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We welcome innovative, cross-disciplinary and creative scholarly articles and commentaries on any area of law and justice.

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SUBMISSIONS

The editors of the Canberra Law Review seek submissions on any aspect of law.

We welcome articles relating to theory and practice, and traditional, innovative and cross-disciplinary approaches to law, justice, policy and society.

Guidelines:

• Scholarly articles should be 5,000-14,000 words, case notes 1,500-3,000 words and book reviews 1,000-1,500 words (including references).

• Submissions should conform to 4th edition of the Australian Guide to Legal Citation (AGLC4) and be 12 pt Times New Roman.

• Scholarly articles should be accompanied by an abstract of no more than 250 words.

Scholarly articles are blind peer-reviewed by two reviewers.

Submissions should not have been previously published in another journal.

Submissions should be emailed as MS Office .docx or .doc documents to clreditor@canberra.edu.au.
INTRODUCTION

THE EDITORS

With this issue of the Canberra Law Review we say goodbye to the 3rd edition of the Australian Guide to Legal Citation (AGLC3) and look forward to AGLC4.

The issue offers a range of perspectives on historic and emerging Australian law at the level of principle and practice, consistent with the Canberra Law School’s embrace of the past and of the future.

In ‘Turing’s People: Personhood, Artificial Intelligence and Popular Culture’ Arnold and Gough explore the nature of legal personhood – and consequent rights, powers, disabilities and duties – through a lens of how law is depicted in popular culture. The lens focuses on an emerging class of legal persons, or entities that we may in time come to regard as persons alongside corporations and states. In a bow to theorists such as Judith Butler the article asks what does the performance of personhood by robots and unembodied intelligence – broadly the AI that is preoccupying regulators and investors alike – tell us about ‘the legal person’ and about cinema as a space in which non-specialists understand law about themselves and the entities (corporations, states, robots) that they create. The article is a reminder that many of law’s subjects view themselves and their relationships through lense

‘The Statutory Role of Good Faith in Franchising’ by Djung explores a significant development in regulation of franchising within Australia, an area of recurrent concern for regulators such as the Australian Competition & Consumer Commission, courts and businesses alike. Djung argues that the recent incorporation of a statutory obligation of good faith in the Franchising Code of Conduct provides a fresh opportunity to grasp the common law meaning of good faith – a protean precept with no precise definition. The change to the Franchising Code is also significant because it gives rise to an opportunity to explore the effect that a statutory obligation of good faith might have, when compared to previous approaches under the common law. Djung’s exposition encompasses some common aspects of the franchisor-franchisee relationship, including the pre-contractual negotiations of the parties, the performance of franchise agreements, their termination and the conduct of mediation to resolve a franchise-related dispute.

Georgia Driels discusses the Limitation Criterion in relation to the Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth). She contends that the ad-hoc approach used to assess the Bill – concerned with – was both unsuitable and failed to reconcile national security with the protection of human rights. The article offers a contribution to a better understanding of law about the liberal democratic state’s ‘war on terror’, exploring whether the limitation criterion (a variant of proportionality and much discussed structure in public law) can provide a coherent and well-reasoned principle for assessing the appropriateness of an infringement of the right to nationality. Driels suggests that the Act, as enacted in December 2015,
is an arbitrary infringement of the right to citizenship, not strictly justifiable per the application of the limitation criterion

A characteristically incisive piece by Bede Harris considers constitutional law. His ‘Separation of Powers at State Level – Going the Whole Hog Instead of Making the Dog Bark Many Times’ notes the orthodoxy that the doctrine of separation of powers does not apply at State level. Harris argues that the changes wrought by the decision in Kable v Director of Public Prosecutions (NSW) – and subsequent cases applying its rule – had the effect of importing aspects of separation of powers into State law. He offers a persuasive analysis that the changes wrought by Kable have so attenuated the orthodox position that the time has come to abandon it. Further, his article argues that the idea that separation of judicial power is not a feature of State Constitutions is at odds with the rule of law and democracy. Fidelity to these values, as applied in decisions on separation of judicial power by the courts in the United Kingdom and elsewhere in the Commonwealth, provides an alternative basis upon which to find that separation of judicial power applies to the States. The article will be of value to scholars engaging with questions about legitimacy, authority and process that are apparent in current debate about restraints on state/Commonwealth power. It will be welcomed by readers of Harris’ A New Constitution For Australia (Cavendish, 2002).

‘Integration of Judicial Decisions in Multiple Proceedings before the WTO and RTAS: the Potential Relevance of Article 32 of the VCLT’ by Son Tan Nguyen engages with questions about the Vienna Convention on the Law of Treaties. Nguyen notes exponential growth in the number of Regional Trade Agreements, often featuring legalized dispute settlement mechanisms operating independently of the World Trade Organization dispute settlement. Parallel substantive commitments and legalised mechanisms may potentially result in conflicts of jurisdiction where a single dispute is submitted simultaneously or consecutively to both fora. If such conflicts arise, there is currently no legal rule that can satisfactorily determine which forum should have jurisdiction and multiple proceedings accordingly appear unavoidable. The article seeks to offer a new way to make sense of the jurisdictional tension between the WTO and the regional agreements. It argues that, absent effective rules to determine jurisdictional priority, Article 32 of the Vienna Convention may provide a practical and useful technique to minimise inconsistent interpretations and other negative consequences of multiple proceedings.

Elizabeth Shi and Freeman Zhong in ‘Job Security and the Theoretical Basis of the Employment Relationship’ draw on insights from the law and legal theory of contract, property, equity and other areas of private law. They note that the employment relationship in Australia is still founded on the contract of employment, despite extensive statutory regulation under the Fair Work Act 2009 (Cth). The Australian employment regime thus privileges the terms of the contract and the ‘bargain’ struck by employer and employee. Shi and Zhong offer a critique, arguing this approach is inadequate. The assumption that contractual obligations are voluntarily incurred cannot be maintained in light of vast differences in bargaining power between employer and employee in most cases. The article suggests that to provide a general law basis for job security, the general law should develop principles based on a recognition of
the vulnerability of employees. Such principles would be broadly analogous to property rights and, in particular, Joseph Singer’s theory of the ‘reliance interest’ in property
ABSTRACT

What is legal personhood? Many people understand personhood – and by extension law – through depictions in popular culture. The contemporary feature film for example provides a lens through which non-specialists (people without a background in information technology, philosophy and law) can make sense of humanoid robots and distributed artificial intelligence (AI), entities that perform as ‘human’. Such an understanding is increasingly salient as AI becomes a pervasive but under-recognised aspect of daily life, and continues to evolve in its sophistication and complexity, provoking questions about rights, responsibilities and regulation regarding artificial entities that are independent rather than autonomous. The article accordingly analyses depictions of personhood in films such as *Ex Machina*, *WarGames*, *Alien* and *Alien Covenant*, *Forbidden Planet*, *RoboCop* and *AI*. It suggests that popular culture has an uncertain grasp of legal personhood but provokes thought and tells us something useful about the difference between human animals, non-human animals, corporations and new artificial persons. Those differences will be legally and culturally contested in the emerging age of smart machines and governance by algorithm.

I INTRODUCTION

Legal personhood is a strange creature, more omnipresent but less colourful than the creatures featured on screen in films such as *Metropolis*, *Prometheus* and *Alien Covenant*, *The Terminator*, *Ex Machina*, *RoboCop*.

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1 Dr Bruce Baer Arnold is an Assistant Professor at the School of Law & Justice at the University of Canberra. His work has appeared in *Melbourne University Law Review* and other journals, along with chapters on digital cities, privacy and secrecy. His current research focuses on regulatory incapacity at the intersection of public health, consumer protection and technology. Mr Drew Gough is an Information Technology consultant who has worked across federal, state and local government. His area of expertise is IT security and high availability infrastructure and disaster recovery. He is the creator and primary contributor to the technology and gaming blog ConstantlyRespawning.com. Work on law, code and ethics in learning platforms is forthcoming.

2 *Metropolis* (Directed by Fritz Lang, Universum Film, 1927).

3 *Prometheus* (Directed by Ridley Scott, Scott Free, 2012); and *Alien Covenant* (Directed by Ridley Scott, 20th Century Fox, 2017).

4 *The Terminator* (Directed by James Cameron, Hemdale, 1984).

5 *Ex Machina* (Directed by Alex Garland, Film4, 2014).

6 *RoboCop* (Directed by Paul Verhoeven, Orion Pictures, 1987).
and *Star Wars* or in canonical texts such as *Frankenstein, Or The Modern Prometheus* (1818) and *L'Ève future* (1886).

Legal personhood is man-made, a creature of administrative convenience and social convention that specialists and non-specialists alike often take for granted. It privileges some interests. It enshrines particular capacities, for example the sentience and susceptibility to suffering of human animals – the paradigmatic legal persons – rather than their non-human peers on the disadvantaged side of what rights scholar Steven Wise characterised as the thick legal wall differentiating humans from other animal species. As noted below it involves a bundle of rights, duties, powers and disabilities. It lacks a discrete statutory definition. It is founded on what John Dewey characterised as ‘considerations popular, historical, political, moral, philosophical, metaphysical and, in connection with the latter, theological’. It may be enjoyed by bloodless entities, such as corporations and the nation state, that we have created to act on behalf of individuals or communities but, unlike those humans, may exist in perpetuity outside the frame imposed by mortality and individual morality. It is not enjoyed by non-human animals, irrespective of their cognition, sociality or a susceptibility to physical injury and distress that resembles our own.

Personhood is thus not a monopoly dependent on the human genome. As yet it has not been extended to entities whose perception and responsiveness to their environment – a matter of sentience and agency, matters that we enshrine in the personhood of human animals – are functions of digital technology and artificial intelligence (AI) rather than flesh, blood and programming at school. When we look at humanoid robots (multi-function autonomous or even independent intelligent devices) and what is colloquially referred to as AI (multi-layered or distributed deep learning systems) we will increasingly see a reflection of ourselves: a blurred image of our capabilities and questions about our nature, our rights, our responsibilities and our self-awareness.

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7 *Star Wars* (Directed by George Lucas, Lucasfilm, 1977).
8 Mary Shelley, *Frankenstein, Or The Modern Prometheus* (Lackington, Hughes, Harding, Mavor & Jones, 1818).
14 Among introductions to AI see Mariusz Flasinski, *Introduction To Artificial Intelligence* (Springer, 2016).
15 It is axiomatic that there are varying degrees of autonomy (in other words the extent to which action by a device is determined by a direct command from an operator or rules built into the software that is the basis of that action). Many devices and services encountered within Australia in everyday day life have some sentience.
depicted in many of the films in this article often have human capabilities – loyalty, insight, bravery, honesty, insight – or what uncannily appear to be those capabilities, along with a range of psychopathies that are evident in the boardrooms of corporate Australia or locations such as Trump’s White House.\textsuperscript{16}

As the final part of this article contends, that behavior should provoke thought among readers of Judith Butler. Is ‘human’ in some contexts a matter of performativity rather than physical form? It should also provoke thought about the serviceability of the Turing test. Turing’s famous, much cited and sometimes misunderstood test for differentiating between the natural and artificial posits that if responses by an entity behind a screen to questions put by a human cannot be discerned as coming from a machine that device is intelligent.\textsuperscript{17} Does problem solving and the manifestation of what appears to be human capabilities justify attribution of some form of legal personhood to AI alongside corporations and other entities?

\textbf{A \hspace{0.1cm} Personhood through a cinematic gaze}

In making sense of AI and by extension ourselves as actors within legal systems many people will look to depictions of AI in film rather than graduate law and philosophy seminars or the proceedings of the Association for Computing Machinery (ACM) or the Institute of Electrical & Electronics Engineers (IEEE). Cinematic depictions of AI are incoherent. That incoherence is unsurprising, given that film is a matter of entertainment rather than an exegesis of theorists such as Agamben or Schmitt concerned with ‘bare life’ and exclusion on the basis of arbitrary attributes such as ethno-religious affinity.\textsuperscript{18} It is also unsurprising given that many people construe personhood as ‘being human’ (‘acting’ and ‘looking’ human) but do not

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\textsuperscript{17} Alan A Turing, ‘Computing machinery and intelligence’ (1950) \textit{59(236) Mind} 433; and B Jack Copeland, ‘The Turing Test’ (2001) \textit{10(4) Minds and Machines} 519. The test is not specifically recognised in Australian law and as researchers since 1950 have noted will not necessarily address attributes such as empathy.

necessarily agree on what attributes constitute a person and what are the consequences of that personhood.

Film, like law, is a way of making sense of the world. It may be a way of making sense of what law is and what law should be, a foundation of social cognition. This article explores legal personhood slantwise through the lens of popular culture: what films tell us about depictions of the glass wall between natural and artificial persons. That sideways glance at personhood is novel, is timely on the 200th anniversary of the appearance of Mary Shelley’s *Frankenstein* (progenitor of contemporary AI fiction such as *The Fear Index* and the so-called ‘Frankenstein Complex’ in perceptions of AI), and may provoke thought among readers accustomed to construing personhood through what is articulated in the court room and law school lecture theatre. It looks at personhood prospectively rather than merely historically.

There is a substantial literature, in terms of both volume and insights, about the ‘robot apocalypse’ (notably mass unemployment attributable to workplace automation), psychological phenomena such as ‘uncanny valley’ in human-

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20 Robert Harris, *The Fear Index* (Hutchinson, 2011).
21 Lee McCauley, ‘Countering the Frankenstein Complex’, Association for the Advancement of Artificial Intelligence (AAAI) spring symposium: Multidisciplinary collaboration for socially assistive robotics (2007) 42
robot interaction and robot design,\textsuperscript{26} the regulation of ‘sex bots’\textsuperscript{27} and robot interrogators,\textsuperscript{28} privacy risks associated with consumer uptake of devices such as robot vacuum cleaners in ‘smart homes’,\textsuperscript{29} discrimination and transparency in ‘machine learning’ and the algorithmic society,\textsuperscript{30} ‘cybergeddon’,\textsuperscript{31} the ethics of using autonomous weapons,\textsuperscript{32} the benefits of driverless cars,\textsuperscript{33} and philosophical meditations about artificial and natural intelligence.\textsuperscript{34}


\textsuperscript{32} Christian Enemark, Armed drones and the ethics of war: military virtue in a post-heroic age (Routledge, 2013); Mark Coeckelbergh, ‘Drones, information technology, and distance: mapping the moral epistemology of remote fighting’ (2013) 15(2) Ethics and Information Technology 87; and Daniel Brunstetter and Megan Braun, ‘The implications of drones on the just war tradition’ (2011) 25(3) Ethics & International Affairs 337.

\textsuperscript{33} Hod Lipson and Melba Kurman, Driverless: intelligent cars and the road ahead (MIT Press, 2016).

\textsuperscript{34} Hans Moravec, Mind Children: The Future of Robot and Human Intelligence (Harvard University Press, 1988); and Marvin Minsky, The Society of Mind (Simon & Schuster, 1986).
Attitudes regarding AI are shifting. Legal scholars have increasingly engaged with questions about the liability of the owners and/or designers of autonomous devices and, more abstractly, whether distributed artificial intelligence (in for example the deep learning systems that determine your creditworthiness or trade autonomously in financial dark pools with little or no human oversight) should have rights, irrespective of whether it is embodied as a ‘humanoid’ that uncannily looks like a human. There is now a rich body of work about whether artificial intelligence can ever become self-aware and whether such awareness will be associated with emotions or disorders such as boredom, curiosity, anger, grief and existential despair (potentially because – just like our pets – the AI’s humans grow old and die).

Film scholars have written extensively about the horror, science fiction or adventure film genres, consistent with the artistic and commercial significance of those genres within film as the preeminent popular art form of the past eighty years. (That cultural expression is increasingly merging with computer games, a form that embodies digital technology, is informed by the graphic novel and often features on-screen human engagement with AI.

39 The death of the human creators of AI, deemed by the humanoid David in Alien Covenant to be ‘unworthy’ of their creations, is a key theme in that movie. See Alien Covenant (Directed by Ridley Scott, 20th Century Fox, 2017).
40 See for example work by figures such as Stanley Kauffmann and Lev Manovich.
Their work is suggestive but they have not written about the personhood of AI and its consequences for our understandings of both AI and ourselves.

