am not suggesting that all relationship breakdown and termination can be avoided in all cases. Of course it cannot. …The time has come for a major examination of all the issues surrounding family life, its support and maintenance, and especially the mechanisms and laws for its termination.\(^{45}\)

VI THE ENDURING FAMILY AND THE INDISSOLUBILITY OF PARENTHOOD

The assumption that divorce would dissolve the family unit, which was fundamental to the no-fault divorce revolution, has now been abandoned. Emeritus Professor Margo Melli has said what many Australians have proved in the crucible of living with divorce, ‘[t]oday, divorce is not the end of a relationship but a restructuring of a continuing relationship’.\(^{46}\) Marriage may be dissoluble by law but family is indissoluble in fact.


Australia has been at the forefront in recognising this truth by legislative reform; i.e. by the 2006 amendments to the FLA which require courts to consider shared care arrangements in relation to children.\textsuperscript{47} Section 60B of the FLA now provides: ‘Children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child’. Shared care or shared parenting is now common and the old “custody” and “access” regime is over.\textsuperscript{48} This movement towards some form of shared care has also occurred (or is being debated) across the western world.\textsuperscript{49} As Professor Parkinson has said:

Legal systems throughout the Western world have not created the indissolubility of parenthood. Slowly, painfully, and through much conflict in the legislatures and the courts, legal systems have had to come to terms with the reality of parenthood’s indissolubility. Positive law has had to become realigned with natural law. Having sought freedom from the pain of broken relationships, people have had to come to terms with the limitations on that freedom. Autonomy is limited by the connectedness of parenthood for as long as each parent desires that close connection with his or her children, and insofar as the law will refuse to sever or attenuate that connection.\textsuperscript{50}

Having been forced to recognise the indissolubility of the family, and so the error of the assumption that underpinned the no-fault divorce

\textsuperscript{47} Patrick Parkinson \textit{The Payoffs and Pitfalls that Encourage Shared Parenting: Lessons from the Australian Experience} University of Sydney Law School Legal Studies’ Research Paper No. 14/47 May 2014.

\textsuperscript{48} Ibid 5.

\textsuperscript{49} Ibid 1 and 6-8.

\textsuperscript{50} Parkinson above n 4, 36.
revolution, it is submitted that it is now time to examine again the concept of no-fault divorce on the basis of a 12 month separation.

VII SUGGESTIONS FOR REFORM

Why should the law deal attempt to reduce the number of divorces and keep families together? This article has shown that the impact of the public purse and the reality of the enduring family require such an attempt. It is also clear that the rise in divorce was aided and abetted by the no-fault divorce revolution:

In Australia, the divorce rates started to climb from the mid-1960s and rose very sharply following the introduction of the Family Law Act 1975 that introduced no-fault divorce. The sharpness of the divorce peak in 1976 was partly due to a backlog of long-term marital separations for which the end of the marriage was formalised as soon as the new Act came into effect. Following the 1976 peak, the divorce rate subsequently declined and has since been stable, but at a much higher level than prior to the introduction of the new Act.\(^51\)

If the increase in the divorce rate was aided and abetted by a change in the law, it is legitimate that the law attempt to reduce that rate. As a matter of public policy, the legislative efforts will yield most benefit in supporting marriage. After all, unmarried cohabiting relationships break up at a far higher rate than marriages. Indeed, An Australian study has found that the chances of a cohabiting couple with children breaking up are greater by a factor of seven than a married couple who had not lived together before marriage, and greater by a factor of four than a married

\(^51\) Above n 9, 3.
couple who had cohabited before marriage. Accordingly, the benefits to the public purse flow from supporting marriage rather than any variant thereof.

Three propositions for reform are suggested:

A Revisiting the 1 year period of separation as proof of an irretrievable breakdown of the marriage

The period was selected arbitrarily. For instance, some European countries require a 3 year waiting period. Requiring a greater period of separation, say 2 years, will force couples to give greater consideration to staying together and resolving their conflicts. Alternatively, the grounds for filing for divorce may be period of separation for 1 year, but the court may be precluded from granting the application for a further year. The period may be abridged to 1 year if a court finds there are special circumstances which require it. Special circumstances may be left to the courts’ discretion but an inclusionary descriptor like the following may assist:

When the respondent has been convicted, during the marriage, of a violent or sexual [offence] against the [applicant] or a minor child; or When a court has made a final, non-preliminary civil protection order against the divorce respondent, based on a final determination

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that the respondent committed or threatened physical violence against the divorce petitioner or a minor child of the divorce [applicant], where the respondent had advance notice and an opportunity to participate in an evidentiary hearing.\textsuperscript{54}

The evidence suggests that longer waiting periods are associated with lower divorce rates.\textsuperscript{55} This complements the other evidence that at nearly half of divorcing couples are from low conflict relationships, which could survive with help.\textsuperscript{56} Recent research shows that about 40\% of American couples who are already in the divorce process say that one or both of them would be interested in pursuing reconciliation.\textsuperscript{57} There is therefore good evidence to consider extending the period before parties may obtain a divorce.

B \textit{Mandatory reconciliation counselling}

Australia has already legislated for mandatory mediation to resolve issues such as parenting orders before an application may be filed.\textsuperscript{58} This proposal would entail refining these provisions to require counselling specifically directed at the possibility of reconciliation. Matter to be addressed may be:

- \textit{Questions to help individual spouses reflect on their potential interest in reconciliation;}

\textsuperscript{54} Ibid 42.
\textsuperscript{55} Ibid 23.
\textsuperscript{56} Ibid 19.
\textsuperscript{58} Parkinson above n 47, 21.
- The potential benefits of avoiding divorce for children and adults;

- Resources to assist with reconciliation; and

- Information on when the risk of domestic violence should rule out working on reconciliation at this time.⁵⁹

Aligned to such counselling may be a requirement for a formal notice before action process. Such a process is widely used in civil courts. In the Family Court this may take the form of a formal notice by one party to another that their marriage faces serious difficulties and suggesting that they undertake counselling together.⁶⁰ Such a procedure may overcome the common situation that one party first knows of the issues in the marriage when the other announces they are leaving.

C Providing the right for a court to award damages for a breach of the marriage contract

The law gives a right to claim damages for breaches of contract in the civil and commercial arenas. Why should marriage be the only contract, which may be breached with impunity? The law, by means of ascribing consequences to actions, signals to us what we as a community hold important.

Marriage is a contract. It is clear, however, that the no-fault revolution, in allowing the marriage contract to be breached without any legal consequences (though as this paper has demonstrated there are serious

⁵⁹ Doherty et al above n 41, 33.
and unavoidable consequences in fact) has undermined the value we place on marriage to the detriment of Australian society.

It is time to change and give new value to marriage. The courts must be given the power, on application, to award damages to a party who has breached the marriage contract namely of a union between a man and a woman for life to the exclusion of all others.\(^61\)

Clearly this will involve the courts having to make awards of damages for intangible losses. However, courts routinely do so in awarding damages for non-economic loss in personal injury claims and damages for loss of reputation in defamation claims. This may be by means of an actual award of damages or by weighting any division of property to account for the fault. The benefit to assisting the longevity of marriages is that, once it is known that damages may flow, parties may be more inclined to abide by the marriage contract. Such a reform is likely to find widespread community support.\(^62\)

**VIII CONCLUSION**

Four decades after the no-fault divorce revolution in Australia, our society has experienced the massive financial and human costs of a legislative reform that was enacted without adequate forethought. As Professor Parkinson has stated, ‘fragile families lead to broken hearts. They also threaten the wellbeing of the community as a whole. Turning

\(^{61}\) *Marriage Act 1961* section 5.

this around will require a herculean effort, but we cannot afford not to make the attempt’.\textsuperscript{63}

Indeed, the cost of fragile families that has ensued is now significant. Naturally, as noted in this article, children are the principal victims of this ‘no-fault revolution’. Professor Judith Wallerstein has argued that ‘[f]or every Little Engine That Could there is a Little Engine That Couldn’t’.\textsuperscript{64} Those Little Engines are young people and we cannot afford to delay helping them. Now it is the time to start.

\textsuperscript{63} Parkinson above n 4, 30.
\textsuperscript{64} Wallerstein above n 39, 266.
MAGNA CARTA

PAPERS

“ORIGINALISM” IN MAGNA CARTA

DR. AUGUSTO ZIMMERMANN*

I INTRODUCTION

King John’s grant of Magna Carta in 1215 is a wonderful example of the central role religion played in the development of the common law. Constituting a major shift in the social mentality of the English people, the Great Charter represents a revolutionary advancement in the law; in that, the provisions found in the Charter, and its many subsequent revisions, were predominantly concerned with recognising and endowing political and juridical rights. More importantly, the effect of the Charter was a concession from the king that he, too, could be bound by the law, thus establishing a clear formal recognition of the rule of law.

Prior to Magna Carta, customary law defined the legal rights of English subjects. In the absence of statute law, disregarding custom, the king was vested with the authority to administer the law as he saw fit. Accordingly King John ruled arbitrarily after inheriting the throne after King Richard’s death in 1199, endeavouring to liberate himself from restraints

* LLB, LLM cum laude, PhD (Mon.). Law Reform Commissioner, Law Reform Commission of Western Australia; Former Associate Dean (Research) and Senior Lecturer in Legal Theory and Constitutional Law, Murdoch Law School; Professor of Law (Adjunct), The University of Notre Dame Australia, Sydney; President, Western Australian Legal Theory Association (WALTA). Paper presented at the Parliament of Tasmania on the occasion of its commemoration of the 800th anniversary of Magna Carta, Hobart/TAS, 16 June 2015.
of the law and powerful ministers so as to govern the realm at his sole pleasure. Still, the monarch’s ability to rule arbitrarily was soon called into question, especially when a number of failed military conflicts abroad (namely, losses to the French), combined with constant increases in taxes to fuel such conflicts, provoked a great deal of discontent amongst his subjects (most notably, the nobles and barons).

The 12th century was marked by a significant outburst of literature, art and culture in England, which the development of Christian ideals of law and government accompanied. The influential Archbishop of Canterbury, Hubert Walter (1160-1205), espoused the view that the royal power was inseparable from the law. As Theodore Plucknett pointed out, ‘[his] prestige was so great that a word from him on the interpretation of the law could set aside the opinion of the King and his advisers. King John, in fact, felt with much truth that he was not his own master so long as his great minister was alive’.

Growing discontent with King John heightened after a dispute with Pope Innocent III over the appointment of the See of Canterbury. Archbishop Walter had died and the endorsement of different candidates resulted into a bitter power-struggle between King John and Pope Innocent III. In 1205 two candidates disputed the election of the see of Canterbury. Pope Innocent III rejected both contenders and appointed his own candidate, Stephen Langton. Yet, John regarded his bishops as no more than higher civil servants and desired the English church to be entirely subservient to the Crown. Langton, however, assumed the separate sphere of Church and State, thus attacking the king’s conduct and declaring that his subjects were not bound to him if he had broken faith with the ‘King of kings’.
The Great Interdict followed to which the King replied by confiscating Church property. This led Rome to submit King John to severe punishments, especially interdict in 1207 and excommunication in 1209. The king eventually succumbed to the Pope’s demands and was forced to resign the Crowns of England and Ireland, receiving them again as the Pope’s feudatory. In 1213, under the threat of French invasion by Phillip Augustus, King John finally accepted Langton’s appointment and to subject his kingdom to the lordship of Innocent III. These sources of discontent eventually led the English barons to march into London in 1215. They forced King John to sign the articles of demand encompassed in Magna Carta. By that time Langton had become the main figure in the struggle of the barons against King John.