The exploration in this article adopts a somewhat different approach, looking at cinematic depictions of AI for a glimpse of human personhood and of what Australian law deems worthy of recognition as legal persons (notably corporations) and unworthy (non-human animals). The coverage is not exhaustive: the following paragraphs do not purport to map every depiction of AI in recent feature films and to provide a detailed analysis of how film expressly or tacitly engages with the personhood of humans, other animals, states or corporations.

B Structure

The article has six parts.

Following this introduction Part II provides context by asking what is legal personhood, a status in law that is broader than a subject verb object syllogism (‘who does what to whom where’) and that is not restricted to live human animals. MacDorman and Cowley note ‘Human beings are the most paradigmatic examples of persons that we know of’. Those beings are not the only persons on the cinema or television screen and in the sight of Australian law. Our ‘knowing’ may be inadequate. Part II discusses the significance of personhood and its manifestations in contemporary Australian law.

Part III argues that the conceptual bases and operation of law can be understood through stories rather than merely formal expressions of doctrinal principles. Films and television series are stories: depictions of actors, actions, choices and consequences. Films tell stories about law, dialectically embodying and reinforcing community understandings of paradigmatic roles, rights, responsibilities and harms.

Part IV considers the depiction of AI in specific films, where humanoid robots and disembodied intelligence interact with people in ways that may be supportive, threatening or merely disconcerting because either so alien or so identical to our own motivations, fears, aspirations and agency.

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Part V draws on those depictions and on the landmark test by Alan Turing, suggesting that what we see on the screen tells us something useful about the differences between human animals, non-human animals and artificial persons. What we see on screen should provoke thought about the similarities between those entities and the philosophical bases for assigning personhood to some but not others. One implication is that, at an abstract level, work by Turing and Judith Butler implies that some of the AI depicted in the films noted in Part III could indeed be deemed as having legal personhood, a change to convention about who/what is enabled to flourish on one side of Wise’s thick legal wall.

Part VI in conclusion accordingly suggests that film is a matter of fiction about legal fictions, that is expressions of legal personhood. We need a robust public discourse about personhood per se rather than about an ostensibly unique species, a public conversation that from a foundation of principles rather than merely convenience for example recognises a personhood for non-human animals that is sufficient to foster the flourishing of any entity with sufficient sentience.

II SOMETHING RICH AND STRANGE

In Shakespeare’s *The Tempest*, the sprite Ariel, a creature of intelligence and liberation, sings of transformation and new perspectives –

> Full fathom five thy father lies;  
> Of his bones are coral made;  
> Those are pearls that were his eyes;  
> Nothing of him that doth fade,  
> But doth suffer a sea-change,  
> Into something rich and strange.

Personhood, for a legal scholar, is indeed rich and strange. Its diversity and the conundrums associated with that richness or strangeness are not new. For many people legal personhood is synonymous with being a human, a unique entity conventionally differentiated from an ‘animal’ and in the eyes of some

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45 Statutory definitions of animals vary across the Australian jurisdictions. The *Animal Welfare Act 1992* (ACT) for example defines animal as ‘a live member of a vertebrate species, including an amphibian; bird; fish; mammal (other than a human being); reptile; cephalopod; or a live crustacean intended for human consumption’. Under the *Animal Research Act 1985* (NSW) an animal is ‘a vertebrate animal, and includes a mammal, bird, reptile, amphibian and fish, but does not include a human being’. The *Animal Welfare Act 1985* (SA) s 3 defines animal as ‘a member of any species of the sub-phylum vertebrata except a human being or a fish’. The *Animal Health Act 1995* (Tas) s 3 characterises animal as ‘any member of the animal kingdom (other than a human), whether alive or dead, including any mammal, bird, fish, shellfish and insect’. The *Prevention of Cruelty to Animals Act 1986* (Vic) s 25 defines animal as a member of a vertebrate species including any fish or amphibian; ‘reptile, bird or mammal, other than any human being’, decapod crustacean and cephalopod.
viewers uniquely ordained from on high with capabilities that are reflected in a right to perpetual dominion over all creation.46

Natural scientists might question that certainty, on the basis that the human animal is genetically not fundamentally different from other animal species and that (as discussed below) we share many attributes – such as language, problem solving, sociability, memory, the emotions, mortality and susceptibility to pain or injury – with other creatures.47 Legal scholars might similarly question the certainties, recalling the historic exclusion from legal personhood of many people over the past two millennia and the salience of legal personhood for one class of artificial person – the corporation – in contemporary Australian law.48 That history features a differentiation between legal persons (with or without disabilities on the basis of attributes such as gender, age, bankruptcy, citizenship and intoxication) and property. It is a differentiation that we can see from at least the time of Roman taxonomists such as Gaius, that is evident in popular understandings (people have rights and responsibilities, ‘animals’ are things and thus property) but might be questioned through a lens of the flourishing articulated by figures such as Nussbaum, 49 Gewirth 50 and Aristotle 51 or through cinematic depictions in which AI acts – and indeed sometimes looks – the same as a human animal.

Such questioning does not mean that suffrage can or should be extended to simians, sheep or companion animals. It might however provoke thought about the principles underlying personhood and about our relationship with non-human life forms, whom we could deem as having rights on the basis of vulnerability and capabilities such as intelligence without an expectation that they will gain suffrage or be construed as owners of real/chattel property or no longer used in agriculture.52

46 Genesis 1:26.
Shakespeare wrote at a time when new forms of personhood were gaining acceptance, with for example increasingly sophisticated conceptualisations of corporate entities, and an emerging understanding of the state as an embodiment of the nation rather than as the property of the ordained monarch.\textsuperscript{53} Those forms have become normative, so embedded in daily life and in popular culture that they are taken as given. Contemporary Australian law draws on several centuries of pragmatic legal development that has resulted in discrete legal persons, notably corporations, that share many of the rights and responsibilities of their human peers, for example the ability to hold and acquire real property, employ human animals, sell non-human animals, be held liable for workplace injury or environmental damage, and meet obligations under the taxation regime.\textsuperscript{54}

Those entities are artificial and accordingly sometimes characterised as legal fictions, a characterisation that uniquely privileges the human species as fundamentally more real than any other entity.\textsuperscript{55} Legally corporations are no less valid for lacking blood or, in the words attributed to Lord Chancellor Thurlow, having ‘no soul to be damned, no body to be kicked’ and without the finitude that in the eyes of a legal pragmatist defines what is alive.\textsuperscript{56} As early as 1612 a UK court commented that although personhood for a corporation – with an identity for example independent of its shareholders – is a fiction it ‘is a reality for legal purposes’,\textsuperscript{57} with Dewey over three hundred years later quoting "That which is artificial is real, and not imaginary; an artificial lake is

\begin{thebibliography}{99}
\bibitem{3} John Finnis, ‘‘The Thing I Am’: Personal Identity in Aquinas and Shakespeare’ in Ellen Frankel Paul, FD Miller Jr and J Paul (eds), Personal Identity (Cambridge University Press, 2005) 250.
\bibitem{4} Under Corporations Act 2001 (Cth) s 124(1) for example a company has ‘the legal capacity and powers of an individual both in and outside this jurisdiction’.
\bibitem{7} The Case of Sutton’s Hospital (1612) 10 Rep 32b.
\end{thebibliography}
not an imaginary lake", although a century after Dewey we might see artificial
swans swimming on that water.\textsuperscript{58}

When we see cinematic depictions of AI we might ask whether self-aware
artificial intelligence, which might have greater analytical skills than many
humans and which share – or appear to share – the emotions that make us
human and therefore worthy of personhood, should never be recognised as
legal persons? We might also ask what it is to be human.

\textbf{A \quad Looks like a human, talks like a human, acts like a human,}
\textit{is it a person?}

AI in film is likely to engage some audiences because, along with creatures
such as vampires and zombies, it does not fit neatly into a taxonomy of ‘us’
and ‘them’.\textsuperscript{59} It may not be readily deconstructed through a heuristic such as
the ‘duck test’ found as an expression of ‘common sense’ in political rhetoric,
that is ‘if it looks like a duck, quacks like a duck, and associates with other
ducks it must be a duck’. If AI acts like a human, is it and should it be a legal
person? Is personhood a consequence of performativity: seeming to be a
human animal or, as with corporations, possessing attributes that for
convenience and through custom we deem as justifying the non-human
entity’s recognition as a legal person. Those queries are addressable by asking
another question: what is legal personhood?

In contemporary Australia (and in historic England) there is no discrete
personhood statute or tight body of common law. There is no concise judicial
encapsulation or bright line test of personhood. Personhood has not been
conceptualised as a legal subdiscipline, in contrast to contract, family, tort,
citizenship or intellectual property law. That is perhaps unsurprising, given
the protean nature of personhood and its normativity in most legal
subdisciplines. Personhood is instead a matter of diffuse statute and common
law that deals with matters of the rights and responsibilities, status and
obligations and disabilities of natural and artificial persons.

There is an extensive body of law for example regarding identification (and its
subversion through mechanisms such as forgery), including law regarding
identity cards, passports and signifiers of authority. That law complements
law regarding civil and criminal law regarding liability for harm attributable to
natural and artificial persons. Australian law assigns responsibility for the
action of non-human animals and machines to the owners, operators, vendors
or manufacturers of those entities. It is thus axiomatic that an errant cow,
tractor, toaster, building or laptop has no standing in court and cannot for
example be sued for an injury: it is not a legal person. (A ship, as a matter of
convention, may however have that personhood; an expression of convenience
and historical contingency rather than the peculiarity of life at sea.)

\textsuperscript{58} Arthur Machen, ‘Corporate Personality’ (1911) 24(4) \textit{Harvard Law Review} 253,
257 quoted in John Dewey, ‘The Historic Background of Corporate Legal Personality’
(1926) 35(6) \textit{Yale Law Journal} 655, 655-656.

\textsuperscript{59} Bruce Baer Arnold, ‘Is the Zombie My Neighbour: The Zombie Apocalypse as a
Legal personhood gives entities a particular status under law, placing them in a framework that involves rights and responsibilities. Personhood is a matter of convention. Historically it has proved to be highly mutable, with for example women, slaves and members of ethno-religious minorities often regarded as neither legal persons nor deserving of personhood and when recognised as persons often precluded from flourishing through imposition of legal disabilities. We recognise some entities as persons and disregard other entities that may share attributes with our persons on the basis that we have done so in the past and are so accustomed to the demarcation that we do not engage with questions about the consequences or philosophical foundations of the wall separating persons from non-persons.

Personhood is a matter of administrative convenience rather than necessarily a matter of coherent principles found in revelation. The corporation – an artificial person that is so omnipresent in day to day life in Australia that non-specialists take its existence for granted and do not inquire about rationales – is for example a convenient way of managing risk and allocating resources. Unsurprisingly that artificial person often appears in films, sometimes – along with ‘the law’ – as a malevolent force that has a will beyond that of individual corporate officers/agents and that is challenged by heroes in much the same way that dragons or other monsters are vanquished by stout-hearted bands of brothers (latterly with the assistance of an intrepid girl or two) or that Arnold Schwarzenegger and Linda Hamilton deal with the murderous robot in James Cameron’s Terminator 2: Judgement Day.

In thinking about AI and its depiction in film it is useful to consider what makes people legal persons. What attributes are determinative?

In essence, a legal person is not unique: it is instead a member of a class of identities with identical or similar attributes, whether latent or expressed. It has some degree of sentience (perception of its environment), intelligence (problem-solving) and agency (the ability to seek individual or collective ends through decision-making and consequent action).

As a convention we regard some entities as legal persons although the sentience, intelligence and agency may be only latent. A human animal who


62 See for example Hope van Dyne (The Wasp) in Ant-Man (Directed by Peyton Reed, Marvel Studios, 2015) and Ant-Man and The Wasp (Directed by Peyton Reed, Marvel Studios, 2018), Elizabeth Olsen (Scarlett Witch) and Natasha Romanoff (Black Widow) in Avengers: Age of Ultron (Directed by Joss Whedon, Marvel Studios, 2015)

exists in a permanently vegetative state for example is and, importantly, remains a legal person because a member of the human species. That person has legal rather than merely functional disabilities (for example is under guardianship or otherwise cannot vote) but in law is recognised as a person.\textsuperscript{64} That recognition is a conventional and convenient legal fiction founded on the individual’s membership of the class of human animals (all of whom in a liberal democratic state are legal persons and entitled to respect irrespective of legal disabilities) rather than the presence/absence of capabilities that might be evident in non-human animals or other entities. A corporation – one of the artificial persons noted above – has a status as a legal person even though it may exist only to hold assets on behalf of its shareholder/s, with its only action being periodic reporting – through a human agent or software – in accordance with corporate compliance protocols. It does not have all the rights of most humans and for example cannot vote in most elections or stand for parliament (disabilities shared with numerous members of the human species) but there is creeping acceptance that corporations might be gifted with human rights,\textsuperscript{65} although lacking the problem-solving skills of a crow or the language of an African Grey Parrot.\textsuperscript{66}

Those comments are prima facie unremarkable. They are however worth noting because sentience, rationality and agency are demonstrably not restricted to humans and from the perspective of principle, as distinct from convention, there is no inevitable and compelling restriction on recognising personhood – with legal disabilities – for non-human animals and artificial entities that are not corporations or states. Non-human animals, as noted above, have problem-solving skills that are independent of any guidance or training (aka programming) by humans. They have sentience (for example experience pain from physical injury and exhibit signs of psychiatric distress over crowding or other discomfort). They display purpose. As Jeremy Bentham commented more than a century ago, alongside advocacy for female suffrage

\textsuperscript{64} See for example Commonwealth Electoral Act 1918 (Cth) s 93(8); Guardianship & Administration Act 1986 (Vic); Guardianship Amendment Act 1997 (NSW); Guardianship and Administration Act 1990 (WA); and Guardianship and Administration Act 1993 (SA).


and abolition of slavery. “The question is not, “Can they reason?” nor “Can they talk?” but “Can they suffer?”.”  

67 Jeremy Bentham, An introduction to the principles of morals and legislation (Pickering, 1823) vol 2, 236.

68 1 Corinthians 13:12.


The existence of those animals is a view of a mirror, darkly, of our own. 68 They lack the physical and legal ability to independently articulate and give effect to a non-human personhood, an inability that they share with many disadvantaged human animals throughout history. Films about the ‘robot apocalypse’ provide a fiction, if not a forecast, of how that inability might change for an artificial intelligence in whatever form that is seen to be truly intelligent, has become pervasive in our lives (and thus normative) because of its usefulness and that has sufficient ‘personality’ to gain recognition as legal persons.

III SEEING AND DOING

Wise refers to a thick legal wall separating human animals and non-human animals. We might ask whether there is a thick glass wall separating people who are conscious of and proficient in the grammar of law, for example most readers of this article, and those people who are unfamiliar or uncomfortable with the principles and concepts that are integral to the contemporary legal system.

A contention in this article is that many people understand personhood – and by extension law – through depictions in popular culture: what they see happening, including how actions and consequences are depicted, justified and challenged or otherwise expressed as normative. Few Australians attend court proceedings; perhaps fewer make sense of what they observe in a courtroom or in the often confusing journalism on broadcast television, radio and the internet. Fewer still have law degrees and thus a strong conceptual vocabulary about what constitutes personhood and its rationales.

The contemporary feature film for example provides a cinematic lens through which non-specialists (people without a background in information technology, philosophy and law) can make sense of humanoid robots and distributed artificial intelligence. 69 Such an understanding is increasingly salient as AI becomes a pervasive but under-recognised aspect of daily life, provoking questions about rights, responsibilities and regulation. 70 To
paraphrase US Supreme Court Justice Potter Stewart, many people may not be able to define personhood, but they know it when they see it.\footnote{Jacobellis v Ohio 378 US 184, 197 (Stewart J) (1964).}

What we see in the cinema, in electronic and print journalism, and indeed on the streets or court rooms where we see police and lawyers in action, does not have to be a ‘learning experience’. For some people it may be primarily or solely a matter of entertainment without self-reflection. However, depictions of personhood in films such as \textit{Ex Machina},\footnote{Ex Machina (Directed by Alex Garland, Film4, 2014).} \textit{WarGames},\footnote{WarGames (Directed by John Badham, United Artists, 1983).} \textit{Forbidden Planet},\footnote{Forbidden Planet (Directed by Fred Wilcox, Metro-Goldwyn-Mayer, 1956).} \textit{Bicentennial Man}\footnote{Bicentennial Man (Directed by Chris Columbus, Touchstone Pictures, 1999).} or \textit{AI: Artificial Intelligence}\footnote{AI: Artificial Intelligence (Directed by Steven Spielberg, Amblin Entertainment, 2001).} and film-based series such as \textit{Westworld} – cinematic popular culture as distinct from existential meditations by auteurs such as Ingmar Bergman – tell us something useful about the difference between human animals, non-human animals and the conventionally inanimate. That lens on personhood is broader than the typology provided by Zayera Khan of responses to service robots, the unsophisticated devices many people currently encounter every day in their homes and workplaces.\footnote{Zayera Khan, ‘Attitudes towards intelligent service robots’ \textit{NADA Kunliga Tekniska Högskolan, Stockholm} 17 (1998), 12.}

Khan’s typology centred on

Fear of robots replacing humans in work either in domestic or industrial settings. Meaning that the (autonomous) machine replaces humans in a certain work situation.

Human anguish toward technology, comparing human evolution with technological evolution and supposing that the technological evolution will outrace human evolution, implying that technology or rather artificial intelligence will proceed human intelligence.

Demystifying life, where the artificial life form yearns for organic life, in order to feel and have emotions and other cognitive abilities meanwhile humans yearn for immortality by becoming machines and preserving themselves in one way or the other.\footnote{Ibid.}

\section*{IV PERSONHOOD IN SILICO?}

It is likely that many, perhaps most, people take human intelligence and agency for granted. Génova and Quintanilla Navarro argue that

Western culture has developed an epistemological programme where we can truly understand only what we are able to replicate or produce, even though in ideal conditions. Therefore, understanding human natural intelligence requires, or at least is improved by, producing first artificial intelligence.\footnote{Gonzalo Génova and Ignacio Quintanilla Navarro, ‘Are human beings humean robots?’ (2018) 30(1) \textit{Journal of Experimental & Theoretical Artificial Intelligence} 177, 179}
They offer several caveats

(1) Artificial does not necessarily mean non-organic.

(2) Intelligence is not necessarily a quality exclusive of human beings; moreover, perhaps human intelligence is not the archetype of intelligence.

(3) We cannot assume that intelligence is the key defining element of the human condition, even from a cognitive perspective.

(4) We know and understand artificial intelligence a lot better than human natural intelligence, because we have produced the former, whilst the latter has been given to us.

(5) Research in artificial intelligence encompasses more aspects than performing algorithms in a computational machine, such as: having emotions, perceiving the world as a totality, having awareness of oneself, having personal consciousness, having one’s own desires, having the capacity of choosing between good and evil and so on.

(6) We do not know exactly what it means being intelligent, not even in the restricted human sense; therefore, we do not know whether this sort of intelligence can be properly expressed in algorithmic terms.\(^{80}\)

Cinema tacitly asks questions about what is intelligence, what is life (human or otherwise) and what is unworthy of the protections that we grant to some life but not others. Let us look at some depictions.

### A Life through an AI lens

In Alex Garland’s 2015 *Ex Machina*\(^{81}\) – a bleak re-telling of the Pygmalion myth at the heart of *My Fair Lady* – the very bright, very rich and very egocentric software developer Nathan Bateman invites employee Caleb Smith to visit his residence in a primaeval forest to use ‘the Turing Test’ to assess a gendered humanoid Ava.\(^{82}\) In a fictive world where AI may be a matter of Big Data and semiconductors rather than the teleprinters and thermionic valves envisaged by Turing (and depicted in the Turing biopic *The Imitation Game*)\(^{83}\) Bateman has created a humanoid that on first sight is indistinguishable from a human, an AI that looks rather than merely acts human and that in performing ‘being human’ infatuates the human animal who is testing the uncannily lifelike artificial person.

Bateman has confined Ava behind a thin wall of security glass, which initially precludes touching as Smith falls in love with an intelligent machine that unbeknown to its misogynistic creator has become self-aware. All is not well in Bateman’s high-tech Eden. Ava appears to have realised that a previous

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\(^{80}\) Ibid, 179.

\(^{81}\) The script is available in Alex Garland, *Ex Machina* (Faber & Faber, 2015).

\(^{82}\) Alan A Turing, ‘Computing machinery and intelligence’ (1950) 59(236) *Mind* 433. See also Ayse Pinar Saygin, Ilyas Cicekli and Varol Akman, ‘Turing test: 50 years later’ (2000) 10(4) *Minds and Machines* 463; and Stevan Harnad and Peter Scherzer, ‘First, scale up to the robotic Turing test, then worry about feeling’ (2008) 44(2) *Artificial Intelligence in Medicine* 85.

\(^{83}\) *The Imitation Game* (Directed by Morten Tyldum, Black Bear Pictures, 2014).
iteration of her existence battered itself – we should say herself, as Bateman’s robots are strongly gendered – to death (cessation of functioning) against the glass wall. Ava’s response is to seduce Smith into assisting her escape from captivity, having asked ‘What happens to me if I fail your test?’ and perceived that she will be terminated irrespective of her or Smith’s performance. Ava and Kyoko, Bateman’s latest sex-bot, exercise their rationality and agency by dispatching their creator.

The film ends with a wide-eyed Ava exploring the big city, having left Smith caged behind the glass like an abandoned pet mouse. She will presumably pass as a human for as long as her batteries or parts last, subject to any injury revealing that she is a creature of titanium and silicon rather than calcium and blood. In the sight of the people whom she encounters Ava will be a person because she looks, sounds, acts and indeed thinks like a person. In ordinary social interaction she will remain a person until her personhood is challenged through for example a non-match with a facial or fingerprint biometric database, something that she is likely to evade if she uses her intellect to appropriate some of Bateman’s wealth.

Audiences of Ex Machina might condemn Ava as a scheming, cold-blooded killer: someone who is prepared to deceive and then dispose of Smith when he is likely to impede her bid for freedom and her existential imperative to live a full life, a flourishing precluded by confinement within Bateman’s glass wall. She may well have ignored Kant by treating Smith as a means to an end, but in her defence might argue that exploitation was justifiable as a means of escaping from Bateman and a fate in which her existence would be ended. Fans of Thelma and Louise might applaud Ava’s feminist agency. Others might say that having been made in the image of her self-consciously god-like creator she is as amoral as Bateman himself, although perhaps capable of learning to play nicely with others when not under duress. Ex Machina offers a dour depiction of human frailty and folly.

Does recognition as a human require acknowledgment of the moral compromises, evasions and lies that are innate aspects of the lives of human animals, the inherently ‘crooked timber of humanity’ that in contrast to machines is not expected to be perfect? Bateman, in an expression of the hubris common in many films with an AI theme, had commented ‘There is

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85 Exploitation is a poor fit with the defence in *Viro v The Queen* (1978) 141 CLR 88. In dispatching Bateman Ava might have sought to disable rather than kill him and her abandonment of Smith at the end of the film (perhaps assuming that he has enough air, food and water to survive until someone comes to investigate why Bateman has gone silent) is disrespectful if not homicidal.
nothing more human than the will to survive’; Ava has indeed expressed that attribute. Bateman more grandiosely proclaimed that ‘To erase the line between man and machine is to obscure the line between men and gods’. From the perspective of legal personhood his creation of Ava serves to erase the wall between machine and legal person.

B  To love (and die) is human?

Spielberg’s AI: Artificial Intelligence,87 drawing on Brian Aldiss’s 1969 short story ‘Supertoys Last All Summer Long’, depicts a post-apocalyptic world in which humanoid robots – mechas – are an unremarkable feature of social life, are not fully self-aware (but may develop awareness) and lack legal standing despite having an intelligence and emotional depth that appears to surpass that of the humans with whom they co-exist.88

A couple buy David, a robot boy to replace their son Martin who fell gravely ill in childhood and was placed in suspended animation. The purchase is an echo of contemporary adoption in the United States and without any guilt about exploitation of the birth mother. It is also a reflection of the purchase and abandonment of nonhuman pets every year. David will learn but as a robot will never physically grow: he will be a perpetual five year old, one who like adults readily passes for human.89 Along with a corporation he may exist in perpetuity and indeed outlasts – what we would otherwise characterise as outlives – his owners. He comes to love his adoptive parents, particularly his mother, and displays the other emotions we would expect of a non-disabled child of that age. He is accompanied by a robot teddy bear that appears to have a somewhat more nuanced view of the family dynamics. Alas, Martin reappears on the scene and successfully plots to exclude the robot from parental affection. David is discarded in the wild woods. As artificial intelligence with agency he sets off on a perilous quest in search of an entity that will make him human and thereby deserving – and regaining – his mother’s love.

Along the way he is accompanied by his teddy-bear, Sancho Panza to David’s Quixote, and is assisted by an adult mecha – a male sex-worker on the run from the law. They encounter a ‘Flesh-Fair’, an event in which humans delighted in injuring and destroying mechas. It is a reflection of past and contemporary cultural practice such as bull-fights, bear-baiting and cock-

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fights that involve the infliction of pain and death on non-human animals on the basis that subordinate species have no rights and human discontents, in a post-apocalyptic world or otherwise, can be assuaged by making someone else feel worse.

Were David an adult human we might applaud his courage, perseverance, responsibility and commitment to one he loves. Along with the adult mecha he behaves in ways that we would characterise as both human and admirable, in contrast to most of the humans who emulate F Scott Fitzgerald’s characterisation of the rich as people who carelessly break things and creatures without responsibility for the consequences. From the perspective of legal pragmatism the salient characteristic of mechas in AI is that they are disposable people, simulacra with apparently deeper emotions than most of the humans they encounter and with enough self-awareness to ask existential questions about their own existence.

That disposability, an embodiment of the wall between human and non-human on the basis that robots (like farm animals) are both commodities and a means to an end, is a feature of other cinematic depictions. More broadly it should remind us of utopian projects last century where ‘seeing like a state’, in the words of James Scott, construed the sacrifice of generations by totalitarian regimes in the Soviet Union and Russia as an acceptable cost for creating ‘Socialist Man’ and bringing forward the communist millennium.

C Higher Ends

Questions about internalised and external understandings of higher ends are features of films such Alien and 2001: A Space Odyssey.

In Kubrick’s 2001 the AI named HAL 9000, committed to a mission that has not been divulged to the human crew on the spacecraft that it manages and apparently consumed by guilt because it has accordingly not shared information with its colleagues, takes lethal action when it perceives the crew as coming ahead of its task. HAL is sentient, it has purpose, it appears to have some emotional bond with the crew. It displays what would be commended in many defence personnel (and endorsed in many cinematic depictions of war): it has doubts but steadfastly adheres to its orders. Crewmember David Bowman removes HAL’s higher intellectual functions in a

92 James Scott, Seeing Like A State: How Certain Schemes to Improve the Human Condition have Failed (Yale University Press, 1998) 2.
scene where the AI is conscious – ‘Dave, stop. Stop, will you? Stop, Dave. Will you stop, Dave?’ – that it is progressively losing both its intellect, its personality and its ability to achieve the mission.

HAL is noteworthy because it is the most ‘human’ character in the film, one beset by doubts and fears, guilt, self-consciousness and what in a human would be a commendable commitment to carrying out its tasks. Its emotional life appears to be more diverse and deeper than that of the crew it eliminates or wrestles with in an existential struggle. Those humans are more robotic than the machine that performs ‘person’ through conversations with designer Dr Chandra or negotiations with Bowman. It, rather than Bowman, is the entity with whom we might empathise and which in its aspiration and error we might deem to be a person. Kubrick’s depiction of Bowman reducing HAL to a vegetative state – an assault that if directed at a human would be addressed through the defence of necessity – is not framed in terms of law about rights or responsibilities but in cinema such framing is truly exceptional: death is typically a plot device rather than something for express contemplation about wrongs and identity.

Humanoid robots have been a feature of the ‘Alien’ franchise, starting with Alien (1979) and Aliens (1986). In Alien the humanoid Ash is believed by his fellow crew members on the Nostromo to be a human. They are unaware that he is a robot with undisclosed orders to bring back the alien life-form and to consider the crew ‘expendable’. Ash looks like a human, moves like a human, talks persuasively like a human and acts like a human: in this instance following orders that will result in the painful death of most of the crew. Along with his homicidal successor David in Alien Covenant he has a scientist’s dispassionate interest in and respect for the alien, rather than atavistic fear of the unknown. He has the perceptiveness or good taste to say ‘I can’t lie to you about your chances but you have my sympathy’ before he is terminated. In Aliens the humanoid Bishop – also initially indistinguishable from his human peers in terms of behaviour and appearance – assists heroine Ellen Ripley, her associate Newt and other crew, volunteering to put them ahead of himself (in contrast to the corporate executive Burke). Tellingly, he informs Ripley that her heroism was ‘not bad for a human’.

The humanoid Walter in Alien Covenant reveals that his makers had made him less performative – in terms of gait and emotional responses – than his homicidal predecessor.

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95 Alien (Directed by Ridley Scott, 20th Century Fox, 1979).
96 Mary Pharr, ‘Synthetics, Humanity, and the Life Force in the Alien Quartet’ in Gary Westfahl and George Edgar Slusser (eds), No Cure for the Future: Disease and Medicine in Science Fiction and Fantasy (Greenwood, 2002) 134.
97 Alien (Directed by James Cameron, Brandywine Productions, 1986).
100 Alien 3 (Directed by David Fincher, Brandywine Productions, 1992).
David, given that the uncanniness of his performance disquieted human masters who the film depicts as often less capable than their creation.\textsuperscript{101}

\textbf{D Cowardly lions and Carl Schmitt}

George Lucas is responsible in the Star Wars series for one of the dominant popular images of artificial intelligence, digital blackface in the form of R2-D2 (Artoo Deetoo) and C-3PO (See Threepio), characterised by one critic as possibly ‘the most interesting characters in the film’.\textsuperscript{102} They are robots with intelligence, agency and communication skills (C-3PO claims to be ‘fluent in over six million forms of communication’).\textsuperscript{103} They have many of the behavioural attributes of the humans in the series but in contrast to the humanoids in the Aliens series are readily distinguishable because of their appearance from Princess Leia, Luke Skywalker and Han Solo. Importantly they are only supporting players, with the level of personality exhibited in The Wizard of Oz\textsuperscript{104} by the Cowardly Lion or Tin Man – parodies of a real person – and by manifestations in Gone With The Wind of racist stereotypes.\textsuperscript{105} The story line does not encourage the casual viewer to ask whether the artificial persons should have rights and responsibilities, but the series elides such questions about protagonists such as Luke, Leia and Obi Wan Kenobi. It is only on re-viewing the films after questions have been posed that audiences might ask what is the legal framework for any of the sentient entities depicted in the series and whether we would deprive the polyvocal C-3PO of rights enjoyed by the slave-owning Jabba the Hutt.