II STEPHEN LANGTON’S ORIGINAL INTENT

Historians in search of the author of Magna Carta generally agree that Stephen Langton (c.1150 – 1228) was the principal drafter of the original document. But when Pope Innocent III appointed him in 1206, he had made an unusual choice since Langton had spent over thirty years outside England in the schools of Paris. This fact alone, indeed, was a very good reason for King John’s complaint that the chosen candidate had lived too long among his archenemies in France. Moreover, before becoming the pontiff, Pope Innocent III—who deeply admired the learned Langton—was a student of his at Paris.

When Langton arrived in England in July 1213 and met King John on 20 July at Winchester, he immediately absolved the king from
excommunication on the condition that the laws of his ancestors were fully restored, particularly the laws of Edward the Confessor (c.1003–1066) that required the monarch to rule justly. This specifically included an utterance made in 1140, which, based on the laws of Edward the Confessor, stated:

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\text{[T]he king ought to do everything in the realm and by judgement of the great men of the realm. For right and judge ought to rule in the realm, rather than perverse will. Law is always what does right; will and violence and force are indeed not right. The king, indeed, ought to fear and love God above everything and preserve His commands throughout his realm.}
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Archbishop Langton shared the view of his predecessor, Hubert Walter, that ‘loyalty was devotion, not to a man, but to a system of law and order which he believed to be a reflection of the law and order of the universe’. From Romans 13 Langton concluded that the royal power derived from God and that such power was always limited by the rule of law. He stated: ‘If someone abuses the power that is given to him by God and if I know that this bad use would constitute a mortal sin for me, I ought not to obey him, lest I resist the ordinance of God’. Elsewhere Langton also stated that ‘when a king errs, the people should resist him as far as they can; if they do not, they sin.’ Additionally, he commented that ‘if someone has been condemned without a judicial sentence, the people are allowed to free the victim.’ Consequently, as Plucknett noted, ‘conflict was inevitable between such statesmen and John, whose life had been spent in constant turbulence, intrigue, treachery, with complete indifference to those principles of harmony in life and nature which underlay all the current belief in justice and responsibility.’ It was Langton, therefore, who drafted the Great Charter as way of
addressing the baronial grievances. His biblical studies at Paris anticipated the direct challenges of Magna Carta to the royal power, which manifestly asserted the superiority of the written law over political arbitrariness. In Chapter 18 of Deuteronomy the Holy Bible seemed for him to convey the principle that the law of the land should be reduced to writing for the instruction of the civil ruler. Since the idea of written law had played a fundamental role in the formation of the Hebrew nation, Langton concluded that a similar function should be applied to the grievances levied against King John. These grievances should be expressed in writing and the king compelled to affix his royal seal to the written law. As Baldwin points out, ‘the law of the realm should be written down to guide the king in ruling the kingdom and that due process facilitated by the judgement of peers and guided by the law of the land should be applied not only in the king’s courts but also to the king himself’.

Magna Carta was therefore primarily the work of Archbishop Langton, who sincerely hoped through this written document to realise an Old Testament, covenantal kingship in England. His concerns for freedom and due process were made explicit in several provisions of Magna Carta, especially Article 39 (‘No freeman shall be taken or imprisoned or disseised [dispossessed] or outlawed or exiled or in any way ruined … except by the lawful judgement of his peers or by the law of the land’), Article 40 (‘To no one will we sell, to no one will we deny or delay right or justice’), and Article 52 (‘If anyone has been disseised or deprived by us without lawful judgement or his peers of lands, castles, liberties, or his rights, we will restore them to him at once’).
Langton’s biblical studies at Paris deeply shaped those important provisions. Because of this, Magna Carta can be read not just as a historical, constitutional or legal document but also a *religious* document. Langton had, in his Parisian exile, been among the most famous lecturers on teachings of the Old Testament. He strongly believed that the law written down in Deuteronomy prevented the monarch from going beyond the power explicitly authorised to him. He had studied Saul’s acclamation as king over Israel by the prophet Samuel, who ‘declared to the people the law of the kingdom and wrote it in a book and deposited it in the presence of the Lord (1 Samuel 10:25)’. As such, Langton expected that a written law should become an ‘English Deuteronomy’ that would work in the form of a covenant between God, king and people, thus ensuring that common-law polities had at their heart a covenantal foundation in which the king would be constitutionally accountable to a higher authority. For Langton wholeheartedly believed, as Lord Sacks noted, that:

> [w]hat has been true in ancient Israel was to be true in medieval England. Langton was trying in his contributions to the Charter to realise in England a biblical, covenantal kingship. The Charter would soon be known as the Great Charter of Liberties. It is in the form of a *covenant* of liberties: a covenant between God, the king and the people, laying down the principles on which the king would reign.

Archbishop Langton was a learned theologian and his massive commentaries on the Bible contain thousands of pages of explanation about the meaning of scriptural words and phrases. He applied his knowledge of biblical hermeneutics to draw modern parallels between England and the Old Testament stories of good kings and bad kings who
abused their powers by violating God’s laws. The good kings of Scripture, Langton argued, had been wise to acquaint themselves with the legal rules of Deuteronomy, a book of laws that Moses wrote in the form of a treaty (or social contract) between the king and his subjects, calling the nation of Israel to faithfully uphold God’s laws. By contrast, the bad rulers were those who sought to evade both the advice of their priests and the obligation to rule according to the law. Thus Langton concluded, among other things, that ‘necessity’, or absolute need, was the primary reason for taxation, although he complained that contemporary ‘rulers taxed for trivial reasons, from mere vanity or pride’. As Nicolas Vincent points out:

Those who attended Langton’s lectures would have heard him contrast the priesthood recruited by Moses with modern bishops ‘recruited from the Exchequer in London’. Those who read his commentary on the book of Chronicles would have found him railing ‘against princes who flee from lengthy sermons, surely a reference to King John’s attempts to escape the sermonizing of St Hugh of Lincoln. Kingship itself, Langton argued, had been decreed by God not as a reward but as a punishment to mankind. As the Old Testament of Hosea (13:11) proclaims, ‘I have given you a king in my wrath.’

Archbishop Langton wholeheartedly embraced the scriptural thesis that civil government is not God’s original plan for humankind but rather a result of original sin. The first reference to civil government in Scripture is located in Genesis, Chapter 9, where God is reported to command capital punishment for anyone who takes innocent life since humans are
created in the image of God. Yet the state is regarded as not being envisaged in God’s original plan for humankind. Rather, the state is deemed a ‘necessary evil’ since it is conceived only after sin has entered in the world, when it becomes therefore necessary to establish a civil authority that must curb the violence ushered by the Fall (Genesis 6:11-13). At the beginning of God’s creation, however, the biblical account reports that man and woman lived in close fellowship with their Creator, under his direct law and sole authority. According to Baldwin, this biblical worldview led Archbishop Langton to conclude that:

[t]here was no government in the Garden of Eden before the Fall, and there will be none at the end of the world. Just as God allowed divorce before of human frailty, so he has permitted the existence of rulers only to curb the original sin that resulted from the Fall. When Yahweh in the Old Testament narrative (1 Samuel 8 and 9) agreed to the children of Israel choosing Saul as their king, therefore, he allowed it only with severe reservations and misgivings. After Saul was acclaimed king, the prophet Samuel proclaimed the law of the real (legem regni) and had it inscribed in the book that was placed before the Lord (1 Samuel 10:24-5) … Langton argued that the law not only stated the peoples’ obligations to the king, but also what the king could exact from the people; for that reason the law was written down to prevent the king from demanding more. Most specifically, the law was the book of Deuteronomy, truly the send written law of the children of Israel. Chapter 17 prescribed the duties of the king.

III RELIGIOUS SIGNIFICANCE OF MAGNA CARTA

Magna Carta signalled a remarkable advancement in English law. King John, acting on the advice of two archbishops and nine bishops, sealed
Magna Carta ‘from reverence for God and for salvation of our soul and of all our ancestors and heirs, for the honour of God and the exaltation of Holy Church and the reform of our realm’. Furthermore, the barons justified their actions as legally permissible under God and the Church. In so doing, Archbishop Langton and Robert Fitzwalter led them, with Fitzwalter declaring himself the ‘Marshal of the army of God and Holy Church’.

From 1225, subsequent versions of the Charter ‘were reinforced by sentences of excommunication against infringers’. Although this appears to be a strange form of punishment to our modern standards, it was for the breaking of their oaths that King Stephen after 1135 was stigmatised as a tyrant and usurper. Oath-taking was taken seriously and, in an age without effective judicial sanctions, ‘the consequences of oath-breaking could prove disastrous for individuals as for nations.’ J C Holt commented on the efficacy of ecclesiastical penalties for breaches of the Charter:

Reinforce the charters by the threat of excommunication; promulgate the penalty in the most solemn assemblies of king, bishops, and nobles, as in 1237 and 1253; reinforce the threat by papal confirmation, as in 1245 and 1256, have both charters and sentence published in Latin, French, and English as in 1253, or read twice a year in cathedral churches as in 1297; display the Charter of Liberties in church, renewing it annually at Easter, as Archbishop Pecham laid down in 1279; embrace the king himself within the sentence of excommunication, [as] Archbishop Boniface did by implication in 1234. To modern eyes it is all repetitive and futile. In reality it was a prolonged attempt to bring the enforcement of the
Charter within the range of canon law, to attach the ecclesiastical penalties for breach of faith to infringements of promises made “for reverence for God”, as the Charter put it, promises repeatedly reinforced by the most solemn oaths to observe and execute the Charter’s terms. This was perhaps the best the thirteenth century could do to introduce some countervailing force to royal authority.

In this sense, Magna Carta can be historically described as a medieval treaty between the English king and his barons, concerning such matters as the custody of London and, in the Letters of Testimonial signed by the Archbishop and the bishops, a ‘charter of liberty of Holy Church and of the liberal and free customs’ that the monarch had conceded. The primary intent behind the original draft was to bring about an end to a state of civil war through signing a document that declared the liberties that it itself conveyed. In his Second Institutes, Sir Edward Coke identified ‘four ends of this Great Charter, mentioned in the Preface, viz. 1. The honour of Almighty God, &c. 2. The safety of the Kings Soule, 3. The advancement of the holy Church and 4. The amendment of the Realm: foure most excellent ends’. So customs were not predominant, but rather keeping the peace and liberties of the realm. Indeed, throughout Magna Carta, customs are subsidiary to liberties since they are conveyed as liberties in relation to practices that were commonly described as consuetudines. Above all, the Great Charter was explicitly granted not only ‘for the honour of God and the exaltation of Holy Church’, and out of ‘reverence of God and for the salvation of the [king’s] soul and those of all [his] ancestors and heirs’, but also, and particularly significant, for ‘the reform of our realm.’
IV FINAL CONSIDERATIONS

For those who honestly seek to understand the historical legacy of Magna Carta, the document must be analysed primarily in light of the original drafter, Stephen Langton’s, legal-political philosophy. The Great Charter was primarily the work of this great Archbishop, who sincerely hoped to realise an Old Testament, covenantal kingship in England. Indeed, Langton’s biblical studies at Paris deeply shaped the provisions of Magna Carta, including those who still endure even to this present day as great declarations of rights and freedoms. As Lord Sacks points out, ‘[t]he torch handed down from Magna Carta to the present day is a torch that Langton had fuelled from the Bible he knew so well.’ Lord Sacks correctly reminds that Magna Carta can be read as a historical, constitutional or legal document, but the document is first and foremost a religious document that underlies the biblical justification for limited government under the law. This reflects an ideal of limited government that is inseparable from a biblical worldview that makes civil authorities subject to legal rules that can be enforced against them if such authorities fail to comply with its explicit terms.
Magna Carta is accorded an iconic status in British constitutional doctrine. To those who are trained in the common law tradition of jurisprudence it is seen as a Great Charter of the liberties of the subject – the font of the notion that the King is not above the Law but subject to it, and as a written guarantee of the right to trial by a jury of one’s peers. If you study the text, however, you will not find any express statement of the principles of democratic government or the rights of man. Winston Churchill in his *History of the English Speaking Peoples* says ‘it is not a declaration of constitutional doctrine but a practical document to remedy current abuses of the feudal system. It implies on the King’s part a promise of good government for the future, but the terms of the promise are restricted to the observance of the customary privileges of the baronial class’.

It was assented to by King John at a time of great political unrest bordering on civil war and, as Churchill says, ‘the actual Charter is a redress of feudal grievances extorted from an unwilling King by a
discontented ruling class insisting on its privileges, and it ignores some of the most important matters which the King and baronage had to settle, such as the terms of military service’. Nevertheless it did secure for all men above the status of villeins or serfs, who then formed the majority of the population, tenure of land secure from arbitrary encroachment, and clauses 28, 29 and 30 of the original document are the beginning of a long series of enactments designed to prevent abuses of the royal prerogatives of purveyance and pre-emption. For example, Clause 28 provides that ‘no constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this’. Purveyance and pre-emption, as former High Court Justice, Sir Victor Windeyer explained in his *Lectures on Legal History* first published in 1938, ‘was the right claimed by the King and his servants to compel subjects to supply provisions, to pay for them at the lowest price and in their own time, which might well mean never. These exactions by the Crown continued to cause resentment during the Middle Ages. But the prerogative was by degrees limited. Magna Carta contains the first statement of the doctrine that the government ought only to acquire the property of subjects on just terms.’ This is mirrored in our own Federal Constitution, section 51(xxxi).

The Charter involved a promise by the King to remedy the barons’ complaints and to recognise their liberties and those of the Church, the merchants and the City of London. As Windeyer says, ‘[i]t was a charter of liberties not a proclamation of liberty. A liberty was then a special privilege or immunity. Liberties were the established rights by feudal law of certain people or places to be exempt from the arbitrary power of an overlord. The Charter promised to the free man his liberties.’ But who
was the ‘free man’ mentioned in Magna Carta? Many scholars contend that the term applied not to each and every subject but only to the freeholder of feudal law and certainly not to the villain of the feudal manor who, though not a slave, was bound to the soil and owed labour service to his lord. So it is contended that the liberties protected by the Charter were those not of the common man but of those further up the social scale such as the barons, knights, churchmen and merchants.

The clause which has engendered most enthusiasm for the proposition that Magna Carta guaranteed all the King’s subjects protection from arbitrary arrest or restraint and a right to trial by a jury of his peers is clause 39 in the original 1215 version of the Charter. In the following decade the document was re-issued in 1216 and 1217 and again in 1225. Many clauses which were of import only to individuals or to specific localities, having in the meantime effected their purpose, had been expunged and it is the 1225 version with its re-numbering of the clauses which is now usually printed in the Statute Book. The original clause 39 read:

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

I should point out that there are several translations of the Charter. I am using the translation appearing on the British Library web site.¹ The site claims that the translation sets out to convey the sense rather than the

precise meaning of the original Latin. It also points out that in the charter itself, the clauses are not numbered and the text reads continuously.

Windeyer’s translation, which he describes as literal, is this:

No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor will we send upon him, except by the lawful judgment of his peers or (and) the law of the land.

The original clause 40 read:

To no one will we sell, to no one deny or delay right or justice.

In the 1225 version issued by Henry III these two clauses were amalgamated, clause 40 being added to clause 39 and the entirety of the clause re-numbered 29.

By way of completeness I add that the copy of Magna Carta held in Parliament House Canberra was one issued by Edward I in 1297 using the numbering of the 1225 version. Clause 29 is translated by Nicholas Vincent, Professor of Medieval History at the University of East Anglia, as follows:

No free man is to be taken or imprisoned or disseised of his free tenement or of his free liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgment of his peers or by the law of the land. To no one will we sell or deny or delay right or justice.

Windeyer argues that the reference to ‘lawful judgment of his peers’ is not a guarantee of trial by jury as we understand it. In the first place the freeman to whom the clause relates is different from the villain or peasant
occupier entirely subject to a lord and furthermore the Latin word ‘judicium’ is not an apt word for the verdict of a jury which differs from the formal judgment of a court. He raises the question whether the barons sought by this clause to provide for the trial of a feudal vassal by his fellows in the court baron of their lord and to ensure that they, themselves, were tried by their own equals, a right that persisted for the members of the House of Peers until 1948. But whatever the precise meaning of the clause it has been valuable not because of its precise and technical meaning but because of its vague but grand meaning in later times. Clause 39 was not given particular prominence in 1215 but its intrinsic adaptability has given succeeding generations the opportunity to re-interpret it for their own purposes. In the 14th century Parliament saw it as guaranteeing trial by jury; in the 17th century Sir Edward Coke interpreted it as a declaration of individual liberty in his conflict with the Stuart kings and it has echoes in the American Bill of Rights (1791) and the Universal Declaration of Rights (1948).

In the century after 1215 the Charter was re-issued 38 times and little was heard of it until the 17th century when Parliament sought to curb the encroachments of the Stuarts. Throughout the document it is implied that the Law is above the King. For the first time the King himself is bound by the Law. Clause 61 was quite revolutionary and was directed personally at King John, for it was never included in any of the subsequent re-issues. In part it read:

Since we have granted all these things for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety,
with lasting strength, for ever, we give and grant to the barons the following security:

The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us— or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress. If we, or in our absence abroad the chief justice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distress and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress they may then resume their normal obedience to us.

Any man who so desires may take an oath to obey the commands of the twenty-five barons for the achievement of these ends, and to join with them in assailing us to the utmost of his power. We give public and free permission to take this oath to any man who so desires, and at no time will we prohibit any man from taking it. Indeed, we will compel any of our subjects who are unwilling to take it to swear it at our command.

The remainder of the clause deals with filling casual vacancies within the twenty-five, the oath they are required to take, and provides that in the event of disagreement among them on any matter referred to them the verdict of the majority present is to have the same validity as a
unanimous verdict of the whole twenty-five. The clause enabled the barons to compel the King by force of arms to keep the Charter. Back from Runnymede, at Windsor, John was decidedly not happy with the inclusion of this clause and, as one historian, John Richard Green, noted in his *Short History of the English People* “‘They have given me five-and-twenty over-kings’ cried John in a burst of fury, flinging himself on the floor and gnawing sticks and straw in his impotent rage.’ Thereafter he repudiated the Charter, the Pope annulled it and John hired mercenaries to take up arms against the barons who in turn invited the French king, Philip’s, son, Louis, to invade England and take the Crown. Matters were only resolved when John fortuitously died in 1216 and was succeeded by his son, Henry III, then only nine years old, whereupon William the Marshall assumed the regency and had the Charter re-issued without clause 61. The French were defeated and Louis withdrew.

Although the explicit means of compelling the King to obey the law was withdrawn, to quote Churchill again:

The root principle was destined to survive across the generations and rise paramount long after the feudal background of 1215 had faded in the past. The ASfacts embodied in it and the circumstances giving rise to them were buried or misunderstood. The underlying idea of the sovereignty of law, long existent in feudal custom, was raised by it into a doctrine for the national State. And when in subsequent ages the State, swollen with its own authority, has attempted to ride roughshod over the rights or liberties of the subject it is to this doctrine that appeal has again and again been made, and never, as yet, without success.
Let another iconic English figure, Shakespeare, have the last word. In *Twelfth Night* he coins the time honoured phrase: ‘But be not afraid of greatness: some men are born great, some achieve greatness and some have greatness thrust upon them.’ I suggest that most people would agree that Magna Carta was not born great and although some might say that after a very long time it achieved greatness, it is the third category which is most aptly applied to it, namely that Magna Carta has had greatness thrust upon it. However we should not forget the preamble to Malvolio’s *bon mot*: ‘But be not afraid of greatness.’ There is a greatness about the Magna Carta which all now recognise and respect. It has served, possibly despite itself, to generate the notion of the sovereignty of law over arbitrary government which we venerate as a guarantee of our liberty and one which deserves our respect, not fear.
MAGNA CARTA AND THE PARLIAMENT

PROFESSOR PETER BOYCE AO*

Magna Carta had nothing to say directly about parliaments. They didn’t exist in 1215 and the first English parliament would not make its appearance until the second half of that century, though the word ‘parliament’ first appeared in official usage in the 1230s. Yet we can argue with conviction that Magna Carta is at the root of Westminster-style parliamentary democracy. How can such a claim be sustained?

From the 8th to 11th centuries Anglo-Saxon kings had tolerated a forerunner of parliament, the witan, literally a meeting of wise men, but the witans had disappeared before Magna Carta. Norman kings periodically met with the nobility in Great Councils, but they were not standing institutions and exercised no legislative authority. Clause 61 of Magna Carta, however, promised that ‘the barons shall elect twenty-five of their number to keep and cause to be observed with all their might, the peace and liberties granted and confirmed by this charter’. That body would evolve into the House of Lords.

* MA (Modern History), PhD (Duke University). Former Chair of Political Science at the University of Queensland and the University of Western Australia. Vice-Chancellor of Murdoch University (1985-1996). Former visiting fellow, Oxford. Honorary Research Fellow at the University of Tasmania’s School of Government. Paper presented at the Parliament of Tasmania on the occasion of its commemoration of the 800th anniversary of Magna Carta, Hobart/TAS, 16 June 2015.
An institution carrying the name ‘parliament’ was convened some four decades after Magna Carta through the initiative of an ambitious but enlightened noble, Simon de Montfort, brother-in-law of the king, Henry the Third. These meetings of barons and king were generally called to authorise fresh taxes. De Montfort sought to consolidate and expand the powers and responsibilities of these parliaments under an agreement with Henry called the Provisions of Oxford in 1258, which included the genesis of a cabinet—a council of fifteen. But the king reneged on the agreement, just as John had done after the signing of Magna Carta. A short civil war followed, Henry was captured, and de Montfort’s new-look parliament convened in 1265, including representatives of knights and burgesses from the towns. Some historians date the birth of the English parliament, or more specifically the House of Commons, from that year, but de Montfort’s creation did not enjoy a long life. Henry’s son, Edward, led a revolt and de Montfort was killed at the battle of Evesham. Fortunately for British political history, Henry had the good sense to continue to meet with his barons to discuss matters of national interest, and the word parliament became enshrined in the lexicon of English political life. The Commons met separately from the nobility, but from 1341 they met together, thereby creating two chambers.