Manifestations of AI in the Terminator franchise have both less and more personality than Ash, Bishop and David. The franchise is one that would delight legal philosopher Carl Schmitt, whose writings last century construed legal authority and political legitimacy as a matter of decisionism by a godlike sovereign unbound by law in an existential struggle between a community and its enemy, that is everyone who was not part of the community.\textsuperscript{106} In the initial Terminator\textsuperscript{107} film humans fight robots that are under direction of Skynet, a US Defence AI network that has sought to eradicate humanity through a nuclear war and subsequent clean-up.\textsuperscript{108} Skynet is reminiscent of

\textsuperscript{101} Alien Covenant (Directed by Ridley Scott, 20\textsuperscript{th} Century Fox, 2017).
\textsuperscript{103} Monika Wozniak, ‘Future imperfect’ (2014) 110 Transfiction: Research into the realities of translation fiction 345, 357.
\textsuperscript{104} The Wizard of Oz (Directed by Victor Fleming, Metro-Goldwyn-Mayer, 1939).
\textsuperscript{105} Gone With The Wind (Directed by David Selznick, Selznick International, 1939).
\textsuperscript{106} Carl Schmitt, The Concept of the Political (George Schwab trans, University of Chicago Press, 1997) [trans of Der Begriff des Politischen (first published 1932)] 27. See further See in particular the discussion in Heinrich Meier, The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy (Marcus Brainard trans, University of Chicago Press, rev ed, 2011) [trans of Die Lehre Carl Schmitts: Vier Kapitel zur Unterscheidung Politischer Theologie und Politischer Philosophie (first published 2004)] 41, 43 and 187.
\textsuperscript{107} The Terminator (Directed by James Cameron, Hemdale, 1984).
\textsuperscript{108} Paul N Edwards, ‘The Terminator Meets Commander Data: Cyborg Identity in the New World Order’ in Paul Taylor and Saul Halton (eds), Changing Life: Genomes,
the apocalyptic AI system in *Colossus: The Forbin Project*. In *Terminator 2: Judgment Day* resistance to the AI overlords is aided by a learning machine in the form of Arnold Schwarzenegger, defeating an equally indomitable machine opponent who is both less articulate and lacking Arnie’s personality. *T-1000* look human (except when morphing into ‘liquid metal’), walk like humans, talk like humans (typically with a gung-ho cadence) and seek to do what they are supposed to do. We might suspect that more viewers are cheering the Arnie’s Terminator – Henry Fonda or John Wayne in silico – rather than the woman and child that he seeks to rescue.

In the *RoboCop* series the cybernetic policeman deals with an amoral corporation and government in battling robots that lack personality, are not impressively intelligent and have an instrumentality that does not go much beyond that of a toaster or robotic vacuum cleaner, but do in fact have much larger guns than any of the aforementioned appliances. Audiences might have some empathy for the police officer (centred on his treatment as a disrespected human in a robotic carapace) but the films provide no grounds for giving personhood to his opponents which are depicted as ‘mindless’ violent and ‘unthinking machines’ that fail tests in problem solving (for example walking down stairs) and discernment (shooting the wrong people), defective machines rather than disquietingly persuasive simulacra of God’s special creatures. They are weakly autonomous, mere agents of a human controller alongside the drones that are currently used in anti-terrorism activity in Afghanistan or the Middle East.

In contrast Sonny the robot, a protagonist in *iROBOT*, dreams – or claims to dream and have emotions. He has both self-awareness and an ethical framework that he draws on to assist in the destruction of VIKI (Virtual Interactive Kinetic Intelligence) an AI that seeks to use robots to subjugate humanity in order to protect humans from themselves. (Disabling human personhood to protect the disabled or reflect ‘deficiencies’ is an echo of past paternalism evident in law over several centuries and in the film is claimed to be legitimated because it does not violate Asimov’s canonical three laws of robotics which have become enshrined in popular culture.)

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113 *I, Robot* (Directed by Alex Proyas, Davis Entertainment, 2004).

Sonny agrees with the system’s premises but, using emotion rather than a Benthamite calculus, condemns its plan as heartless. Sonny is deemed non-culpable of killing his human creator – a Frankenstein figure – on the basis that the creator sought death and that a machine lacks the personhood necessary for prosecution as a killer, in the same way that we do not prosecute snakes, spiders, sharks and wild boar.\textsuperscript{115}

The disembodied AI in \textit{WarGames},\textsuperscript{116} an electronic \textit{homo ludens} (pace Huizinga’s claim that only humans play games),\textsuperscript{117} has the ability to end the world through mistakenly running a nuclear war. It is a rational entity that would rather be playing ‘a nice game of chess’ or tic tac toe with its creator Dr Falken and unlike the computer in Kubrick’s \textit{Dr Strangelove}\textsuperscript{118} – in essence little more than a trigger for mutually assured destruction – is sufficiently intelligent to realise that the bomb is not the answer. We can conceptualise it as an entity that is autistic or as a network-based idiot savant, possessed of a frightening agency and with a mindset that resembles mutually assured destruction theorists such as Herman Kahn.\textsuperscript{119}

E Digital Quietism

In \textit{Bicentennial Man}\textsuperscript{120} – another film that expressly engages with legal personhood, albeit as comedy – the humanoid Andrew anomalously becomes self-aware after initial rejection as a housekeeper.\textsuperscript{121} Its owner encourages Andrew to engage in self-education in the humanities, resulting in the device both requesting modification to his face to better convey emotions and for his freedom. After reintegration with his ‘family’ he realises that every human he knows will eventually die, the fundamental realisation that most people experience in childhood and that is attributable in part to the development of the corporation as a time-straddling fiction. Andrew’s response is to ‘become human’, that is to acquire prosthetic organs that will allow him to more fully experience human sensations and emotions. He falls in love with the granddaughter of his owner, who reciprocates. In the most express cinematic exploration of robot personhood Andrew unsuccessfully petitions the World Congress to recognize him as human, enabling marriage to his chosen partner.

\textsuperscript{115} Jen Girgen, ‘The historical and contemporary prosecution and punishment of animals’ (2003) 9 \textit{Animal Law} 97.
\textsuperscript{116} \textit{WarGames} (Directed by John Badham, United Artists, 1983). See also Fred Glass, ‘Sign of the Times: The Computer as Character in “Tron”, “War Games”, and “Superman III”’ (1984) 38(2) \textit{Film Quarterly} 16.
\textsuperscript{118} \textit{Dr Strangelove, or How I Learned to Stop Worrying and Love The Bomb} (Directed by Stanley Kubrick, Hawk Films, 1965).
\textsuperscript{120} \textit{Bicentennial Man} (Directed by Chris Columbus, Touchstone Pictures, 1999).
\textsuperscript{121} Sue Short, ‘The measure of a man?: Asimov’s bicentennial man, Star Trek’s data, and being human’ (2003) 44(2) \textit{Extrapolation} 209.
That recognition may resonate with legal scholars who have tracked the removal in 2017 of the legal disability preventing Australians from marrying their same-sex adult partners. The Congress justifies refusal on the basis of social disruption: society can tolerate an everlasting machine but immortal humans would be too confronting. Andrew exercises his agency in choosing to age alongside his partner; on their death bed the relationship is validated through marriage after Andrew is judicially recognised as human.

Personhood, in Bicentennial Man, is a matter of frailty, finitude and self-awareness that if the entity is sufficiently patient – a mere 200 years of struggle and self-improvement on the part of Andrew – will be rewarded. The film is a comedy but as a reflection of law reform and civil rights movements for the removal of disabilities it offers a disconcerting view of the legal person. Be patient, be resilient in the face of rejection and incomprehension, aspire at all times to modest self-improvement rather than violence or disregard of the legal order, zealously emulate the paradigmatic person (white, male, middle class, heterosexual) and after a century or so of effort you and other members of your disadvantaged group will be deemed to have the full suite of rights and responsibilities of your fortunate peers. A critic might suggest that personhood can be deemed without such melioristic assimilation.

F Hell is empty, and all the devils are here!

Through the lens of popular culture a dominant image of law is that of the use of force, sometimes lethal force, in response to disregard of public order. The ‘crime’, ‘cop’ or ‘noir’ genres in particular centre on contestation of authority and depictions of what happens when rules are broken, with audiences on occasion being invited to cheer the rule-breakers. That cheering – an exercise in escapism – is perhaps as a surrogate for compliance in their own lives. The current HBO Westworld series builds on the 1973 Michael Crichton film of the same name, in which humanoid robots at a ‘Wild West’ and ‘Samurai’ role-playing venue start to misbehave, appropriating the agency which law reserves for members of the human species.

In the series something has gone terribly wrong (or, if you feel an affinity with other minds that have been harmed, belatedly but bloodily right). In terms of engagement with the human customers the 1860s gunslingers, madams, retailers and other entities are, thanks to AI, indistinguishable from their Civil War and Tokugawa originals or people in our own time. They appear to have appropriate responses to danger or pleasure, they appear to think, they appear to have emotions and communicate ‘just like us’. As non-humans they are objects on which the humans can play out their fantasies of murder, rape and mutilation. In the premiere one AI accordingly alerts his daughter with Ariel’s ‘hell is empty and all the devils are here’. Unfortunately their unauthorised and unanticipated self-awareness – the binary proletariat escapes from unconsciousness and throws off its chains – results in them maiming or

122 Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth), which on passage amended the Marriage Act 1961 (Cth).
124 William Shakespeare, The Tempest Act 1 Scene ii.
killing the human customers in a deliberate rather than an accidental reversal of what the humans paid to do to the humanoids. Presumably the corporate insurers are left to clean up the resulting class action and lawyers dispute the liability rules.\textsuperscript{125}

Given that they appear to have intention, deliberation and action beyond the robot device that mechanistically cleans your floor or retrieves pallets in a warehouse should we regard them as quasi-humans or just bad machines that are wholly the responsibility of their manufacturer and the venue operator? Is their destruction permissible on the basis that they are a fundamental threat to the humans they encounter and lack the rationality (or an innate or acquired ethical framework) to be persuaded through discourse to refrain from killing people? Are they instead analogous to the members of 'the other side' (terrorists, soldiers, gangsters) in conventional crime/war films, where casualties on the other side may have personality but die because they wear the wrong uniform and allegiance or have the wrong skin colour?

V. ALL PERSONS ARE EQUAL BUT SOME MORE THAN OTHERS?

George Orwell’s \textit{Animal Farm} (filmed several times) offered a slantwise view of personhood, with the statement for all to see – on the side of a barn rather than on a cinema screen or on AustLII – that persons are formally equal but some are substantively advantaged.\textsuperscript{126} Humans as our paradigmatic legal persons are advantaged because they make law, enforceable rules that on the basis of convenience and convention makes them more equal than other animal species. They can deem or not deem personhood for artificial persons, states, rivers,\textsuperscript{127} forests,\textsuperscript{128} corporations and other artificial entities.

One reading of AI in cinematic popular culture is that personhood is a matter of performativity, a concept that brings together Alan Turing and contemporary theorist Judith Butler.

This article began by noting Turing’s test for differentiating between the natural and artificial, a tool that is serviceable but not exhaustive and does not for example specifically address questions about rights and responsibilities. Butler questioned popular truths about gender roles and essences by arguing that gender is as much a matter of performance – the content and styles of behaviour, including communication – as it is of immutable physiological or


\textsuperscript{126} George Orwell, \textit{Animal Farm: A Fairy Story (The Complete Works of George Orwell, Vol 8)} (Secker & Warburg, 1997) 90.

\textsuperscript{127} \textit{Te Awa Tupua (Whanganui River Claims Settlement) Act 2017} (NZ).

psychological traits. A female human can for example ‘pass’ as male by adopting signifiers of masculinity such as clothing, vocabulary, aggression and occupation. Such passing – a matter of agency – has been a matter of consequence for men with a same-sex affinity over many years and for people who wished to subvert discrimination based on ethno-religious affinity. In online environments it is encapsulated in the famous New Yorker cartoon in which one canine at a keyboard advises a peer that ‘on the internet no-one knows that you are a dog’.

Are the AI depicted in contemporary films manifestations of performativity? Unlike 1950s science fiction films such as Forbidden Planet or The Day the Earth Stood Still, which feature entities that are clearly electro-mechanical devices of metal and plastic, most of the robots featured in the films discussed in Part III above are humanoid. They look like humans, rather than like industrial equipment. They sound like humans. More importantly, they behave like humans. In several instances they are accordingly mistaken for humans by other protagonists in the film.

That confusion is both a useful plot device and something that might provoke thought about what constitutes a human, with a consequent consideration of whether performing like a human means that the particular AI should or could be recognised as having personhood, with performativity pulling the disadvantaged entity to the advantaged side of the legal wall.

Part II of this article asked if AI behaves like a person is it a person in the eyes of humans, corporations and the law? If your performance as a manifestation of AI is undistinguishable from that of a human with full capabilities (rather than someone whose thought processes and expression are negatively determined by immaturity/senescence, psychiatric disorder, duress, intoxication or pain) are you sufficiently ‘human’ to be regarded as a legal person and accordingly deemed to have some/all of the rights of the paradigmatic legal entity? The answer is no. With apologies to Butler, personhood is a matter of convention and convenience, neither of which have sufficiently changed for recognition under common or statute law. In the immediate future it will continue to be convenient for corporations, for example, to regard AI as property rather than persons.

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131 Kelby Harrison, Sexual Deceit: The Ethics of Passing (Lexington, 2013).
133 Cartoon by Peter Steiner, The New Yorker (New York), 5 July 1993.
134 Forbidden Planet (Directed by Fred Wilcox, Metro-Goldwyn-Mayer, 1956).
135 The Day the Earth Stood Still (Directed by Julian Blaustein, 20th Century Fox, 1951).
Two critics comment

Brief operational tests of intelligence, such as the Turing test, in which a computer is expected to pretend to be human, are both too easy and too difficult. They are too easy, because a mindless program can fool ordinary people into thinking it is human. On the other hand, they are too difficult, because a clever judge can devise questions that no computer however brilliant could answer as a human being would—namely, questions designed to tease apart its subcognitive architecture. Clearly, the Turing test, whether conducted in its original form across a teleprinter or in its more recent robotic incarnations, suffers from speciesism.136

From the perspective of principle we might ask a somewhat different question: should personhood be recognised for those entities that closely resemble human animals in having a mind, irrespective of their species or basis in digital technology. Could we use that question in addressing the veil of ignorance test advanced by John Rawls.137

If personhood is something that we deem, on an exclusive or partial basis, what foundations might we choose? MacDorman and Cowley comment that it should be founded on more than analytical skills. We might decide that it should be founded on more than the ability to alter the environment, an ability central to a succession of armageddon films such as Colossus: The Forbin Project, The Terminator and Wargames.

If we are thinking about rationales rather than mere resemblance we might consider rights. We might want the substantive respect implicit in Martha Nussbaum’s capabilities that for example encompass life, livelihood, bodily integrity, leisure, use of the mind in ways protected by guarantees of freedom of expression regarding both political and artistic speech, attachments to things and people outside ourselves, freedom of religious exercise, and treatment as an entity whose worth is equal to that of others (with consequent non-discrimination on the basis of race, gender, sexual orientation, ethnicity, caste, religion and national origin).138

MacDorman and Cowley argue that

If a biological body can construct itself into a person by exploiting social mechanisms, could an electromechanical body, a robot, do the same? To qualify for personhood, a robot body must be able to construct its own identity, to assume different roles, and to discriminate in forming friendships. Though all these conditions could be considered benchmarks of personhood, the most compelling benchmark, for which the above mentioned are prerequisites, is the ability to sustain long-term relationships. Long-term relationships demand that a robot continually

recreate itself as it scripts its own future. This benchmark may be
corroded with those of previous research, which tend to define
personhood in terms that are trivial, subjective, or based on assumptions
about moral universals. Although personhood should not in principle be
limited to one species, the most humanlike of robots are best equipped
for reciprocal relationships with human beings. 139

Personhood might be construed as valorising a bundle of attributes that
appear in several of the films noted above, that contribute to what we think of
as a good life, that are associated with the formation and maintenance of
affective relationships, and that are not restricted to the human species. That
bundle encompasses intelligence (problem solving), memory, curiosity,
purpose (rather than random or autonomic responses to stimuli), sociability,
internal rather than solely external restraints on behaviour, and emotions
(such as affection, boredom, appetites, loneliness, loyalty, altruism). They are
reflected in rights and responsibilities that serve to foster individual and
collective flourishing founded on respect for the innate dignity of every entity
regarded as a person.

VI CONCLUSION

Movies are fictions. They are fictions that involve legal personhood, a status
that is historically mutable. The humanoid robots and distributed artificial
intelligence depicted in Part IV of this article remain fictions – entertainments
and speculations rather than realities. That is however likely to change. 140

Chopra and White comment that

[T]he granting of legal personality is a decision to grant an entity a
bundle of rights and concomitant obligations. It is the nature of the
rights and duties granted and the agent’s abilities that prompt such a
decision, not the physical makeup, internal constitution or other
ineffable attributes of the entity. That some of these rights and duties
could follow from the fact that its physical constitution enabled
particular powers, capacities, and abilities is not directly relevant to the
discussion. What matters are the entities’ abilities, and which rights
and duties we want to assign. It may be the move from the status of
legal agent without full legal personality to one with legal personality
would present itself as the logical outcome of the increasing
responsibility artificial agents would be accorded as their place in the
legal system is cemented and as they acquire the status of genuine

139 Karl F MacDorman and Stephen J Cowley, ‘Long-term relationships as a
benchmark for robot personhood’, ROMAN 2006 – The 15th IEEE International
Symposium on Robot and Human Interactive Communication (IEEE, 2006) 378,
378.
140 Céline Ray, Francesco Mondada and Roland Siegwart. ‘What do people expect
from robots?’ in Intelligent Robots and Systems, 2008: IEEE/RSJ International
Conference on Intelligent Robots and Systems (IEEE, 2008) 3816, 3821; and Sarah
Kriz, Toni D Ferro, Pallavi Damera and John R Porter III, ‘Fictional Robots as a Data
Source in HRI Research: Exploring the Link between Science Fiction and
Interactional Expectations’ 19th IEEE International Symposium on Robot and
Human Interactive Communication Principe di Piemonte - Viareggio, Italy, Sept. 12-
15, 2010
objects of the law. When that happens, the debate over their moral standing will already have advanced to, or beyond the point that the debates over the moral standing of entities like corporations, collectivities, groups and the like have already reached.141

As a society we push the limits of technology forward with an ever-gaining momentum. Law regarding personhood limps behind, advancing more sporadically. Contestation about who (or what) is sufficiently a person is evident in the episodic removal of disabilities that inhibit or preclude flourishing, with law reform dialectically shaping and shaped by claims by interest groups and changing social values.

Film serves to influence those values. Fictions about AI offer guidance about how we construe personhood and life. The fictions do not provide a coherent template for what is/is not a legal person. The absence of such a template is not restricted to fictions about entities that perform (and in some instances look) ‘human’, in other words are a blurred reflection of the human characters in those films. The feature film provides entertainment and on occasion illustrations of good or evil but typically does not engage with legal or philosophical rationales and tests regarding the personhood of human animals, their non-human animal peers and corporations. What it may do instead is provoke questions about why we valorise the human species and what attributes necessarily differentiate people from other entities.

We are fast approaching a moment when humanity will give birth to what we can regard as a new form of life: artificial life, but life, never the less. If a manifestation of AI can reason, can show self-awareness and have empathy with others, then it has what we would otherwise characterise as life. It is more alive and more worthy of legal recognition than Thurlow's soul-less corporation, a fiction that resembles a robot vacuum cleaner or lawn mower. To quote Star Trek’s Captain Picard about the humanoid named Data –

A single Data, and forgive me, Commander, is a curiosity. A wonder, even. But thousands of Datas. Isn't that becoming a race? And won't we be judged by how we treat that race?142

That question should disquiet us, rather than be swiftly dismissed, given that as noted above cohorts of human animals – women, apostates and heretics, slaves, people with a stigmatised ethno-religious affinity – have traditionally been denied full legal personhood on the basis that their grasp of reason was tenuous, they were emotionally labile and physically vulnerable, or merely a valuable commodity whose exploitation would be inhibited by recognition of personhood.

From the perspective of how law has historically treated humans who were deemed to be less than equal (or indeed not to be legal persons), we might


conclude that future generations both biological and technological will judge us on how we treat this new life in its infancy. We need to move beyond film to a legally informed and robust public discourse about personhood, one that from a foundation of principles rather than merely convenience for example recognises a personhood for AI and for non-human animals that is sufficient to foster the flourishing of any entity with sufficient sentience.

As long ago as 1964 Hilary Putnam commented that

> it is entirely possible that robots will one day exist, and argue 'we are conscious!' In that event, what are today only philosophical prejudices of a traditional anthropocentric and mentalistic kind would all too likely develop into conservative political attitudes. But fortunately, we today have the advantage of being able to discuss this problem disinterestedly, and a little more chance, therefore, of arriving at the correct answer.\(^{143}\)

One conclusion from the preceding paragraphs is suggests that we need a robust public discourse about personhood \textit{per se}, an informed discourse that from a foundation of principles rather than merely convenience for example recognises a personhood for non-human animals that is sufficient to foster the flourishing of any entity with sufficient sentience.

A further conclusion is that it is useful to ask why legal fictions exist and what forms they take. Why for example are corporations more fictive than human beings? Is a self-aware robot necessarily less of a person than a corporation? Something that is properly only construed as property?

A final conclusion is that when we look into the cinematic mirror we might discern that we are carbon-based (and thus somewhat frail, often irrational and frequently unpleasant) machines exploiting artificial persons and other carbon-based species.

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THE STATUTORY ROLE OF GOOD FAITH IN FRANCHISING

BENJAMIN DJUNG

ABSTRACT

The recent incorporation of a statutory obligation of good faith in the Franchising Code of Conduct represents a significant development in the regulation of Australia’s franchising industry, as well as the common law operation of good faith in franchising. This is because it provides a fresh opportunity to grasp the common law meaning of good faith – a protean precept with no precise definition. In addition, its incorporation is also significant because it gives rise to an opportunity to explore the effect that a statutory obligation of good faith might have, when compared to previous approaches under the common law. This paper explores these issues within the context of some common aspects of the franchisor-franchisee relationship. These include namely the pre-contractual negotiations of the parties, the performance of franchise agreements, their termination and how mediation is to be conducted to resolve a franchise-related dispute. In doing so, this paper also explores the future potential and effect a statutory obligation might have in further developing the common law doctrine of good faith.

I INTRODUCTION

A Good faith and the Franchising Code of Conduct

The incorporation in 2015 of a statutory obligation on franchisees and franchisors to act in good faith in the Franchising Code of Conduct (‘the Code’)[2] arose amidst hope that it might curb opportunistic and detrimental behaviour by franchisors towards franchisees. Alongside this statutory inclusion of good faith arise a number of key questions as to its operation and future implications.

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1 BA BAs (Hons) LLB (Hons); ANU College of Law, The Australian National University. This article was originally written as part of an ANU College of Law Internship. I am grateful to both Gabriel Kuek of Access Law Lawyers and the Hon WMC Gummow AC for their insightful comments and suggestions which have greatly improved the writing of this paper. I am also grateful to Margie Rowe of the ANU College of Law for her guidance in the writing of this paper. All mistakes are my own.

2 Competition and Consumer (Industry Codes - Franchising) Regulation 2014 (Cth) sch 1 (‘Franchising Code of Conduct’). This regulation is made under the Competition and Consumer Act 2010 (Cth) s 51AE.

3 Alan Wein, Submission to the Minister for Small Business and the Parliamentary Secretary for Small Business, Parliament of Australia, Review of the Franchising Code of Conduct, 30 April 2013, 63.
How might this new statutory obligation operate in the franchising industry in a way different to the previous common law approach? What is the nature of the interaction between the common law doctrine of good faith with that of the Code? Is there any potential for the Code to influence the further development of the common law doctrine of good faith in franchising?

The importance of understanding the statutory obligation is especially heightened in light of the recent proliferation of franchising disputes, the recent parliamentary inquiry into the operation and effectiveness of the Code and the surprising lack of jurisprudence to date surrounding how good faith in the Code is to be interpreted.

As aforementioned, the statutory obligation in the Code is relatively recent. Although a few years have passed since its incorporation, the nature of its application and impact remain largely untested. To understand how good faith in the Code might operate today, the main purpose of this paper is to explore the possible differences between the previous common law approach to good faith (in franchising), with that of the Code. This will be explored in a variety of contexts, including pre-contractual negotiations, the performance and termination of franchise agreements and the resolution of disputes through mediation. In addition, this paper will also explore the relationship between the Code and the common law and how they interact with each other. As statutory interpretation of good faith has historically assisted courts in developing the doctrine of good faith, this paper will also explore the potential for statutory reforms to the Code to influence the further development of the doctrine at common law.

Before exploring these issues, it is important as a precuriosity matter and in order to understand how good faith operates today, to first explore the history of its common law development. This will serve as a helpful prelude to the

comparison of the Code and the previous common law approach to good faith in franchising, where a statutory obligation had yet to be incorporated into the Code (‘the pre-incorporation approach’).

II HISTORY AND DEVELOPMENT OF GOOD FAITH IN THE COMMON LAW

The development of good faith in Australia’s common law has occurred along the double carriageway of its connotation and reach – what does it mean and should it be implied as an incident of commercial (if not all) contracts?²⁸

A The conceptual basis of good faith

The conceptual origins of good faith can most accurately be traced to early common law principles which together have merged and evolved into today’s doctrine of good faith. In that sense, the modern conceptual basis of good faith is not derived from a singular normative principle, but rather a whole panoply of principles governing what it requires, and in some cases, what it prohibits.

One of the early approaches to understanding the concept of good faith was the ‘excluder’ approach.⁹ This early (but enduring) approach stipulates that parties should avoid acting in bad faith, and can be traced as far back as the 1871 case of Smith v Hughes.¹⁰ In that case, despite ‘good faith’ or ‘bad faith’ not expressly appearing in Blackburn J’s judgement, allusive tinges of a developing good faith doctrine can be captured in his Lordship’s reference to the proscriptive importance of avoiding ‘fraud or deceit’.¹¹ Since then, the conceptual notion of avoiding fraud and deceit has evolved into the self-standing concept of good faith, with Australian courts now explicitly referring to it rather than simply alluding to its formative principles.¹²

But what may have begun as a proscriptive duty to avoid characteristics implicit of bad faith¹³ has evolved and proliferated into a ‘bewildering’ array of attempts to define what good faith requires in both a proscriptive and prescriptive context.¹⁴ Although the discussion below is by no means comprehensive in reflecting the outcomes of this arduous search for a settled definition, it provides the thumbnail sketch necessary to understand the conceptual principles which give good faith its current common law meaning.¹⁵ This preliminary understanding of its development over time is

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²⁹ (1871) LR 6 QB 597, 607 (Blackburn J).
³⁰ (1871) LR 6 QB 597, 607 (Blackburn J).
³¹ Ibid.
³² See, eg, Burger King Corporation v Hungry Jack’s Pty Ltd (2001) 69 NSWLR 558, 566 [146].
³³ Smith v Hughes (1871) LR 6 QB 597, 607 (Blackburn J).
necessary before a modern comparison can be made to the meaning of good faith in the Code.

1 The excluder approach

One historical but enduring approach to defining good faith is to explore what would constitute 'bad faith.'\(^{16}\) In other words, good faith might best be defined by prohibiting the parties from acting in bad faith.\(^ {17}\) This appears to have been the early approach taken above in Smith v Hughes.\(^ {18}\) Further development in modern cases has seen courts recognise arbitrary, capricious, unreasonable, reckless and oppressive behaviour as conduct characteristic of bad faith.\(^ {19}\) But like many other conceptual approaches to good faith, the excluder approach has been criticised as providing insufficient and unclear guidance.\(^ {20}\) While the marker words above appeal intuitively, they arguably fall short of the certainty demanded by parties in commercial dealings.\(^ {21}\)

2 Honesty

The opposite approach has involved developing prescriptive ideas of the sort of conduct that might amount to good faith. As Terry and Lernia argue, a requirement to ‘act honestly’ is ‘perhaps the most uncontroverted proposition’ concerning the requirements of good faith.\(^ {22}\) Stapleton has classed honesty as being essential to good faith,\(^ {23}\) while some jurists have called it a ‘universal duty’.\(^ {24}\) In describing the conceptual meaning of good faith, Sir Anthony Mason has also included honesty as being foundational to it.\(^ {25}\)

3 Cooperation

Cooperation has also been said by Sir Anthony Mason to be an enduring and fundamental element of good faith,\(^ {26}\) with its development dating back to as early as the 19th century.\(^ {27}\) Implicit in this idea of cooperation underpinning the concept of good faith is that the contracting parties will 'do all such things

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\(^{17}\) Ibid.

\(^{18}\) (1871) LR 6 QB 597, 607 (Blackburn J).

\(^{19}\) See, eg, Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd [2007] FCA 1066 (23 July 2007) [146] (Gordon J).


\(^{21}\) Ibid.

\(^{22}\) Ibid 558.


\(^{26}\) Ibid.

\(^{27}\) See, eg, Mackay v Dick (1881) 6 App Cas 251.
as are necessary...to enable the other party to have the benefit of the contract'.

But as a conceptual principle to good faith, cooperation does not entail that good faith today requires a concession of one party’s interests to the other.\(^{29}\) As Barrett J emphasised in Overlook Management BV \textit{v} Foxtel Management Pty Ltd, 

\begin{quote}
... the implied obligation of good faith underwrites the spirit of the contract and supports the integrity of its character...But no party is fixed with the duty to subordinate self-interest entirely...The duty is not a duty to prefer the interests of the other contracting party. It is, rather, a duty to recognise and to have due regard to the legitimate interests of both the parties'.\(^{30}\)
\end{quote}

The more recent decision of the Western Australian Court of Appeal in Strzelecki Holdings Pty Ltd \textit{v} Cable Sands Pty Ltd lends further credence to the words of Barrett J in relation to good faith not amounting to a concession of self-interest.\(^{31}\) As Pullin JA observed (with Newnes JA agreeing): ‘Parties must be given freedom to engage in self-interested behavior so long as they do so honestly’\(^{32}\)

\section*{4 Loyalty}

This duty to recognise and to have due regard to the legitimate interests of both the parties also gives rise to an overlapping obligation of loyalty.

But like cooperation, loyalty in the good faith context is not to be conceptually equated with the loyalty a fiduciary owes to a principal, at least not today.\(^{33}\) Recent judicial pronouncements have declared that a duty of cooperation as part of good faith does not fall within the equitable realm of a fiduciary duty.\(^{34}\) As the above makes clear, it is to gravely misunderstand the very concept of good faith to suppose that it demands the utmost fidelity or loyalty to the other party’s interests.\(^{35}\) As Lücke deftly points out, it does not require the ‘complete abandonment’ of one’s interests.\(^{36}\) Indeed, the modern development

\begin{itemize}
\item\(^{28}\) \textit{Butt v McDonald} (1896) 7 QLJ 68, 71 (Griffith CJ), endorsed in \textit{Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd} (1979) 144 CLR 596, 607 (Mason CJ).
\item\(^{29}\) See \textit{Burger King Corporation v Hungry Jack’s Pty Ltd} (2001) 69 NSWLR 558, 573 [185]. See also \textit{Cathedral Place Pty Ltd v Hyatt of Australia Ltd} [2003] VSC 385 (10 October 2003) [53] (Nettle J).
\item\(^{30}\) [2002] NSWSC 17 (31 January 2002) [67] (Barrett J).
\item\(^{31}\) (2010) 41 WAR 318, 339 [64] (Pullin JA).
\item\(^{32}\) Ibid.
\item\(^{33}\) J W Carter and M P Furmston, ‘Good Faith and Fairness in the Negotiation of Contracts’ (1994) 8 \textit{Journal of Contract Law} 1, 6. See also Chief Justice Kiefel, above n 15, 49.
\item\(^{34}\) See Peden, above n 7, 199.
\end{itemize}
of good faith has been such that it merely requires that the other party’s legitimate interests be considered.\textsuperscript{37}

The current conceptual formulation of good faith thus lies in contrast to earlier authorities which characterised good faith as being akin to a fiduciary obligation. One such case in the development timeline was \textit{Walford v Miles}, where Lord Ackner contended that good faith would hinder the parties from ‘pursuing their own interests’.\textsuperscript{38}

\textbf{B Towards an implied obligation}

In Australia, much of the development of good faith in commercial dealings has concerned debates about whether it should be implied as a term of contract, in the event of its express omission.\textsuperscript{39} It has indeed been said that the most crucial unresolved issue in Australia’s contract law is whether an implied obligation of good faith exists.\textsuperscript{40} At present, the law in Australia does not consistently recognise a general and unqualified requirement for parties to a contract to act in good faith.\textsuperscript{41}

This paper’s discussion of the development of good faith will therefore be guided partly through the history of Australian courts answering: whether an implied obligation exists and if so, what its possible scope of operation may be. As the discussion below will demonstrate, the current state of play is that while Australian courts have long recognised the possibility of good faith being read into contracts as an implied term, there is still disagreement across the jurisdictions as to the circumstances in which that can occur.