It would take another four centuries, however, before Parliament became the recognised custodian and guarantor of those collective and individual rights spelled out in Magna Carta. Although the Tudor and Stuart kings continued to assume that they ruled by divine right, Parliament secured major concessions from Charles the First in 1629, when he agreed to
ratify the Petition of Right, which re-stated the validity of Magna Carta. In particular, the Petition demanded restrictions on non-parliamentary taxation, the forced billeting of soldiers, imprisonment without cause and the use of martial law. This didn’t save Charles from the gallows twenty years later, however, and for three years following his execution England was ruled by the ‘rump parliament’ without a head of state. The abolition of monarchy and proclamation of the republican Commonwealth by Oliver Cromwell did not confirm the supremacy of parliament but it paved the way for the final constitutional showdown, the Glorious Revolution of 1688. The flight of the last Stuart monarch, a Catholic, and the acceptance by William of Orange and his wife Mary Stuart of Parliament’s Bill of Rights in 1689, must be seen as events of equal significance to Magna Carta, but building upon that 13th century compact.

The rules were now firmly in place for the model of English parliamentary democracy which would evolve over the next two centuries and be successfully transplanted to British settler colonies, most notably Canada, Australia and New Zealand. Hanoverian monarchs in the 18th century and even Queen Victoria in the 19th would sometimes chafe at the bit, but Cabinet government, directly responsible to Parliament, would become celebrated as the Westminster model. In Britain there would be no written constitution, merely a collection of statutes, common law and custom. The monarch would remain the legal fountain of executive authority but the royal prerogative would gradually be exercised by ministers of the Crown. The Bill of Rights was not a clarion call for democracy, but interpretations of representative government would become ever more progressive through the 19th and early 20th centuries through a largely peaceful and evolutionary process. The development of
robust parliamentary institutions in Australia from the 1850s, within a broadly Utilitarian philosophy, is a fascinating story deserving of celebration, though one lingering anachronism has not yet been addressed. The powers of Tasmania’s Legislative Council cannot be amended without its consent. Classroom explanations of our political system became a bit more difficult with adoption of our federal constitution. With no mention of prime minister or Cabinet or the conventions of Westminster parliaments, the printed document can be somewhat misleading for a beginner.

It has been argued, with good reason I think, that Americans tend to be more excited about Magna Carta than the British or other citizens of the Crown Commonwealth. The only physical memorial to Magna Carta at Runnymede is a white portico cupola in a meadow by the Thames, presented by the American Bar Association in 1957, and some 800 members of that Association will have descended on that site this week. Every state constitution in the U.S. carries reference to rights, and some of them express these rights in the language of Magna Carta’s Clause 29. But why was it such a useful symbol to the founding fathers of the American republic? I can think of at least two reasons. The first is that the late 18th century was an era of increasing preoccupation with the notion of rights and the cause of limited government, twin ingredients of what came to be called ‘classical liberalism’—owing much to the political philosophy of John Locke. And these intellectual influences inspired vigorous debate among the delegates at the constitutional conventions of the 1780s, possibly the most brilliant assembly of political minds ever convened. A second reason is that the founding fathers knew
they would need a written constitution if the thirteen colonies were to be federated, and in that constitution they could enshrine the rights of citizens and limited responsibilities of government. The Constitution which emerged in 1789 was not a democratic document of course, but its separation of powers and the subsequently adopted bill of rights, the second amendment, offered both the process and the idealism for gradual progress towards full democracy.

I hope those side references to the North American reverence for Magna Carta will not seem too unrelated to its influence on the development of parliamentary systems. And I want to turn now to how the reputations of major Westminster–style parliaments, legatees of Magna Carta and the Glorious Revolution, are faring in the early 21st century. Some of the evidence to hand is very disturbing. In Britain there is widespread loss of trust in Parliament and its elected membership; in Canada serious surveys reveal an equally disenchanted electorate.

And what of the state of play in Australia? Disillusionment and/or political illiteracy is so widespread that among younger adult Australians, those aged between 18 and 29, only 48% believe that democracy is preferable to any other form of government. This finding has been consistently reported by the Lowy Institute in its national attitude surveys over recent years. 21% have stated that it doesn’t matter what kind of government is thrust upon us. Despite this statistic, an overwhelming majority of Australians endorsed other western liberal values, including freedom of the media, freedom of expression, the right to a fair trial and the right to vote.
How serious a form of alienation does this represent in Australia, given that other western societies are also reporting alarming levels of disenchantment? And how do we explain it? The Lowy investigators have listed several possible factors in a discussion paper prepared by Alex Oliver for the Australian Parliament last October. I will mention them briefly, but at the heart of the problem is a generally unacknowledged disconnect between freedoms and democratic government. In other words, rights are embraced enthusiastically but not the parliament that can guarantee them. Accordingly the public seems happier with unelected tribunals or commissions than with a reliance on their elected legislatures.

As to the possible reasons for disenchantment with parliaments, especially in the Crown Commonwealth countries, one might consider the following:

   (1) The first possibility is that democracy has become the victim of its own success. Because there has been a spectacular increase in the number of sovereign states professing to be democratic, now more than half of the world’s 200-odd countries, it seems to be so much the norm that it is taken for granted, with no need to celebrate it or understand its vulnerability;

   (2) The second possible explanation is that capitalism and consumerism, feeding on unparalleled prosperity, has distracted citizens, especially Generation Y, from a focus on civil and political freedoms;

   (3) A third argument cited is that our younger citizens are overly impressed by the economic success of non-democratic states in our region,
especially China and Singapore. There is no doubt, from the survey data, that a huge percentage of Australians are more admiring of China than they are of the United States for example; and

(4) Disgust with the level of political discourse is another possible explanation of the public’s disenchantment with Parliament, and there seems little doubt that this is a factor highly relevant to the Australian experience of recent years. Reinforcing it is the rigidity of political party discipline and the apparent inability of both major parties to practice any measure of bipartisanship outside key issues of national security.

Can respect for Parliament be restored? In considering that herculean task we should concede that the problem lies as much with the electorate and the media as it does with parliamentarians themselves. The 24-hour news cycle is at fault, as is the confused priorities of voters as to whether they want their members to be trustees of the national interest or faithful only to party or interest group wishes. Also, the mounting influence of social media is distracting parliamentarians from their primary tasks and encourages instant or unrestrained complaint and abuse from voters.

Perhaps structural changes to our parliamentary institutions are needed? There is certainly scope for electoral and possibly procedural reform, but I suspect that the nub of our problem is cultural. Perhaps we worry unduly, for even a seemingly dysfunctional national parliament ‘keeps blood off the streets’, as Amanda Lohrey, the Tasmanian novelist (and brilliant political science graduate) reassured us in a recent essay for The Monthly. But the image of our national Parliament could be improved if we were able to convince the electorate that the protection of rights should not be divorced from Parliament. Leaving aside the case for or against a bill of rights, Parliament is sometimes not given credit for
monitoring draft legislation for possible human rights implications, and I was reminded by a friend recently that Tasmania can claim an honourable track record in this area with its Subordinate Legislation Statute, introduced in 1968 by the reformist Bethune Government.

Can we educate for changes to our political culture? We certainly don’t want to see the emergence of facile propaganda about the virtues of our political institutions, but the serious decline of history in our schools and narrowing specialisms of history and political science in our universities make it very difficult indeed to excite young Australians about the dramas and debates that have punctuated our political history through the past 800 years.

In any healthy, free-speaking democracy there will always be critics of the workings of Parliament or of the quality of party leadership, but when serious doubts arise about the value of Parliament itself we should start losing sleep. Thomas Jefferson argued that democracies should be subject to rebellion every generation or so. I doubt whether we need a violent rebellion within our political culture of liberal democracy, but we could do with some serious collective soul searching.
SHORT ESSAYS
A ‘LIVING CONSTITUTION’: ROLLING DICE
AND THE DEATH OF THE RIGHT TO LIFE

BRUCE LINKERMANN*

From a room in Elsinore Castle … Enter Justice Blackmum:

To be, or not to be,—that is the question:
Whether ‘tis nobler in the mind to suffer
The slings and arrows of outrageous fortune;
Or to take arms against a sea of troubles;
And by opposing end them?1

I INTRODUCTION

In the months and weeks leading up to the 22nd of January 1973 the Supreme Court of the United States was tasked with settling arguably the most controversial decision in the history of the Court: *Roe v Wade.*

Writing for the majority, Blackmum J’s opinion reads as if the Court faced, much like Shakespeare’s Hamlet did, a vexing moral question. His judgment is all the more bewildering since the Court was actually tasked with a simple constitutional question: whether a Texas criminal abortion statute was constitutional, not whether abortion was moral.

* LLB student, Murdoch University. This essay was selected for publication as a highly distinguished essay that was written for assessment as part of the Legal Theory unit at Murdoch University.


His reasoning was rooted in a ‘living constitution’ approach, which became apparent at the onset of his judgment when he nonsensically insisted that ‘the issue be resolved by constitutional measurement, free of emotion and predilection’, only to equate that measurement with what ‘history reveals about man’s attitudes toward the abortion procedure over the centuries’. Frankly, how pontificating on the attitudes of man over the centuries can sensibly be regarded as a legitimate constitutional measurement is startling since, in all honesty, there is no semblance of certainty, no semblance of objectivity, when an approach to interpretation disregards the text that it purports to interpret, instead advocating a philosophical survey of the attitudes of man; in such instances, every decision is an exercise in arbitrary, or better yet, ‘raw judicial power’.

The consequence of this ‘living constitution’ approach is grave; in that, express constitutional rights such as the Fifth and Fourteenth Amendment’s rights not to deprive ‘persons’ of life without due process of law are no longer entrenched since fabricated rights such as the right to privacy and the right to abortion have extinguished them. But, owing to the protean morality and linguistic indeterminacy of the ‘living constitution’, not even the rights to privacy and abortion are entrenched since constitutional adjudication is as arbitrary as rolling dice.

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3 Ibid 116, 117.
II LIVING CONSTITUTION: ON THE ORIGIN OF TEXTUAL UNCERTAINTY BY MEANS OF NATURAL SELECTION

In time, after 1859, after Charles Darwin published his influential text *On the Origin of Species by Means of Natural Selection*, American constitutional jurisprudence evolved to a point where the rights of the individual—namely, the rights to privacy and abortion—denied the people their democratic right to legislate a controversial moral issue, a moral issue where reasonable minds disagreed (and still disagree today). To understand how this undemocratic constitutional reality manifested, a brief account of Darwinism and postmodern philosophy is required, for it sheds light on the intellectual foundation of a growing legal absurdity: the ‘living constitution’.