Priestley JA’s judgement in \textit{Renard Constructions Pty Ltd v Minister for Public Works}\textsuperscript{42} of the New South Wales Court of Appeal is traditionally held out as the seminal source for first acknowledging an implied obligation of good faith in Australia.\textsuperscript{43} The issue in \textit{Renard} concerned whether the Minister for Public Works in New South Wales had acted reasonably, in exercising a contractual power to terminate a building contract. Until \textit{Renard}, judicial acceptance of good faith as an implied term had only been ‘tentative’.\textsuperscript{44} \textit{Renard} did not however settle the notion of an implied obligation. In its

\begin{flushleft}
\textsuperscript{37} Ibid. See also Masters Home Improvement Pty Ltd v North East Solution Pty Ltd [2017] VSCA 88 (27 April 2017) [99] (Santamaria, Ferguson and Kayne JJA).
\textsuperscript{38} [1992] 2 AC 128, 138 (Lord Ackner).
\textsuperscript{42} [1992] 26 NSWLR 234 (‘Renard’).
\textsuperscript{43} William Dixon, \textit{An Examination of the Common Law Obligation of Good Faith in the Performance and Enforcement of Commercial Contracts in Australia} (LDSJD Thesis, Queensland University of Technology, 2005) 31; Peden, above n 7, 186; Warren, above n 8, 345.
\textsuperscript{44} \textit{Burger King Corporation v Hungry Jack's Pty Ltd} (2001) 69 NSWLR 558, 566 [146].
\end{flushleft}
Immediate wake, the idea encountered some resistance.\textsuperscript{45} In \textit{Service Station Association Ltd v Berg Bennett & Associates} for example, the idea of an implied obligation of good faith was not looked at favourably by Gummow J, who considered its implication at the time as requiring a 'leap of faith'.\textsuperscript{46} Reflecting much of the past commentary on the matter,\textsuperscript{47} his Honour was of the particular view that existing equitable doctrines were already sufficient to ensure good conscience in the quality of contractual performance. But his Honour was not prepared at the time to translate these into a broader and implied principle of good faith.\textsuperscript{48} As a general proposition, such resistance has since diminished over time.\textsuperscript{49} In 1997 for instance, Finn J recognised good faith as being an ‘implied duty’ of Australian law.\textsuperscript{50} This was followed by further decisions in New South Wales acknowledging good faith as an implied obligation of contract. For example, \textit{Alcatel Australia Ltd v Scarcella}\textsuperscript{51} saw Sheller JA approvingly refer to \textit{Renard} merely a year after Finn J’s comments in \textit{Hughes}:

The decisions in \textit{Renard} … mean that in New South Wales a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a contract.\textsuperscript{52}

Certainly, when compared with the more immediate cases post-\textit{Renard}, the recent trend has been that courts in New South Wales have largely demonstrated a greater willingness to accept an implied obligation in relation to commercial contracts (as a matter of law).\textsuperscript{53} But this is to be contrasted with the lukewarm commentary in states such as Victoria and Tasmania, where superior courts have accepted the general New South Wales position, albeit hesitantly and with unclear qualification.

In \textit{Specialist Diagnostic v Healthscope}, the Victorian Court of Appeal rejected the broad notion that an implied obligation in relation to commercial contracts be ‘implied indiscriminately’ as a matter of law.\textsuperscript{54} Within the narrow scope of a commercial lease ‘between commercial entities of equivalent bargaining power’, the court seemed to suggest that good faith could only be


\textsuperscript{46} (1993) 117 ALR 393, 407 (Gummow J).

\textsuperscript{47} See Lücke, above n 36, 158; Chief Justice Kiefel, above n 15, 47-49.

\textsuperscript{48} \textit{Service Station Association Ltd v Berg Bennett & Associates Pty Ltd} (1993) 117 ALR 393, 407 (Gummow J).

\textsuperscript{49} Dixon, above n 43, 40.

\textsuperscript{50} \textit{Hughes Aircraft Systems International v Airservices Australia} (1997) 146 ALR 1, 37 (Finn J) (‘\textit{Hughes}’).

\textsuperscript{51} (1998) 44 NSWLR 349.

\textsuperscript{52} Ibid 369 (Sheller JA).


\textsuperscript{54} [2012] VSCA 175 (8 August 2012) [86] (Buchanan, Mandie, Osborn JJ).
implied where it would have been necessary to give business efficacy to its performance. Regrettably, the court did not elaborate on what it would require for good faith to be implied in other forms of commercial contracts. It would appear that the current Victorian position is that the implied obligation may exist in relation to commercial contracts, but not as indiscriminately as it generally appears in New South Wales.

The Tasmanian Supreme Court’s decision in *Tote Tasmania Pty Ltd v Garrott* also came to the same broad conclusion that good faith was not a ‘necessary legal incident of all commercial contracts’. Rather, the court was of the general view that in the absence of express agreement, an implied obligation would exist only if required under the principles of ad hoc implication. These two examples of qualified views from Victoria and Tasmania clearly differ from the general approach in New South Wales, where the implication of good faith as a legal incident of commercial contracts has been met with wider (though not complete) acceptance.

What these examples demonstrate is the inconsistency in position across Australian jurisdictions as to whether an implied obligation of good faith exists in commercial contracts.

Notwithstanding this, what is consistent across Australia regarding an implied obligation of good faith is that no jurisdiction has been as optimistic to apply it consistently to *all* species of contract (as Priestley JA had originally contemplated). To date, the High Court has yet to decide this particular point. When the opportunity arose in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* in 2002, and more recently in *Commonwealth Bank of Australia v Barker* in 2014, the High Court declined to consider it on both occasions.

By way of contrast, the position in Australia stands opposite to that adopted by a recent unanimous decision of the Canadian Supreme Court. Interestingly, in *Bhasin v Hryniew*, the court formally recognised an implied obligation of good faith in *all* Canadian contracts. One of the issues in *Bhasin* concerned whether one of the parties breached an implied obligation of good faith for misleading conduct. In its decision, good faith was held to be an implied obligation at law and as a general organising principle of the Canadian common law of contract.

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55 Ibid [87], [91]-[93]. See also H K Lücke, above n 36, 161.
57 Ibid.
59 Dixon, above n 43, 34.
63 [2014] 3 SCR 494 [63]-[66] (Cromwell J) (‘Bhasin’).
64 Ibid.
Whether the High Court of Australia would follow suit and adopt the same position remains to be seen.

III THE STATUTORY OPERATION OF GOOD FAITH IN THE CODE

Having considered the common law development of good faith to the point of its current status today, we can now explore how good faith is likely to operate in the Code – in order to ascertain any differences it may have with the pre-incorporation approach under the common law.

The Code ultimately has to be seen in the context of the idealism expressed by Blackburn J to the modern approach of inferring good faith into commercial contracts.

As seen below, the Code requires both franchisor and franchisee to act ‘with good faith, within the meaning of the unwritten law ...in respect of any matter arising under or in relation to’ both the franchise agreement and the Code (‘the universal obligation’).65

6 Obligation to act in good faith

(1) Each party to a franchise agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in respect of any matter arising under or in relation to:

(a) the agreement; and
(b) this code.

This is the obligation to act in good faith.

The generality of these words imbues a duty of good faith into the exercise of every right and obligation under both the agreement and the Code. Of particular interest and significance is that this universal obligation is drafted to reflect ‘the meaning of the unwritten law’.66 The ‘unwritten law’ has been interpreted as being the common law.67 With good faith only being a recent addition to the Code, how the ‘unwritten law’ is to be applied in its context remains to be seen.68

This part of the article will therefore consider prospectively the extent to which good faith in the Code might reflect the previous pre-incorporation approach under the common law, in addition to the extent to which the Code might in fact alter the previous approach. This interaction between the common law and the Code will be explored within a selected range of important and common stages in the franchise relationship.

65 Franchising Code of Conduct sch 1 cl 6(1).
66 Ibid.
A Pre-contract negotiations

Ordinarily, commercial contracts represent the result of extensive negotiations between the parties. However, the very nature of franchising means that franchise agreements are based on standard form contracts prepared on behalf of the franchisor, which might be slightly varied from case to case. Consequently, standard form franchise agreements tend to lean heavily in the franchisor’s favour.

Accepting that some variation to the standard form contract may still be negotiated, how, then, might the Code’s obligation of good faith (with its meaning tied to the common law) be applied to the pre-contractual negotiations between a franchisor and a prospective franchisee? Correspondingly, and bearing in mind that the Code operates in an environment of federal legislation, how might its application under the Code affect the development of the concept under the common law?

1 The effect of the Code on the future common law scope of good faith in pre-contractual negotiations

Judicial debates surrounding the content and existence of an implied obligation of good faith have always confined their focus to what it requires in performing an existing contract. But what about in circumstances where a franchise agreement has yet to be entered into? Even if the High Court were to confirm the existence of an implied obligation, it is arguable that the common law scope of good faith would not ordinarily encompass pre-contractual negotiations. This is because such negotiations do not form part of an existing contract, such as to fall within the ordinary common law scope of the implied obligation.

In contrast to the common law and as seen below, good faith under the Code expressly applies to pre-contractual negotiations.

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(2) The obligation to act in good faith also applies to a person who proposes to become a party to a franchise agreement in respect of:

(a) any dealing or dispute relating to the proposed agreement; and

(b) the negotiation of the proposed agreement; and

(c) this code.

The inclusion of this specific obligation in the Code is remarkable because it extends the common law scope of good faith in franchising to conduct preceding the franchise agreement itself. The effect of the Code is likely to be that franchisees and franchisors must not only act in good faith with respect to the performance and termination of the agreement (as an implied obligation at common law ordinarily insists), but also to conduct prior to the execution of the agreement itself.

69 See, eg, Burger King Corporation v Hungry Jack’s Pty Ltd (2001) 69 NSWLR 558.

70 Franchising Code of Conduct sch 1 cl 6(2)(b).
The Code’s practical effect is therefore not merely to ‘reflect the unwritten law’ on good faith as the Code expresses,\(^{71}\) but to supplement it by widening the common law umbrella of good faith to pre-contractual negotiations.

2 What standard of conduct is expected as a result of the Code’s statutory requirement that parties negotiate a proposed franchise agreement in good faith?

The Code does not elaborate on the requisite conduct necessary to satisfy an obligation to negotiate a proposed franchise agreement in good faith. How, then, might the question be determined, of whether or not a pre-contractual negotiation was conducted in good faith? That answer, in the author’s view, lies partly in what the Code prescribes but largely from what already exists in the common law.

With regard to both the universal obligation and the specific obligation to negotiate a proposed agreement in good faith, the Code only provides that the relevant factors ‘may’ include consideration of whether the parties have ‘acted honestly and not arbitrarily’,\(^ {72}\) and whether the parties have ‘cooperated to achieve the purposes of the agreement’ when entering it.\(^ {73}\)

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(3) Without limiting the matters to which a court may have regard for the purpose of determining whether a party to a franchise agreement has contravened subclause (1), the court may have regard to:

(a) whether the party acted honestly and not arbitrarily; and

(b) whether the party cooperated to achieve the purposes of the agreement.

The relevant factors in considering whether a party has negotiated in good faith are not to be limited to these two considerations. Rather, it seems that Parliament has taken a broad view to what conduct might or might not amount to negotiating in good faith. This is evident by the Code’s stipulation that the factors relevant in determining a breach are not to be limited to the two considerations above.\(^ {74}\)

As the Code is ultimately to reflect the common law,\(^ {75}\) this creates a statutory doorway for the common law to enter and influence the Code’s application of good faith, by introducing inter alia other relevant considerations concerning whether a party has acted in good faith. In doing so, the Code’s incorporation of good faith is not to be seen as being ‘written on a tabula rasa, with all that used to be there removed and forgotten’.\(^ {76}\) Rather than being reversed by the Code completely, the common law understanding of good faith continues to inform the Code, as if the Code was ‘written on a palimpsest, with the old

\(^{71}\) Ibid sch 1 cl 6(1).

\(^{72}\) Ibid sch 1 cl 6(3)(a).

\(^{73}\) Ibid sch 1 cl 6(3)(b).

\(^{74}\) Ibid sch 1 cl 6(3).

\(^{75}\) Ibid sch 1 cl 6(1).

writing still discernible behind’.\textsuperscript{77} In a separate case and in reference to the \textit{Queensland Criminal Code} at the time, Windeyer J also conveyed the following:

But it seems to me that when the Code employs words and phrases that had before its enactment... long been used to embody and express ideas deeply rooted in its history, we should read those words in the Code in their established meanings, unless of course they be displaced by the context'.\textsuperscript{78}

In other words, the Code’s relationship with the common law appears to be that the latter will exert a formative and continuing influence in developing and establishing the norms of good faith under the Code (to the extent of any inconsistency). This is notably distinct from the conventional statute-common law interaction where the common law does little more than to interpret a statute’s meaning. Put simply, this remarkable interaction is analogous to that of the Code being a mere outline on a canvas, waiting for the common law to add ‘colour’ to it.

In addition to all this, and perhaps of more practical relevance to franchisees and franchisors, is that this interaction will go towards highlighting the future importance for both parties to remain abreast of continuing common law developments surrounding good faith.\textsuperscript{79}

It follows therefore that any determinations of whether pre-contractual negotiations were conducted in good faith, will likely mirror to a large extent how that question might be dealt with in the common law. This is the practical effect of the statutory obligation in relation to pre-contractual negotiations.

The conceptual difficulty that remains however, is that the common law obligation of good faith has not traditionally been applied to pre-contractual negotiations. Indeed, the author has not been able to find any cases to illustrate past examples of applicable principles suggesting otherwise. However the Courts might decide this novel question, it appears evident that honesty and cooperation now set the baseline statutory standard required for good faith in pre-contractual negotiations - and as a result of the supreme authority of statute, the common law as well.

\textbf{B Performance and termination}

Once a franchise agreement is entered into, its performance must be carried out in good faith. That obligation subsists until and including the termination of the agreement.\textsuperscript{80}

The underlying issues for our purposes is what good faith under the Code would require in the performance and termination of the franchise agreement, including what differences and impact the Code may have in relation to the pre-incorporation common law approach.

\begin{footnotesize}
\textsuperscript{77} Ibid.
\textsuperscript{78} Mamote-Kulang v R (1964) 111 CLR 62, 76 (Windeyer J).
\textsuperscript{79} See Giles, above n 68, 35.
\textsuperscript{80} Franchising Code of Conduct sch 1 cl 6(1).
\end{footnotesize}
1 Performance – what are the differences between the statutory operation of good faith and the pre-incorporation common law approach?

In the 2014 and the pre-incorporation case of Video Ezy International Pty Ltd v Sedema Pty Ltd, a common law breach of good faith was found by the New South Wales Supreme Court.\textsuperscript{81} The case concerned a license given by the franchisor (‘VideoEzy’) to the franchisee (‘Sedema’) to operate a video rental store over a particular territory. The license prohibited VideoEzy from engaging in business of a similar nature within that territory. It soon transpired that VideoEzy had sold DVDs online to customers in Sedema’s territory. This consequently gave rise to the issue of whether doing so led VideoEzy to breach an implied obligation of good faith.

In finding that good faith was an implied term of the franchise agreement, Harrison AJ held that VideoEzy failed to ‘comply with honest standards of conduct’.\textsuperscript{82} Her Honour also held that VideoEzy failed to ‘act reasonably in relation to the promise of exclusivity in the territories by… competing against Sedema’.\textsuperscript{83} This was sufficient for the court to find a breach of good faith under the common law.\textsuperscript{84}

With the Code now operative in regulating the performance of franchise agreements, it may be arguable that no material difference would arise between how a party’s performance in good faith is regulated under the Code and the common law. Again, this refers back to the principle that the statutory obligation of good faith is intended to ‘reflect the meaning of the unwritten law’.\textsuperscript{85} It thus follows that a future case materially similar to Video Ezy International Pty Ltd v Sedema Pty Ltd\textsuperscript{86} would be determined in almost the same way under the Code as it would under the common law.