A Darwinism to Social Theory to Constitutional Law

Darwin seeded a theory in which organisms evolve according to their environments and biology, advancing the theory of natural selection, which included the concept of the survival of the fittest (a phrase coined by Herbert Spencer); essentially, this phrase describes the processes whereby superior members of a species mutate, copulate and advance the species while the inferior, non-mutated members of the species die out along with their inferior genes. It was not long before this theory sprouted in a number of other intellectual disciplines.

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That biological-evolutionary theory and natural selection was extended to social theory was a natural progression since Darwin, in *The Descent of Man*, wrote that ‘[a]t some future period … the civilized races of man will almost certainly exterminate, and replace, the savage races throughout the world’. Building on this, Herbert Spencer, the influential British evolutionary social theorist, proffered the view that human societies evolve to a point of perfection ‘through a science-based manipulation of the natural process’, which included the assumption that individuals must be left alone to freely compete with each other; in fact, he believed that the freedom of exchange between individuals better maintained the equality of bargaining power between them, which, in turn, better promoted the evolution of society.

Within a few decades, Darwin’s theory, implicit in Spencer’s social theory, soon found its way into the rhetoric of constitutional doctrine, influencing academic writers such as Roscoe Pound, the former Dean of Harvard Law School, to advocate a results-focused approach to judicial reasoning, believing that law must be judged ‘by the results it achieves’. Moreover, Darwin’s theory also influenced judicial reasoning, epitomised in the infamous *Lochner v New York* decision, which ushered in a new

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10. *Lochner v New York* 198 U.S. 45 (1905). The Court invalidated a New York statute that attempted to limit the number of hours that bakers could work to 60 hours per week.
era of constitutional adjudication, the ‘Lochner’ era, wherein the court maintained that the protection of liberty in the Due Process Clause of the Fourteenth Amendment meant that individuals could contract freely in the labour market. But

[The Fourteenth Amendment, of course, said nothing about any freedom to make contracts upon terms that one thought best, but there was a very substantial body of opinion outside the Constitution at the time of *Lochner* that subscribed to the general philosophy of social Darwinism as embodied in the writing of Herbert Spencer … and William Graham Sumner.]

To the court, a legislative effort to control the distribution of an individual’s resources—such as the hours that bakers in New York could work per week—was an illegitimate exercise of legislative power. Essentially, the right to liberty in the Fourteenth Amendment’s Due Process Clause granted the justices the power to ‘superimpose its own view of wise social policy on those of the legislatures’. ‘Lochnerizing’, in the sense that the court imposed its moral view upon the people of New York, a moral view rooted in Darwin’s theory of survival of the fittest, did not last for too long with the court’s *volt-face* in *West Coast Hotel v Parrish* thirty-two years later.

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14 *West Coast Hotel v Parrish* 300 U.S. 379 (1937). Overturning the *Lochner* approach to substantive due process.
But this was not the death of the ‘living constitution’ in Fourteenth Amendment jurisprudence. Justice Blackmun stressed that the court in *Roe* was not ‘Lochnerizing’,\(^ {15}\) ironically citing Justice Holmes’ dissent in *Lochner*. But how can a court that decided the moral issue of abortion—which struck down a democratically created State legislative instrument that purported to decide this moral issue for the people of Texas—be squared with the following dissent:

> [The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.\(^ {16}\)

**B Moral Relativism and Linguistic Indeterminacy**

While Darwin’s theory of natural selection engendered a belief that societies and constitutions evolve like organisms, the ‘living constitution’ needed another philosophy to buttress its belief that judges must interpret written constitutions in light of pressing social needs. Soon postmodern philosophy provided that buttress.

Reflecting on the horror of the western world reduced to rubble and barbarity during the First and Second World Wars, a new, sceptical philosophy began to influence the intelligentsia of the west. This new philosophy, loosely defined, advanced ‘a range of theoretical challenges to objectivity of truth and knowledge’; this approach was in stark contrast to the Enlightenment’s belief in the power of reason to discover objective

\(^{15}\) *Roe v Wade* 410 US 113 (1973) 117.

\(^{16}\) *Lochner v New York* 198 US. 45 (1905) 76.
facts about human nature and nature in a universal sense,\textsuperscript{17} which was instrumental in developing western constitutionalism.

Individualism—as in, the paramountcy of the individual—is at the very heart of this postmodern belief that truth is relative to each person. Extrapolating this belief, law must be socially constructed since it is ‘entirely dependent on social and political circumstances’.\textsuperscript{18} Bearing this in mind, this belief in individual supremacy and the relativity of everything, moral questions, too, are no longer answerable by objective standards, but only through each particular social context.

Following on from this belief in individualism and the nonexistence of objective truth, Jacques Derrida postulated a new interpretative method, ‘deconstructionism’, arguing that universal objective truth—and, logically, universal meaning for words and sentences—did not exist; accordingly, written texts had meaning insofar as it extended exclusively to the perception of the individual interpreting the text.\textsuperscript{19} To Derrida, the meaning of law, the meaning of words that compose constitutions, was in a constant state of flux, varying with each reading according to the different predilections of the successive readers.

\textsuperscript{17} Zimmermann, above n 7, 254.
\textsuperscript{18} Ibid 258.
\textsuperscript{19} Ibid 257.
III  BIRTH OF THE RIGHT TO ABORT AND THE DEATH OF THE RIGHT TO LIFE: DISTORTING THE 14\textsuperscript{TH} AMENDMENT

The truth is that the judge who looks outside the historic Constitution always looks inside himself and nowhere else.\textsuperscript{20}

In tune with the theories of Darwin and postmodern philosophers such as Derrida, the Supreme Court, by what can only be described as judicial fiat, elevated the morality of the individual above the collective morality of the people, which is astounding since almost all law is the collective expression of the people drawing a line in the sand on moral questions. By implementing this fiat, the Court utterly rejected the actual intention of the 39\textsuperscript{th} Congress, the intention of Congressman Bingham, the principal framer of the 14\textsuperscript{th} Amendment:

Careful research of the history of these two amendments [the Fifth and Fourteenth] will demonstrate to any impartial investigator that there is overwhelming evidence supporting the proposition that the principal, actual purpose of their framers was to prevent any court, and especially the Supreme Court of the United States … from ever again defining the concept of person so as to exclude any class of human beings from the protection of the Constitution and the safeguards it established for the fundamental rights of human beings, including slaves … and the unborn from the time of their conception.\textsuperscript{21}

But in light of the evolving constitution and the inherent indeterminacy of written words, the Supreme Court of the United States again rolled their dice in 1965. Without any express constitutional provision mandating a

\textsuperscript{20} R Bork, The Tempting of America (Simon and Schuster Publisher, 1\textsuperscript{st} ed, 1991) 242.
\textsuperscript{21} Joseph P Witherspoon, cited in A Zimmermann, ‘Feminazis’ Quadrant Magazine.
general right to privacy, the court in *Griswold v Connecticut*\(^{22}\) invalidated a state law that attempted to prohibit the use of contraceptives because enforcement would inevitably violate the marital privacy of the bedroom; Justice Goldberg and Justice Harlan II based their concurrence with the majority’s decision on the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.\(^{23}\)

Undoubtedly, the menace of moral relativism lurked in the ‘Court’s creation of the “right to privacy”, which has little to do with privacy but a great deal to do with the freedom of the individual from moral regulation’.\(^{24}\) And so, the precedent was planted, the precedent that soon grew to reveal a ‘fundamental’ right to abortion in *Roe* when Justice Blackmun unconvincingly reasoned for a seven to two majority that ‘this right to privacy … founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action … is broad enough to encompass a women’s decision whether or not to terminate her pregnancy’.\(^{25}\) Yet, without doubt, only a ‘living constitution’ can justify the reasoning of the majority in *Griswold* and *Roe* simply because neither the broad right to privacy nor the right to abort a pregnancy exist in the American Constitution. That the court arbitrarily created them shows how a textually unfettered interpretation can result in the arbitrary death of the

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\(^{22}\) 381 US 479 (1965).

\(^{23}\) 381 US 479 (1965). But see Douglas J at 486 also proclaiming that the right to ‘privacy’—founded in the ‘zones of privacy’ created by the penumbras of the first, third, fourth and fifth amendments in the Bill of Rights—was older than the political parties and the school system of the United States, remarkably, even the Bill of Rights itself.

\(^{24}\) Bork, above n 18, 246.

\(^{25}\) 410 US 113 (1973) 153.
democratic right of the people to decide pressing moral questions—questions such as when life begins. So despite Justice Blackmun insisting that the Court was not ‘Lochnerizing’, no other conclusion can be drawn from his reasoning. As John Hart Ely, one of the most widely cited intellectuals in United States history, penned: ‘[Roe] is … a very bad decision … because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be’.

IV CONCLUSION

So long as justices embrace the ‘living constitution’, rights such as the democratic right to decide moral issues and constitutional rights such as the Fourteenth Amendment’s right not to be deprived of life without due process of law are never entrenched, always at the mercy of an unelected judiciary that believes it is their duty to ‘Lochnerize’ for us, to override our legislated decisions when those decisions differ from what they believe it should be.

But advocates of the Warren Court and the Burger Court’s decisions in Griswold and Roe should heed their footloose judicial philosophy because—as was shown in Planned Parenthood v Casey when four justices for the minority ruled to overturn Roe—not even ‘fundamental’ rights are protected since every right is subject to justices arbitrarily rolling dice.

26 Ely, above n 12, 947.
SPHERES OF POWER: THE HIGH COURT AS CUSTODIAN
OF CO-ORDINATE FEDERALISM

MICHAEL OLDS

I. INTRODUCTION

Federalism is known as the ‘great theme’ of the Australian Constitution.¹ The framers of the Constitution intended Australia to be a true federation. Indeed, federalism was of ‘utmost concern to the framers, evidenced by both the constitutional conventions of the 1890s and the text and structure of the Constitution they drafted.’² Included in this was that the Commonwealth and the States were to operate in their own spheres without interference of one another, maintaining a federal balance.³ The structure of the Constitution itself provides for a federal balance by providing ‘checks and balances on the exercise of power’⁴ and specifically providing for the States in Chapter V. Accordingly, the High

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Court, created in Chapter III, ‘was to be the custodian of this co-
ordinately federal vision’.  

In early cases heard before the High Court, Commonwealth legislative
power was interpreted extremely cautiously, so as ‘to avoid any
responding reduction in the powers of the States which would be
inconsistent with the Constitution’s broader federal vision’.  

This was
achieved by the Court employing an interpretative approach called
‘originalism’, which interprets the Constitution in accordance with its
original meaning.  

Over time the new judges added to the bench brought with them not only
differing opinions, but also other interpretive approaches. One approach
that was consistently used was ‘literalism’. Literalism interprets the
constitutional text according to its plain and natural meaning. As a result
of this, the Commonwealth was allowed to expand its legislative power at
the expense of that of the States, contrary to what was originally intended
by the framers. Federalism then diminished and centralism took its place.

This culminated in the landmark decision of Engineers which has laid
interpretational groundwork that the High Court has followed for nearly
100 years.

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5 Craven, above n 1; see Constitution s 76(i) ‘The Parliament may make laws
confering original jurisdiction on the High Court in any matter arising under this
Constitution, or involving its interpretation.’

30(2) Alberta Law Review 492, 496.

7 Jennifer Clarke, Patrick Keyzer and James Stellios, Hanks Australian
Constitutional Law: Materials and Commentary (LexisNexis Butterworths, 9th ed,
2013) 120 [1.8.13].

8 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28
CLR 129. (‘Engineers’).
As Professor Craven argues, the High Court drove the Australian Constitution away from the federal nature that the framers intended, which ‘[steered] the Commonwealth’s legislative to [invade that] of the realms of the States’. This article discusses the Court’s failure to protect the federal balance of power since Engineers, thus allowing a more centralised Commonwealth. Whilst I acknowledge that many constitutional powers may be examined to illustrate this effect, the discussion focuses on the corporations power which is found in section 51(xx) of the Australian Constitution.

II THE ORIGIN OF FEDERATION: FEDERALISM AND ORIGINALISM

The Commonwealth of Australia was created to be truly federal. There was to be a central government to be called Commonwealth and the Colonial governments were to continue as State governments. The framers were against the Commonwealth having more power than the States. Great effort and careful drafting of the Constitution was the result of this intention, ensuring that the States retained the bulk of legislative power. Thomas Playford, as quoted in the Convention debate of 1891, stated the necessity to ‘lay down all such powers as are necessary for the proper conduct of the federal government, and not interfere with the slightest degree with any other power of the local legislatures’. The first High Court, consisting of Griffith CJ and Barton and O’Connor JJ, interpreted the Constitution how it was originally designed: to ‘maintain

9 Craven, above n 1.
states’ rights and [reserve] state autonomy over local issues wherever possible’,\(^\text{11}\) as provided for in Chapter V.\(^\text{12}\)

As stated in the introduction to this article, the approach used during the first years of the Court’s existence was originalist. This approach drew ‘from the nature (rather than the text) of the Constitution as an embodiment of a co-ordinate and strongly decentralised federalism’.\(^\text{13}\)

To aid this interpretative approach, two doctrines were adopted. The first was the doctrine of implied intergovernmental immunities. It was first mentioned in the case of *D’Emden v Pedder*\(^\text{14}\) and it prevented the laws enacted by the State parliaments from interfering with the instrumentalities of the Commonwealth.\(^\text{15}\) This doctrine then evolved in the *Railway Servants Case*\(^\text{16}\) in order to prevent Commonwealth laws from interfering with State instrumentalities.\(^\text{17}\)

The second approach adopted by the early Court was known as the States’ reserved powers doctrine. This doctrine provided that the States reserved as much power as possible to themselves, in accordance with section 107, in that ‘grants of law making power to the Commonwealth must be narrowly construed so as not to encroach on these traditional powers of the States’.\(^\text{18}\) The judgment of Griffith CJ in *Peterswald v*

\(^{11}\) Evans, above n 2, 14.

\(^{12}\) See *Constitution* ss. 106-8.

\(^{13}\) Craven, above n 6, 494 – emphasis added.

\(^{14}\) *D’Emden v Pedder* (1904) 1 CLR 91.

\(^{15}\) Ibid 109 (Griffith CJ).

\(^{16}\) *Federated Amalgamated Government Railway and Tramway Association* v *New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488.

\(^{17}\) Ibid 637 (Griffith CJ).

Bartley\textsuperscript{19} illustrates the narrow approach taken when interpreting the Constitution with regard to the legislative power of the Commonwealth, which, among other cases\textsuperscript{20}, aimed to preserve State legislative power.

III FROM ORIGINALISM TO LITERALISM

A The Changing Judiciary

As judicial composition began to change,\textsuperscript{21} so too did the judgments produced by the Court. In particular were the unanimous verdicts concerning the interpretation of the Constitution with regard to legislative power. The addition of Higgins and Isaacs JJ developed a 3:2 split. This broke the unanimity of the Court regarding both the doctrines of implied intergovernmental immunities and reserved powers.\textsuperscript{22} Between 1906 (the addition of Higgins and Isaacs JJ to the bench) and 1918, dissent grew and a more centralist approach began to take form.

Justice Isaacs’s initial acceptance of the doctrine of implied intergovernmental immunities in *Federated Engine Drivers' and Firemen's Association of Australia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398.\textsuperscript{23} was held on narrow interpretation.\textsuperscript{24} This initial interpretative approach grew into dissent in both *Baxter*\textsuperscript{25} and also in *Attorney-General (Qld) v Attorney-

\begin{footnotesize}
\begin{enumerate}
\item Peterswald v Bartley (1904) 1 CLR 497.
\item See, eg, *D'Emden v Pedder* (1904) 1 CLR 91.
\item See: Judiciary Amendment Act 1906 (Cth) – increasing the number of High Court Justices from three to five.
\item Clarke, Keyzer and Stellios, above n 7, 498 [5.2.20].
\item *Federated Engine Drivers' and Firemen's Association of Australia v Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398.
\item Ibid 451-3 (Isaacs J).
\item *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087, 1160-1 (Isaacs J).
\end{enumerate}
\end{footnotesize}
General (Cth)\textsuperscript{26}, where Isaacs J stated that a Commonwealth power should be ‘given its full natural meaning’.\textsuperscript{27} Justice Higgins, however, was ‘outspoken in his criticism of the implied immunities doctrine,’\textsuperscript{28} joining Isaacs J in his dissent in Baxter.\textsuperscript{29} Further, Higgins J rejected the Court’s view in Deakin v Webb\textsuperscript{30} in favour of the view of the Privy Council in Webb v Outrim\textsuperscript{31} ‘that there was no constitutional immunity for Commonwealth payments.’\textsuperscript{32} Both Justices ‘were less equivocal of their condemnation of the implied prohibitions [reserved powers] doctrine’.\textsuperscript{33} Regardless, they were still critical of the doctrine.\textsuperscript{34}

The balance of opinions continued to shift when the founding Justices retired and new Justices were appointed.\textsuperscript{35} In the 1919 case of \textit{Federated Municipal Employees},\textsuperscript{36} the centralist approach was taking hold as the majority favoured the Commonwealth when interpreting the scope of legislative power.\textsuperscript{37} The interpretative method of the Court had now shifted. Dramatic change was on the horizon.

\begin{itemize}
\item \textit{Attorney-General (Qld) v Attorney-General (Cth)} (1915) 20 CLR 148.
\item Ibid 171-2 (Isaacs J).
\item Clarke, Keyzer and Stellios, above n 7, 499 [5.2.23].
\item \textit{Baxter v Commissioner of Taxation (NSW)} (1907) 4 CLR 1087.
\item \textit{Deakin v Webb} (1904) 1 CLR 585 (Griffiths CJ, Barton and O’Connor JJ).
\item \textit{Webb v Outrim} [1907] 1 AC 81.
\item Clarke, Keyzer and Stellios, above n 7, [5.2.24].
\item Ibid.
\item See, eg, \textit{R v Barger} (1908) 6 CLR 41, 84-5 (Isaacs J), 113 (Higgins J).
\item Clarke, Keyzer and Stellios, above n 7, 499 [5.2.25].
\item \textit{Federated Municipal and Shire Council Employees Union of Australia v The Lord Mayor, Alderman, Councillors and Citizens of Melbourne and Others} (1918-1919) 25 CLR 508.
\end{itemize}
B  The Beginning and Rise of Literalism: Engineers

Engineers changed the method in which the High Court interpreted the Constitution, resulting in a dramatic expansion of Commonwealth power. Engineers ‘rejected both doctrines of reserved powers and implied intergovernmental immunities in favour of an expansive, rather than a restrictive, characterisation of federal powers.’ The majority overruled all precedent, holding it to be their ‘manifest duty’ to give ‘earnest attention’ to the interpretation of the Constitution in order ‘to give true effect to the relevant provisions’. In a separate judgment, but in agreement with the majority, Higgins J described the new approach: to give the words their ordinary and natural meaning, that is, their broadest possible meaning; not limited by implications, only limited by the express words of the Constitution.

The majority held that the Constitution was to be read as it was, that is, an act of British Parliament so that interpretative methods applied by the courts in England according to the principle of parliamentary sovereignty should prevail. Accordingly, the legislative power of the Commonwealth was interpreted to be as “plenary” and “ample” … as the Imperial Parliament in the plenitude of its power possessed and could bestow.

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38 Evans, above n 3, 16-7.
39 Engineers majority: Knox CJ, Isaacs, Rich, and Starke JJ.
40 Engineers, 142 (Knox CJ, Isaacs, Rich and Starke JJ).
41 Ibid 162 (Higgins J).
42 Hodge v The Queen (1883) 9 App Cas 117, 132 (Lord Fitzgerald) cited in Engineers, 163 (Knox CJ, Isaacs, Rich and Starke JJ).
This consigned ‘the old doctrines to oblivion’.43 In doing so, it ‘provided the High Court with an interpretative creed to the effect that the powers of the Commonwealth are to be interpreted with all the broadness that their words allow and without reference to some notional residue of State power or federal balance’.44

IV THE FAILURE TO PROTECT THE FEDERAL BALANCE

The result of Engineers was a ‘[new] literalist banner […] unfurled by the Court, on most occasions at which an important federal division of powers case is decided in favour of the Commonwealth’.45 Many commentators have criticised the approach, believing that the Court failed in its ‘fundamental and positive role to protect federalism’.46 For example, Professor Craven argues that the High Court is not a ‘protector of federalism’, but has pursued a ‘centralist agenda’.47 Professor Walker concurs with Professor Craven, and adds that the approach allows the ‘widest (that is, most centralist) meaning that the words can possibly bear’.48 Finally, Professor Ratnapala has discussed how the approach allows the Commonwealth Parliament to extend its powers ‘to matters over which it has no express constitutional authority’.49

45 Craven, above n 6, 495.
46 Craven, above n 1.
47 Ibid 222.
A  The Expansion: An Ever-Broadening Corporations Power

As discussed above, Commonwealth legislative power expanded significantly in the aftermath of Engineers, allowing interference of the Commonwealth in matters originally contained within the States.\(^{50}\)

This section of the article discusses the expansion of the Commonwealth legislative power, illustrating the effect of Engineers through the jurisprudence and academic commentary on the corporations power. The corporations power, at section 51(xx) of the Constitution, provides the Commonwealth with legislative power with respect to foreign, trading and financial corporations formed within the limits of the Commonwealth.\(^{51}\)

The following discussion includes the approaches taken when interpreting the corporations power both before and after Engineers.

1  The Early High Court: A Restricted Approach

The originalist approach adopted by the early High Court saw that the corporations power was read restrictively, with a view to protect the States. First seen in the case of Huddart, Parker & Co.\(^{52}\) the reserved


\(^{51}\) Constitution s 51(xx): ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.’