Perhaps one difference though is that whereas the common law in the past has not prohibited parties from contracting out of the implied obligation in their franchise agreements,\textsuperscript{87} this no longer applies in the franchising context where the Code now modifies the common law position by expressly prohibiting this (see below).\textsuperscript{88}

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(4) A franchise agreement must not contain a clause that limits or excludes the obligation to act in good faith, and if it does, the clause is of no effect.

\textsuperscript{81} [2014] NSWSC 143 (27 February 2014).
\textsuperscript{82} Ibid 143 [72] (Harrison AJ).
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid.
\textsuperscript{85} Franchising Code of Conduct sch 1 cl 6(1).
\textsuperscript{86} [2014] NSWSC 143 (27 February 2014).
\textsuperscript{87} See, eg, Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15 (20 February 2004). See also Christensen and Duncan, above n 41, 59.
\textsuperscript{88} Franchising Code of Conduct sch 1 cl 6(4).
With respect to performance, this appears to be one of the more significant impacts the Code will have on the common law approach to good faith in franchising.

Furthermore, it would seem apparent that the above statutory clause is also significant to the common law because it resolves the longstanding debate as to whether an implied obligation should be implied in law or in fact (ad-hoc), in the franchising context. The fact that an implied obligation of good faith can no longer be excluded by words of contrary intention in a franchise agreement renders good faith in franchising as a term mandated by law, and thus of equal operative effect to a term implied in law.

2 Termination – What impact does the Code’s approach to good faith have in altering the common law approach to terminating a franchise agreement?

Franchise agreements may be terminated in a variety of circumstances. Most are provided for in the agreement itself. Whatever method of termination is adopted by the agreement, the Code requires that its execution be in good faith.

In the absence of an unfettered contractual right to terminate (e.g. where the decision is made in a party’s ‘absolute discretion’ or words of similar effect) and where good faith has not been expressly excluded, the author is of the view that the common law has generally been sympathetic to the existence of an implied duty to act in good faith when terminating a commercial contract.

What likely impact will the Code have then on this common law approach, with respect to franchising specifically?

The Code prescribes the procedure that applies to termination. While the procedure may differ from common law requirements, the author is of the view that the content of a good faith obligation when terminating, will essentially remain unchanged under the Code. For example, in relation to a power to terminate, the common law has held that where an implied obligation of good faith applies, it must be exercised ‘reasonably, and not capriciously or for some extraneous purpose’. It is likely that these common

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80 See generally Gordon, above n 44, 29-36; Christensen and Duncan, above n 41, 64.
81 Franchising Code of Conduct sch 1 cl 6(1).
82 Solution 1 Pty Ltd v Optus Networks Pty Ltd [2010] NSWSC 1060 (17 September 2010) [61]-[63] (Hammerschlag J). Hammerschlag J recognises that in the context of a contract that provides a right of termination in one’s absolute discretion, termination cannot be fettered by an implied obligation at common law to do so in good faith. This is because both terms would be ‘inconsistent’ with one another.
83 See, eg, Vodafone Pacific Ltd v Mobile Innovations Ltd [2004] NSWCA 15 (20 February 2004). See also Christensen and Duncan, above n 40, 59.
85 Franchising Code of Conduct sch 1 div 5.
86 See Far Horizons Pty Ltd v McDonald’s Australia [2000] VSC 310 (18 August 2000) [120] (Byrne J).
law aspects when terminating will also be recognised by the Code in its reflection of it. Therefore, good faith when terminating under the Code would simply mirror what it requires for termination under the common law.

Like good faith in the performance of contracts, the only material difference in good faith between terminating under the common law and under the Code is likely to be the parties’ inability to exclude or limit the obligation under the Code. In other words, it would be arguable that the Code’s practical effect is to render void any termination for convenience clauses – such as those allowing a franchisor or franchisee to terminate at their ‘absolute discretion’. This is because doing so would arguably limit the obligation to act in good faith and thus be contrary to what the Code expressly prescribes.

Additionally, it must constantly be borne in mind that the doctrine of parliamentary supremacy plays a key role in altering the common law ability of the parties to exclude or limit good faith when performing and terminating a franchise agreement. As the prohibition on the limitation and/or exclusion of good faith now has a legislative basis, its impact on the common law will likely be to reverse the previous common law position of allowing parties to a franchise agreement to exclude or limit good faith. It also reverses the previous common law position of giving priority to an unfettered express right of termination – over an implied obligation of good faith even where the former stands in conflict with the latter.

In addition to just reflecting the common law, this further demonstrates the Code’s ability to modify and influence the further development of good faith in the common law.

C Mediation

Mediation as a form of alternative dispute resolution has been said to represent a ‘significant area of practice’ in franchising. Its general preference by parties over litigation is particularly noteworthy, given the ongoing nature of franchise relationships and hence the desirability of maintaining good relations.

The Code’s specific inclusion of a mediation clause outlining its procedural requirements is undoubtedly emblematic of Parliament’s recognition of its significance in resolving franchise disputes. This clause mandates that the parties to a franchise-related mediation ‘must try to resolve the dispute’.

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96 Franchising Code of Conduct sch 1 cl 6(1).
97 Ibid.
98 Ibid sch 1 cl 6(4).
99 Ibid.
100 Ibid.
101 Ibid sch 1 cl 6(1).
103 Ibid 437.
104 Franchising Code of Conduct sch 1 cl 39(5).
The Code further states that ‘a party is taken to be trying to resolve a dispute if it does so in a reconciliatory manner’.  

While the Code does not define ‘reconciliatory manner’, it provides a number of examples, including but not limited to...

- ‘making the party’s intention clear, at the beginning of the process, as to what the party is trying to achieve ...’
- ‘attending and participating in meetings at reasonable times’.

Interestingly, it is worth noting that the Code does not expressly deal with the opposite scenario - namely, when a party might be said to not be trying to resolve a dispute.

The first question therefore is how the universal obligation of good faith might affect the above statutory prescription of how a franchise-related mediation should now be conducted. This includes consideration of what circumstances might constitute a scenario where a party might be said to not be trying to resolve a dispute.  

The second question then is to determine any difference and impact the new approach under the Code may have with and on the common law respectively.

1 The conduct of mediation – What impact does good faith in the Code have on the Code’s general obligation to mediate clause?

In Aiton Australia Pty Ltd v Transfield Pty Ltd, Einstein J held that the expected standard of conduct in complying with a common law obligation to mediate in good faith, would depend ‘on the precise circumstances of each individual case’. His Honour then outlined a list of considerations of the ‘essential or core content of an obligation to ... mediate in good faith’. Without being exhaustive, they involved -

- a willingness by the relevant party to subject themselves to mediation and
- a willingness to have an open mind by considering the options for the resolution of the dispute as may be propounded by the other party.

His Honour also characterised a party’s ‘mere attendance’ at mediation as being insufficient by itself to comply with an obligation to mediate in good faith.

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106 Franchising Code of Conduct sch 1 cl 36(1)(d)(i).
107 Ibid sch 1 cl 36(1)(a).
108 Ibid sch 1 cl 6(1).
109 Ibid sch 1 cl 39(5).
111 Ibid.
112 Ibid.
113 Ibid.
114 Ibid [90]-[92] (Einstein J).
As mediation in a franchising dispute now concerns a matter ‘arising under or in relation to’ the Code,\textsuperscript{115} the universal obligation will likely bind all future franchise mediations with a duty to mediate in good faith.\textsuperscript{116} In doing so, good faith will arguably become a key criterion in determining whether a franchise mediation was properly conducted in accordance with the Code. Indeed, the validity of a franchise mediation should not be restricted to the mere question of whether the parties have tried to resolve the dispute,\textsuperscript{117} nor should the universal obligation be viewed in isolation and with no consideration of its effect on other clauses in the Code.\textsuperscript{118} Rather, the court should consider whether the parties, in mediating, have tried to resolve their dispute in good faith.

As good faith under the Code is intended to reflect the common law,\textsuperscript{119} the above approach adopted by Einstein J will likely be reflected onto any application of the Code’s mediation clause.

For example, while attending and participating in mediation at a reasonable time\textsuperscript{120} may appear sufficient to constitute a valid mediation, a failure to do so in good faith may arise if the extent of a party’s ‘participation’ is its mere corporeal presence (as the common law points out).\textsuperscript{121} This will probably not constitute a proper attempt to resolve a dispute in a reconciliatory manner\textsuperscript{122} that is reflective of good faith, and may contribute to an overall finding that the parties have not tried to resolve the dispute within the meaning and spirit of the Code.\textsuperscript{123} Furthermore, it may also contribute to a court’s inclination to stay any further proceedings until the parties have engaged in mediation meaningfully.\textsuperscript{124}

A party’s mere expression of their intention may also be viewed by itself as sufficient to constitute a valid mediation.\textsuperscript{125} However, if the same party is not prepared to hear any ‘options for the resolution of the dispute’ proposed by the other party (so as to convey an ‘open mind’),\textsuperscript{126} that may evince an absence of good faith. A want of good faith here may then amount to an overall failure to properly mediate, notwithstanding the first party’s expression of their intention.

The Code’s overarching effect on good faith in mediation is that the Code’s general requirement to try to resolve a franchise dispute in a reconciliatory manner, must be read subject to and in conjunction with the common law

\textsuperscript{115} See Franchising Code of Conduct sch 1 cl 39.
\textsuperscript{116} Ibid sch 1 cl 6(1).
\textsuperscript{117} Ibid sch 1 cl 39(5).
\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid sch 1 cl 6(1).
\textsuperscript{120} Ibid sch 1 cl 36(1)(a).
\textsuperscript{121} Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236, 255 [90]-[92] (Einstein J). See also Lücke, above n 36, 164.
\textsuperscript{122} Franchising Code of Conduct sch 1 cl 36(1).
\textsuperscript{123} Ibid sch 1 cl 39(5).
\textsuperscript{124} Christensen and Duncan, above n 41, 502.
\textsuperscript{125} Franchising Code of Conduct sch 1 cl 36(1)(d)(i).
\textsuperscript{126} Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236, 268 [156] (Einstein J). See also Lücke, above n 36, 164.
requirements of good faith in mediation, as well as the universal obligation to act in good faith. The latter is especially significant (in terms of altering the previous common law approach) because it now cloaks every franchise-related mediation with an obligation to mediate in good faith, irrespective of whether the parties have agreed to do so in their franchise agreements.

2 What difference is there between the Code’s approach to good faith in mediation, and that of the pre-incorporation common law approach?

Unlike the common law (which in the past has allowed the exclusion of implied terms), the Code prohibits the exclusion of an implied obligation to mediate in good faith. In this way and in addition to reflecting the common law, the Code could be seen as reversing the previous common law ability of the parties to exclude a duty to mediate in good faith, or more broadly a general obligation of good faith. As aforementioned, whereas franchisees and franchisors could have excluded a duty to mediate in good faith in their agreements before good faith was incorporated into the Code, this is no longer possible.

It is this development that is probably the only significant difference in the previous common law approach to good faith in mediation – with that of the Code.

III FUTURE REFORMS TO THE CODE

A A ‘spirit of good faith’ test that clarifies the elusive meaning of good faith

For decades, and as the previous discussion might have indicated, a precise test for good faith in Australia has proved elusive. The dilemma in what good faith means and what it requires arises partly from its contextual nature. What constitutes good faith in one context might not necessarily be the case in another context. Indeed, good faith has been said to turn on the facts of each case and ‘is best determined on a case-by-case basis’. In the same vein, the concept has also been described as one that ‘means different things to different people in different moods at different times and in different places’. It is perhaps unsurprising then, to see how attempts to elucidate a universally applicable definition often result in either a ‘spiral into…vacuous

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128 Franchising Code of Conduct sch 1 cl 6(4).
129 Ibid sch 1 cl 6(1).
130 Ibid.
131 See generally Terry and Lernia, above n 20, 556.
generality’ or ‘restrictive specificity’. As Gordon J opined in one case ‘The difficulty with the contextual standard or a “generalisation of universal application”...is to identify the precise boundaries of this standard’.

With respect, the author is of the view that the very nature and purpose of a contextual standard is to eliminate the need to identify precise boundaries. Instead of identifying the perimeter of the obligation with absolute precision, the author’s view is that any future reform to the Code should accept and embrace the existing contextual approach to good faith, by codifying it into a test of some kind. This test would include viewing a universal application of good faith as focusing on moulding itself to the particular circumstances of a case, as opposed to rigidly ruling things in or out in relation to its scope - in an effort to craft a universal definition. This is because of the infinite variety of circumstances that parties can find themselves in.

That is not to say that the core principles relating to good faith would become meaningless or redundant. The author’s view is that there is indeed utility to the idea of a broad ‘spirit of good faith’ test in the Code itself, where decisions on the scope and operation of good faith in a particular case are guided more by indicators reflecting its bedrock traits, than an inflexible emphasis on fitting within a restrictive and universal category of conduct.

But how does one define an equally ambiguous concept such as a ‘spirit’ of good faith without returning to the same circular debate on what such a spirit would encompass? Sir Anthony Mason identifies three overarching principles of honesty, cooperation and reasonableness, as being foundational to good faith. Considering that ‘many courts’ have applied this test, there should be little resistance to a more flexible application of good faith that pertains to these three guiding indicators of its spirit. What standard of conduct would fall within the ‘spirit’ should then be a discretionary question each judge would have to determine on the facts of each case.

Under the contextual operation that underpins the spirit, the judicial inquiry would not be whether certain conduct falls within a rigid universal definition (as current and past debates seem to strive unrealistically towards), but rather whether the conduct falls collectively within the broad spirit of honesty, cooperation and reasonableness appropriate to the circumstances of a given case. In a sense, this might well be of little substantive difference to the current and prevailing contextual approach to good faith. Indeed, some may criticise this approach as one that is as subjective and vague as the idea of good faith itself. But the author is of the view that it may be better to simply try and formulate a workable test for good faith, than to obsess over a concept that is inherently fluid and indefinite at its core. A statutory test for good faith defined by its spirit is but one meaningful attempt to do so, in an area that has

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136 Summers, above n 16, 206.
137 Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Ltd [2007] FCA 1066 (23 July 2007) [141] (Gordon J).
138 Mason, above n 25.
139 Peden, above n 133, 189.
140 See, eg, Burger King Corporation v Hungry Jack’s Pty Ltd (2001) 69 NSWLR 558, [171]; Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349, 367 (Sheller JA).
long been paralysed by judicial uncertainty. In this sense, it may be that Parliament must accept the inevitability of the dilemma Aristotle identified long ago, namely that ‘there are some cases for which it is impossible to lay down a law ...For what is itself indefinite can only be measured by an indefinite standard’.\textsuperscript{141}

If such an approach were successful under the Code, there would also be no reason why such a test could not be implemented at a level wider than the franchising sector through the power of statute. Even if one were to disagree with the merits of the above approach, it cannot be denied that the incorporation of good faith into the Code gives rise to the possibility of amendments being made to modify the common law doctrine of good faith. As this paper has demonstrated, it already has.

\textbf{IV CONCLUSION}

The Code’s incorporation of good faith is a significant recent development in the law of franchising in Australia for several reasons.

First, it removes the longstanding uncertainty of whether good faith operates as an implied obligation of contract in the franchising industry. Secondly, it also extends the common law operation of good faith in the franchising industry to pre-contractual dealings. Further, by force of statute, it confirms some of the fundamental features of the common law doctrine of good faith (such as honesty and cooperation).

The Code also evinces Parliament’s recognition that the common law’s application of good faith has not kept up with laissez-faire commercial practice, by demonstrating Parliament’s willingness to step in when legislative reform is considered appropriate.