\(^{52}\) Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330. (‘Huddart, Parker & Co’).
powers doctrine was applied. In doing so, the Court held that the narrowest interpretation of Commonwealth power was to apply,\textsuperscript{53} by confining that description to corporations whose essential character was defined by trade.\textsuperscript{54}

In \textit{Huddart, Parker & Co.}, the Comptroller-General of Customs in Victoria believed that Huddart, Parker & Co. had contravened rules in sections 5(1)(a) and 8(1) of Part II of the \textit{Australian Industries Preservation Act 1906} (Cth).\textsuperscript{55} The plaintiffs contested the validity of the legislation but the Commonwealth argued that these sections were valid and on a broad interpretation of the corporations power and that this should be held.

The High Court considered the depth of the corporations power; whether it could be used to regulate intrastate corporations legislation through the \textit{Australian Industries Preservation Act 1906} (Cth). The majority\textsuperscript{56} interpreted the corporations power narrowly, restricting the legislative power of the Commonwealth, holding that ‘The Constitution contains no provision for enabling the Commonwealth Parliament to interfere with the private or internal affairs of the States...’\textsuperscript{57} Although Griffith CJ acknowledged both broad and narrow constructions,\textsuperscript{58} His Honour’s reasoning took the view that the narrower construction be adopted, as the

\begin{flushright}
\textsuperscript{53} Nicholas Aroney, ‘Constitutional Choices in the \textit{Work Choices Case}, or What Exactly is Wrong with the Reserved Powers Doctrine?’ (2008) 32 \textit{Melbourne University Law Review} 1, 16.
\textsuperscript{54} Craven, above n 44.
\textsuperscript{55} \textit{Huddart, Parker & Co}, 332
\textsuperscript{56} Griffith CJ, Barton, O’Connor and Higgins JJ.
\textsuperscript{57} \textit{Huddart, Parker & Co}, 353 (Griffith CJ).
\textsuperscript{58} Ibid 354 (Griffith CJ).
\end{flushright}
power ‘ought not to be construed as authorising the Commonwealth to invade the field of State law as to domestic trade’.  

True to originalist intent as a founder himself, Griffith CJ believed the Constitution should be interpreted as a whole, emphasizing sovereignty of the States against Commonwealth interference as a relevant consideration when determining the parameters of Commonwealth legislative power.

2   Post Engineers: The Expansion of the Corporations Power

As established in the above discussion, the literal approach adopted in Engineers expanded Commonwealth legislative power. The following discussion analyses the key cases that expanded the corporations power.

The case of Strickland v Rocla Concrete Pipes Ltd was the first case in modern law relating to the scope of the corporations power. The Court held that the then Trade Practices Act was valid in defining Rocla Concrete Pipes as a constitutional corporation for the purpose of submitting an examinable contract. In applying Engineers, with the intergovernmental immunities and reserved powers doctrines rejected, the way was laid for an expansive reading on exploitation of the Commonwealth’s powers.

59 Ibid 352 (Griffith CJ).
60 Evans, above n 2, 196-7.
61 Strickland v Rocla Concrete Pipes Ltd (1971) 124 CLR 486.
64 Evans, above n 2, 232.
This exploitation is illustrated further below, discussing key cases.

(a)  *Tasmanian Dams*

Tasmania established a statutory corporation, the Hydro-Electric Commission, to build a dam on the Franklin River to generate saleable electricity. In an effort to stop construction, the Commonwealth enacted the *World Heritage Properties Conservation Act 1983* (Cth), which prohibited ‘foreign and trading corporations’ from damaging World-Heritage listed land if their activities were undertaken for trading purposes. Tasmania challenged the legislation on the grounds that, inter alia, the *Constitution* did not authorise federal intervention, and that the Commonwealth was unduly interfering with a State government body.

The majority held that the Hydro-Electric Commission was a trading corporation, and thus was within legislative scope. Gibbs CJ, though not in the majority, agreed that ‘the scope of the corporations power extended to allowing the federal parliament to regulate the pre-trading activities of the corporation’.

*Tasmanian Dams* gave the Court the opportunity to comment on the scope of the corporations power. Of particular note are the separate comments by Deane and Murphy JJ. Deane J stated that ‘*it is a* well established principle that constitutional grants of legislative power should be construed expansively rather than pedantically’.

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66 *Commonwealth v Tasmania* (1983) 158 CLR 1. (‘*Tasmanian Dams*’). Majority: Murphy, Brennan, Deane and Mason JJ.
67 Evans, above n 2, 236.
68 *Tasmanian Dams*, 148 (Gibbs CJ).
69 Ibid 269 (Deane J) – emphasis added.
Additionally, in the words of Murphy J:

…the power under s 51(xx) extends to any command affecting the behaviour of the corporation and is not restricted to commands about the trading activities of trading corporations or about the financial activities of financial corporations.\(^{70}\)

Effectively, the view of the High Court was that the corporations power could regulate any activity of a corporation.

(b) The Effect of Re Dingjan

The view of the majority in Tasmanian Dams was considered in Re Dingjan; Ex parte Wagner\(^{71}\) where the issue before the Court was the validity of the 1992 amendment of the Industrial Relations Act 1988 (Cth), which gave the Industrial Relations Commission the power to examine unfair contracts imposed on independent contractors. The Court had to consider whether the Commonwealth could legislate with respect to contracts that relate to the business of a corporation. The issue in Re Dingjan was that the party to the contract was not a corporation. By a narrow majority (4:3), consisting of Toohey, McHugh, Dawson and Brennan JJ, a narrower approach was adopted. The opinion of the Court was that it was necessary to have ‘relevance to or connection with’ the legislation and the corporation.\(^{72}\)

\(^{70}\) Ibid 179 (Murphy J).

\(^{71}\) Re Dingjan; Ex parte Wagner (1995) 183 CLR 323.

\(^{72}\) Ibid 368 (McHugh J).
(c) The Nail in the Coffin: WorkChoices

WorkChoices\textsuperscript{73} was the confirmation that the literalist approach was and is the approach to be taken when interpreting Commonwealth powers. As a result, the corporations power has been construed more broadly than ever before.\textsuperscript{74}

WorkChoices was the transformation of Australian workplace relations law by the Commonwealth.\textsuperscript{75} This was done by amending the Workplace Relations Act\textsuperscript{76} with the Work Choices Act.\textsuperscript{77} The amendment expanded the legislation’s reach under the corporations power\textsuperscript{78} by defining an employer in section 6(1) as ‘a constitutional corporation, so far as it employs, or usually employs, an individual.’\textsuperscript{79} Section 4 of the Work Choices Act was written to define a ‘constitutional corporation’ as a corporation to which section 51(xx) of the Constitution applies.\textsuperscript{80} The objective of the amendment was to ‘introduce a national workplace relations system which applies to the majority of employees throughout Australia’.\textsuperscript{81}

\textsuperscript{73} New South Wales v Commonwealth (2006) 229 CLR 1 (‘WorkChoices’).
\textsuperscript{74} Evans, above n 2, 229.
\textsuperscript{75} Aroney, above n 53, 6.
\textsuperscript{76} Workplace Relations Act 1996 (Cth).
\textsuperscript{77} Work Choices Act 2005 (Cth).
\textsuperscript{78} Evans, above n 2, 329.
\textsuperscript{79} Aroney, above n 53, 6.
\textsuperscript{80} Ibid.
\textsuperscript{81} Ibid 7.
Five States and many trade unions\textsuperscript{82} challenged the constitutional validity of the \textit{Work Choices Act}, their main ground being that the corporations power did not support an entire industrial relations regime of this kind.\textsuperscript{83}

The majority held that the corporations power extends ‘to any law which alters the rights, powers or duties of a constitutional corporation, as well as to laws which have a less direct but nonetheless sufficiently substantial connection to constitutional corporations’.\textsuperscript{84} The approach taken by the Court was that of the dissent of Gaudron J in \textit{Re Pacific Coal},\textsuperscript{85} holding:

\begin{quote}
I have no doubt that the power conferred by section 51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation […] the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters, to the regulation of the conduct of those through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or businesses.\textsuperscript{86}
\end{quote}

It was this and previous decisions which the majority relied upon to expand the scope of the corporations power.\textsuperscript{87} According to Professor

\textsuperscript{82} \textit{WorkChoices} Plaintiffs: New South Wales; Western Australia; South Australia; Queensland; Australian Workers’ Union and others; Unions New South Wales and others; Victoria.

\textsuperscript{83} Aroney, above n 53, 7. See also \textit{WorkChoices}, 4 (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

\textsuperscript{84} Aroney, above n 53, 9.

\textsuperscript{85} \textit{Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union} (2000) 203 CLR 346.

\textsuperscript{86} Ibid 375 (Gaudron J).

\textsuperscript{87} Aroney, above n 53, 9.
Aroney ‘the majority’s reasoning encapsulates the succession of fundamental constitutional choices which the High Court has made in the cases decided since the *Engineers Case*’.\(^{88}\) The majority affirmed that the ‘starting point’ in interpretation must be on the ‘constitutional text’,\(^{89}\) giving ‘the particular words of section 51(xx) their widest possible meaning’.\(^{90}\) Following this, it is clear why Professor Craven contends that ‘[n]ot since the 1920s [sic] has the Court struck such a devastating blow against Australian federalism.’\(^{91}\)

V CONCLUSION

This article explained why it is generally said that the High Court has failed to protected the federal balance of power effected under the Constitution.\(^{92}\) Although the intentions of the framers for an authentic federalism was protected by the founding Justices of the High Court, subsequent appointments to the bench saw dissent in cases that argued over the federal balance of power, with judgments focusing on expanding, rather than limiting, Commonwealth legislative power.

Indeed, as the founding Justices were replaced, the dissents of the minority became the majority view. Culminating in *Engineers*, this landmark decision rejected 20 years of precedent and began an interpretative approach of the *Constitution* in a way polar opposite to the framers’ original intent.

\(^{88}\) Ibid 26.  
\(^{89}\) Ibid.  
\(^{91}\) Craven, above n 1.  
\(^{92}\) Ibid.
Over time, the High Court has kept the *Engineers* approach. New cases expanded Commonwealth legislative power, invading further and further into the legislative sphere of the States. In this context, the affirmation of the approach in *WorkChoices* epitomises the High Court’s failure to protect the federal balance, promoting the centralist regime by affording near limitless legislative power to the Commonwealth, so long as the legislation in question can, in a minute way, be affixed to a head of power under section 51.
RADICAL FEMINISM’S OPPOSITION TO LIBERTY

BIANCA L TALBOT*

I INTRODUCTION

The radical feminist, Kelly Weisberg, stated that ‘the rule of law is too “patriarchal” and the laws we actually have are both masculine in terms of their intended beneficiary and authorship’.¹ This statement, however, is in direct opposition towards the very system that aids women in protecting their basic legal rights. Above all, such a reckless attack on the rule of law risks serving only to eradicate individual rights and responsibilities while promoting a culture that thrives off victimhood. This paper will argue that the function of the rule of law is to protect all individuals without distinction. Finally, this article critically analyses the radical feminist endorsement of a culture of victimhood coupled with the stereotyping of women as being ‘damsels in distress’ in a liberal society.

II THE RULE OF LAW

The rule of law is an essential feature required for a democratic society to function effectively. Its role is to provide a safeguard against abuses of power. It therefore endorses individual liberty while ensuring that there is

* LLB student, Murdoch University. This essay was selected for publication as a highly distinguished essays that was written for assessment as apart of the Legal Theory unit at Murdoch University.

consistency and predictability of the law. The ultimate goal is to provide for a generality of the law that protects individual rights without discriminating between these individuals.²

The crucial element considered necessary for the functioning of the rule of law is the requirement that it implies a certain generality of the law. This requires that the law should not be used to elevate the interests of some over others.³ In order to satisfy this, citizens are to be treated equally before the law. However, this does not mean there is to be a commitment towards the achievement of the equality of outcomes, but instead the equality of opportunity.⁴ Therefore, the law is to be applied without discrimination.

III LIBERAL AND RADICAL FEMINISM

Distinction must first be made between liberal feminism and radical feminist jurisprudence. Liberal feminism, also referred to as first wave feminism, established its primary focus on achieving equality of opportunity and legal rights between the sexes. This was to be done within the framework of a liberal, democratic society. This feminism, pushed forward by writers such as Mary Wollstonecraft and Elizabeth Cady Stanton, was based upon the belief that women were rational beings capable of making the same decisions as men and should be treated equally under the law.⁵

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⁴ Montesquieu, *The Spirit of Laws* (1748), Bk 8, Ch 3.
⁵ Zimmermann, above n 3, 235.
Liberalism, by definition, rejects discrimination and oppression of individuals or groups. Therefore, they agreed that people are to be judged based on their merits, not their membership to a group.\(^6\) This concept of equality, therefore, was the pivotal driver of which these early feminists argued their case. As such, John Stuart Mill, the famous liberal thinker, in his essay *The Subjection of Women*, argued that discrimination based on gender is directly opposed to the fundamental principles of liberalism.\(^7\) This is because it offends against the concept of individual liberty, and instead focuses on an individual’s membership to a group, in this case gender.

Radical feminist jurisprudence originated from the feminist movement, which emerged in the late 1960s and early 1970s, with writers such as Betty Friedan and Gloria Steinem. Generally speaking, they contended that the ‘oppressed’ status of women was caused by the very liberal society that originally liberated women. It is evident that this radical feminist jurisprudence ultimately goes hand in hand with anti-liberalism.\(^8\)

Some of these feminists adopt a postmodern approach to establish that there is ongoing oppression of women in Western societies. Postmodern ideology is particularly promoted by writers like Bell Hooks, who directly attack the idea of thinking of the future and proclaims how silly it is for us to place any hope in it. Such thinking is dangerous because it promotes the idea of focusing only on the present. But if we are to think

\(^7\) John Stuart Mill, *The Subjection of Women* (Frederich A Stokes Company, 1911) 4.
\(^8\) Ratnapala, above n 2, 233.
towards the future, we would have to understand that our actions have consequences and we therefore must exercise a degree of responsibility.\(^9\)

As can be seen, the ‘women’s point of view’ has become the predominant focus in contemporary feminist theory, while liberal feminists believed in the importance of human rights in general.\(^10\) With this elevation of women’s rights over men’s, it is no wonder that radical feminists intend to discredit the rule of law. Without it, it would no longer be necessary to provide a safeguard against discrimination upon individuals based upon their identity. These contemporary feminists no longer fight for equality; their primary goal is now gender superiority.

**IV RADICAL FEMINISM AND MARXISM**

Just as Karl Marx described the inherent oppression that is placed by the bourgeoisie upon the proletariat, radical feminists such as Catherine MacKinnon apply the same analogy to the relationship between men and women. She argues that the State imposes male-oriented legality and that it treats women the exact same way that men see and treat women.\(^11\) She then goes on to opine that the rule of law and the so-called ‘rule of men’ are the same: state power exists only to elevate male power, which she labels as being systemic and legitimated. According to those who subscribe to this view, our liberal democracy amounts to a hegemonic masculine regime that assists male dominance over women.\(^12\)

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9 Tammy Bruce, *The Death of Right and Wrong: Exposing the Left’s Assault on our Culture and Values* (Three Rivers Press, 2003) 156.
12 Ibid 170.
Radical feminist jurisprudence complements the goal of Marxist jurisprudence as they both aim to denounce individual rights and equality before the law. Equality is considered to be a bourgeois construct, which helps maintain their dominance in society.\[^{13}\] Community rights are additionally elevated above individual rights.\[^{14}\] Likewise, radical feminists contend that male power over women is embodied in the ideal of individual rights under law.\[^{15}\] Just as Marx describes capitalism as being the economic system by which the bourgeois impose their values and supremacy over the proletariat, contemporary feminist jurisprudence views the rule of law as a male-oriented ideology masking the oppression of women and that promotes and legitimizes the sexual division of labour. Feminist jurisprudence therefore becomes the advocacy of women against men, just as Marxist jurisprudence established the proletariat’s perpetual struggle against the bourgeois.\[^{16}\]

Radicals such as Catherine MacKinnon support the dangerous notion that objectivity of the liberal State is the ultimate culprit of female subordination. What is furthermore concerning is that she argues that individual rights in law represent male power over women. Does this then mean that the ultimate freedom for women lies in the promotion of group rights where subjectivity reigns as the supreme method of determining the difference between right and wrong? Above all, such ideology


\[^{14}\] Ibid.

\[^{15}\] MacKinnon, above n 11, 244.

effectively aims to create a form of legal segregation based on sex that serves only to promote the impression of there being ‘female exceptionalism, not exceptional females’.

This form of moral relativism invariably promotes a culture of victimhood which holds women as the sole beneficiaries and authors.

V MORAL RELATIVITY AND A CULTURE OF VICTIMHOOD

The West’s embracing of moral relativity has created a culture of victimhood amongst radical feminists. This culture has the capability of completely undermining what first wave feminists originally fought for and should be eradicated since it opposes the concept of individual liberty. While there are still issues in our society that directly affect women—such as domestic violence, sexual violence and objectification—denouncing a system that may aid women with fighting against these injustices is certainly not the solution. Instead, it may act to their disadvantage when the effects of moral relativism creep in and the distinction between what’s right and wrong blur.

One need not look much further than the writings of Carol Gilligan to observe the misleading victimization of women. She is committed to the argument that Western society is largely unsympathetic to women and makes statements such as: ‘As the river of a girl’s like flows into the sea of Western culture, she is in danger of drowning or disappearing’. This is patently sexist and nonsensical since it should be noted that, at the

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17 Elle Hardy, ‘Wither Feminism’ IPA Review (Melbourne), 1 February 2015, 34.
18 Tammy Bruce, The Death of Right and Wrong: Exposing the Left’s Assault on our Culture and Values (Three Rivers Press, 2003) 30.
present time, female students make up the majority demographic in higher learning institutions in the United States. And yet, victimisation of women is being used to override the rule of law and to advocate gender based segregation. Tammy Bruce, former President of the Los Angeles National Organisation of Women (‘NOW’), had this to say about the current state of Western culture:

I have seen firsthand how the agendas of feminism... have been consciously used to break down morals and values that the activists saw as obstructions to their achieving, first, cultural acceptance and, ultimately, cultural domination. Where feminism means isolating and demonizing men instead of bringing them with us as partners into our interdependence.

Organisations like NOW prefer to portray women as invariably victims, and to enforce the idea that their victimhood is their power. It has consequentially become increasingly difficult to question this way of thinking. When attempting to criticize radical feminist ideology, males are labeled as being ‘sexist’ and ‘reactionary’ while female critics are denounced as being ‘traitors’. This serves only to alienate women and men alike, furthermore playing into the hands of the Radical Left’s attempt to segregate society into groups banded against each other.

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20 Ibid 31.
21 Tammy Bruce, The Death of Right and Wrong: Exposing the Left’s Assault on our Culture and Values (Three Rivers Press, 2003) 33.
22 Ibid 81.
The case of *United States v Virginia*\(^{24}\) highlights the impacts of radical feminism on the operation of the rule of law. This is the case in which the *Virginia Military Institute* was held to have violated the 14\(^{th}\) Amendment by excluding girls in their all boys same-sex education program. Justice Ruth Bader stated that sex classifications may be used to compensate women for particular economic disabilities they have suffered in order to promote equality of opportunity. But at what cost? In light of this case’s ruling, it has been established in Virginia that all-girl programs could still be seen as compensatory, while all-boys programs are instead regarded as discriminatory.\(^{25}\)

A study in 1995 demonstrated that boys were increasingly performing at a level substantially below that of girls of the same age group.\(^{26}\) In an effort to counter this trend, American schools tried to develop special programs for male-only students. And yet, organisations such as NOW and the American Civil Liberties Union react by rising up in opposition.\(^{27}\) Above all, decisions such as the one mentioned above undoubtedly make the task of correcting this inequality of education increasingly difficult.

## VI Conclusion

For a liberal and democratic society to flourish the rule of law must not only be embodied in its legal system but it must be accepted as a valid norm within that society. Statements like Kelly Weisberg’s must be

\(^{24}\) *United States v Virginia* (1996) 116 S Ct 2264.


\(^{26}\) Larry Hedges and Amy Nowell, ‘Sex Differences in Mental Test Scores, Variability, and Numbers of High Scoring Individuals,’ (1995) 269(5220) *Science* 41, 45.

\(^{27}\) Sommers, above n 24, 171.
criticized for their disturbing attack on the rule of law, for, without the rule of law, we as individuals will not be safeguarded against tyranny. Hence, to say that the rule of law is too patriarchal and that its primary beneficiaries and authorities are male is absurd. Such an assumption constitutes a direct attack on the very liberal ideals that liberated women in the first place. By presuming that men are banding together to keep women down and that their system only benefits men, women are invited and encouraged to group together in a kind of resentful community. As discussed above, it may instead be argued that Western society is veering toward the complete opposite direction; that the rule of law is effectively operating to the benefit of all women.
BOOK REVIEW

LINDSAY MOORE*

Peter Francis Fenwick’s ‘The Fragility of Freedom’ is an important and challenging book. Many have expressed a yearning for a more fulfilling society which more effectively promotes and supports traditional values - diligence, prudence, justice, duty, charity and responsibility. Few have articulated so convincingly a constructive approach to achieving such a society.

Fenwick presents an analysis of why the current protocols of the democratic process have failed to create the community that we desire. He draws upon the work of a number of philosophers and economic theorists – the brief summaries of the work of six of those who perhaps most inspired him are a useful inclusion – and outlines the destructive outcomes of a system in which those who seek to gain or retain political power make promises to those individuals or groups who can assist their quest. Yet, these promises can only be delivered by unsustainable increases in government debt. His analysis resonates stridently as we reflect on our disappointment at the quality of recent electoral campaigns.

Issues that are particularly interesting in the book includes his critique of the response of the United States to the global financial crisis (which he regards as

* BA. MBA. Managing Director at Parsifal Research Pty Ltd.
both incredibly damaging and immoral) and of the threats to the international monetary system from interventions such as ‘quantitative easing.’

Fenwick’s thesis for developing a more equitable and sustainable society centres on the principle of subsidiarity, where responsibility for the community’s wellbeing is embraced primarily by individuals, by families and by those community groups that are closest to those who need support – the antithesis of the prevailing view that welfare should be controlled and delivered by a central government.

This book will be of great interest and relevance to all who believe that democracy deserves better and can be better than its current manifestation.