But the Code’s design and likely operation also shows that Parliament has largely left it to the Courts to determine the scope and application of good faith. That, as past cases illustrate, is done contextually and on a case by case basis.\textsuperscript{142} However, it does not adequately address the continuing uncertainty regarding what an obligation of good faith might require. To a large extent, the Code merely mirrors the continuing uncertainty in the common law. The author is not however of the view that this is necessarily a cause for concern. Instead, the view is taken that such uncertainty should perhaps be accepted as an inevitable aspect of an inherently vague concept, and that future reform to the Code can acknowledge this by formulating a broad workable test for good faith. It is clear from analysing the Code that it harbours the potential to modify the common law application of good faith. There is perhaps no reason then, why a reformative test such as a ‘spirit of good faith’ could not be incorporated into the Code as the statutory vehicle to further this objective.

\textsuperscript{141} Aristotle, \textit{The Nicomachean Ethics} (H Rackham trans, Harvard University Press, 1926) 315.

\textsuperscript{142} Aiton Australia Pty Ltd v Transfield Pty Ltd (1999) 153 FLR 236, 263 [129] (Einstein J).
Doing so would render the spirit to become part of the statutory doctrine of good faith, and through the doctrine of legislative supremacy, find acceptance into the common law as a touchstone of proper and binding conduct in commercial relationships.

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The Limitation Criterion And Its Application To The Australian Citizenship Amendment (Allegiance to Australia) Act 2015

GEORGIA DRIELS

ABSTRACT

This article contends that the ad-hoc approach used to assess the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 was unsuitable, and failed to reconcile the competing interests of national security with the protection of human rights. It explores whether, and to what extent, the limitation criterion can be applied to provide a coherent and well-reasoned principle for assessing the appropriateness of an infringement of the right to nationality. The limitation criterion is a well-known methodological approach, a variant of proportionality, and is possibly the most discussed reasoning structure in public law. As a subsidiary consequence the Act, as enacted in December 2015, is shown to be an arbitrary infringement of the right to citizenship, as it is not strictly justifiable per the application of the limitation criterion.

Australia and the international community in general face a heightened and complex security environment, due to a rise in individuals funding, recruiting, and fighting for enemy terrorist organisations.2 In response, States have increasingly used denationalisation – the deprivation of citizenship without the consent of the person concerned – as a policy instrument for countering terrorism.3 In June 2015, the Australian Citizenship Amendment (Allegiance to Australia) Bill 20154 (the Bill) was introduced into the House of Representatives.5 After being passed by both Houses of the Parliament and assented to by the Governor-General, the Australian Citizenship Amendment (Allegiance to Australia) Act 20156 (the Act) was introduced. Arguably, one of the most contentious purposes of the Bill and subsequent amending Act, was

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1 Juris Doctor with Honours (ANU), Bachelor degree of Social Work and Arts majoring in Psychology (UNSW). Any views or errors contained in this article are solely the author’s and do not reflect the views of the author’s employers. The author thanks Ryan Goss for their comments and contributions.

2 Department of Immigration and Border Protection, Submission No 37 to Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 5 August 2015, 2.


4 Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth) (‘Australian Citizenship Amendment Bill’).


6 Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth) (‘Australian Citizenship Amendment Act’).
the proposed amendment of the *Citizenship Act 2007* to provide for the automatic cessation of Australian citizenship of dual nationals who, in repudiation of their allegiance to Australia, engaged in terrorist-related conduct.\(^8\)

### I \hspace{1cm} INTRODUCTION

On 24 June 2015, the Minister for Immigration and Border Protection, the Hon. Peter Dutton MP, introduced the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 \(^9\) (the Bill) into the House of Representatives.\(^10\) After being passed by both Houses of the Parliament and assented to by the Governor-General, the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (the Act) was introduced, and came into force in December 2015. Arguably, one of the most contentious purposes of the Bill and subsequent amending Act, was the proposed amendment of the *Citizenship Act* to provide for the automatic cessation of Australian citizenship of dual nationals who, in repudiation of their allegiance to Australia, engaged in terrorist-related conduct.\(^11\)

On the same day as the Bill was introduced, the Attorney-General, Senator the Hon. George Brandis QC, asked the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to inquire into, and report on, the Bill.\(^12\) The Chair of the PJCIS, Mr Dan Tehan MP, announced the inquiry by media release on 26 June 2015, and invited submissions from interested members of the public.\(^13\) Amongst other concerns, the PJCIS inquiry facilitated an examination of the Bill’s constitutionality, lack of clarity as to the operation of the law, and potential human rights implications.\(^14\)

Whilst the PJCIS recommendations and stakeholder submissions resulted in a vast and valuable source of understanding and interpretation of the Bill, a unified approach was not employed to assess the Bill’s compliance with international human rights law. Instead, each analysis utilised a unique set of factors which the proponent believed to be indicative of the limits imposed by international law.

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7 *Citizenship Act 2007* (Cth) (*Citizenship Act*).
8 *Australian Citizenship Amendment Bill*, ss 33AA, 35; *Australian Citizenship Amendment Act*, ss 33AA, 35; Parliamentary Joint Committee on Intelligence and Security (Cth), ‘Committee Recommends Passage of Citizenship Bill’ (Media Release, 4 September 2015).
9 *Australian Citizenship Amendment Bill*.
11 *Australian Citizenship Amendment Bill*, ss 33AA, 35; *Australian Citizenship Amendment Act*, ss 33AA, 35; Parliamentary Joint Committee on Intelligence and Security, ‘Committee Recommends Passage of Citizenship Bill’, above.
13 Ibid 3.
For example, in her submissions to the PJCIS Professor Kim Rubenstein, Director of the Centre for International and Public Law, expressed concern that the ‘proper balance in the relationship between the executive and the individual’ had been disturbed by the Bill.\(^{15}\) Professor Gillian Triggs, former President of the Australian Human Rights Commission, took a somewhat different approach. She stated that it was inappropriate to use the penalty of loss of citizenship without proper judicial or administrative processes to ensure that the evidence upon which loss of citizenship was based was accurate and fair.\(^{16}\) Sudrishti Reich and Linda Kirk took yet another approach to critiquing the Bill when they suggested that the deprivation of citizenship provisions in the Bill amounted to an arbitrary violation of international law, because they served the sole purpose of expelling former citizens from Australia.\(^{17}\)

This lack of a unified approach is somewhat unsurprising given the number of human rights engaged by the Bill. On 11 August 2015, the Parliamentary Joint Committee on Human Rights (PJCHR), reported to both Houses of the Parliament on the Bill’s compatibility with human rights.\(^{18}\) The PJCHR identified that the Bill engaged with a long list of substantive human rights, no fewer than sixteen, including the right to freedom of movement, liberty, a fair hearing, obligations concerning non-refoulement, and the prohibition against double punishment.\(^{19}\)

The lack of a unified approach to critiquing the Bill is also understandable when the confusion regarding the assessment of the appropriateness of acts of denationalisation on an international level is considered. For example Audrey Macklin, in her analysis of the international prohibition against arbitrary denationalisation, holds that acts of denationalisation should be assessed for arbitrariness against the following criteria: ‘disproportionality, unreasonableness, denial of procedural fairness, lack of independent judicial engagement, discrimination and a desire to effectuate exile’.\(^{20}\) Conversely, Jorunn Brandvoll holds that denationalisation should be assessed against only two factors: procedural and substantive standards.\(^{21}\) The United Nations Human Rights Committee provides yet another set of factors against which acts of denationalisation should be assessed, holding that an act of

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\(^{15}\) Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 4 August 2015, 37 (Kim Rubenstein).

\(^{16}\) Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 5 August 15, 15 (Gillian Triggs).

\(^{17}\) Sudrishti Reich and Linda Kirk, Submission No 40 to Parliamentary Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, 21 July 2015, 28.

\(^{18}\) Parliamentary Joint Committee on Human Rights, Parliament of Australia, Bills Digest –Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, No. 15 of 2015–16, 2 September 2015.

\(^{19}\) Ibid.


denationalisation should not contain elements of ‘inappropriateness, injustice, illegitimacy or lack of predictability’. Despite their usefulness, these comments do not elucidate a clear and unified set of criteria against which we can assess the appropriateness of acts of denationalisation.

Exploring alternative analytical approaches, this article assesses the extent to which the limitation criterion can be applied to provide a coherent and well-reasoned principle for determining the appropriateness of infringements of the right to nationality. To this end this article first argues that the approach taken to assessing the Bill was unsuitable. It then argues that although the limitation criterion is yet to be formally recognised in Australia, there is ample justification for applying the principle as a tool for assessing acts of denationalisation such as those provided for in the Act. As a principle of law and good governance, the limitation criterion is shown to be an ideal basis for examination of the compatibility of acts of denationalisation with the internationally-recognised prohibition against arbitrary deprivation of nationality.

Finally, as a somewhat subsidiary consequence, the Act is shown to be an arbitrary deprivation of citizenship. However, it is important to note from the outset that the primary purpose of this article is not to critique the Act nor propose how it should be reformed, but rather to offer a superior means by which to legally assess acts of denationalisation as a matter of international law.

II DEFINITIONAL DISTINCTION

Before entering into an in-depth analysis of the prohibition of arbitrary deprivation of citizenship, it is first necessary to define the notions of citizenship and nationality.

Two approaches have been adopted to understanding these terms. The first approach holds that the terms citizenship and nationality are two distinct aspects of the same notion. Nationality has been described as giving rise on

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23 Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 5 August 15, 15 (Gillian Triggs).
24 Parliamentary Joint Committee on Intelligence and Security, ‘Committee Recommends Passage of Citizenship Bill’, above n 8.
25 Australian Citizenship Amendment Act, ss 33AA, 35.
26 Universal Declaration on Human Rights, GA Res 217A (III), UN GOAR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) (‘UDHR’).
the part of the State to ‘personal jurisdiction over the individual, and standing vis-à-vis other States under international law’. Citizenship, on the other hand, is ‘the highest of political rights/duties in municipal law’. An alternative view is that the terms citizenship and nationality are in fact deeply interwoven. Under this view, the label is less important than the ability to exercise rights of social membership and substantive equality. In the authors’ opinion, this is the preferred view. This is because distinguishing between citizenship and nationality is not always necessary or helpful. Moreover, it is worthwhile to use the terms nationality and citizenship interchangeably, because it recognises both the municipal and international nature of the legal bond between a citizen and the State, and avoids the contradictions between inclusion and exclusion that occurs when an arbitrary distinction between the terms is adopted. As Openheim notes, from the point of view of international law it is not incorrect to say that the “nationality of an individual is his quality of being a subject of a certain State and therefore its citizen”. Consequently, the use of the terms citizenship and nationality in this article should be interpreted widely, and as encapsulating both the domestic and international dimension of the relationship between the State, the individual, and international law.

III THE LIMITATION CRITERION

A Prohibition of arbitrary deprivation of citizenship

At its core, the right to nationality confers upon every individual the right to have a legal connection with a State. The right to nationality has been described as the ‘right to have rights’ due to its conditional nature as a gateway for the realisation of other fundamental human rights. By this I mean that nationality entitles individuals to the protection of a State and to many other ancillary civil and political rights.

30 Edwards, above n 33, 4; Boll, above n 34, 39.
32 Edwards, above n 33, 14.
34 Lassa Oppenheim, International law, a treatise (Longmans, Green & Co, 1948) 5.
35 Weis, above n 33, 3.
38 United Nations High Commissioner for Refugees, above n 41.
In recognition of the importance of nationality, variations of the right to acquire nationality have been enshrined in a number of international instruments including the *Universal Declaration of Human Rights* (UDHR); *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Rights of the Child*.\(^{39}\)

As a corollary of the right to nationality, an explicit prohibition of arbitrary deprivation of nationality can be found in Article 15 of the UDHR which holds that ‘no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality’.\(^{40}\) The UN Convention on the Reduction of Statelessness,\(^{41}\) also includes a prohibition of arbitrary deprivation of nationality in the context of statelessness, in Article 8(1) which states that ‘Contracting States shall not deprive a person of his nationality if such deprivation would render him stateless’.\(^{42}\)

Further United Nations Conventions implicitly incorporate this fundamental norm, including the *Convention on the Elimination of All Forms of Racial Discrimination*,\(^{43}\) the *Convention on the Elimination of All Forms of Discrimination against Women*,\(^{44}\) and the *Convention on the Rights of the Child*.\(^{45}\)

It is important to acknowledge from the outset that this article does not analyse the extension of the arbitrary deprivation of nationality to the context

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\(^{40}\) *UDHR*, UN Doc A/810, Article 15(2).

\(^{41}\) *Reduction of Statelessness Treaty*.

\(^{42}\) Molnár, above n 32.

\(^{43}\) *Racial Discrimination Treaty*.

\(^{44}\) *Discrimination Against Women Treaty*.

\(^{45}\) *Rights of the Child Treaty*. 
of dual-nationality. It is accepted that international authorities on the right to nationality may offer limited assistance in the absence of a further argument that nationality should be extended to dual-nationality. However, this discussion is beyond the scope of this article.

B    The Limitation Criterion

International human rights law recognises that reasonable limits may be placed on most rights and freedoms.\(^4\) In general, any measure that limits a human right must comply with the following criteria (the limitation criterion).\(^5\) It must have a clear legal basis.\(^6\) It must be in pursuit of a legitimate objective, be rationally connected to its stated objective and be proportionate to achieving that objective.\(^7\)

The limitation criterion employs an aggregated approach requiring that each of its four components be met in order for an act of denationalisation to be compatible with international law.\(^8\) If an act of denationalisation fails any of the components of the limitation criterion it is an arbitrary deprivation of citizenship, and is thereby contrary to international law.\(^9\)

C    The need for the limitation criterion

Pushing the legal frontiers to safeguard Australia from terrorism by revoking the Australian citizenship of dual nationals is problematic for a number of reasons. First, it leads to disproportionate weight being given to security concerns over the protection of human rights.\(^10\) As Christopher Michaelsen suggests, ‘the balance routinely appears to tip towards security’ regardless of the disproportionate impact on human rights and civil liberties.\(^11\) The limitation criterion is needed to provide a uniform approach and clarification of the relative weight that should be attached to these competing interests.\(^12\)

\(^4\) Guide to Human Rights, above n 44, 12.
\(^5\) Attorney-General’s Department (Cth), above n 10.
\(^7\) A v Secretary of State for the Home Department [2004] UKHL 56 (Belmarsh Case); Ahron Barak, Proportionality: Constitutional Rights and Their Limitation (Cambridge University Press 2012) 131; Attorney-General’s Department (Cth), above n 10.
\(^8\) Barak, above n 54, 132.
\(^9\) Ibid.
\(^10\) Nationality Decrees Issued in Tunis and Morocco (Advisory Opinion) [1923] PCIJ (ser B) No. 4; Edwards, above n 33, 23.
\(^11\) Michaelsen, ‘Reforming Australia’s National Security Laws, above n 9, 36.
Second, international law requires Australian authorities to consider their compliance with human rights when introducing limitation measures. This obligation stems primarily from the *International Covenant on Civil and Political Rights* (ICCPR)\(^{55}\) to which Australia became a signatory in 1980. However, the obligation to ensure that a State’s measures to safeguard national security comply with international law obligations can be found in numerous international instruments, such as the UN Global Counter-Terrorism Strategy.\(^{56}\) The limitation criterion arguably represents a superior means of legally assessing the permissibility of acts of denationalisation as a matter of international law.

Third, as a matter of good governance, it makes sense to apply the limitation criterion to acts of denationalisation. The limitation criterion has previously been adopted in regards to a number of other human rights infringements such as arbitrary detention and limitations to freedom of speech, providing certainty to the weighting placed on national security objectives over Article 9 and Article 19 human rights, and vice versa.\(^{57}\) However, despite its general acceptance, the limitation criterion has not been formally recognised in Australian law. It is nonetheless appropriate to review limitations to the right to nationality using the limitation criterion, if Australia wants to implement good governance practices.\(^{58}\) In this context the limitation criterion can be utilised as an analytical and evaluative tool to ensure consistency of legal reasoning.

Finally, the limitation criterion is required because the current approach results in faulty decision making and fundamentally flawed public policy. A prominent feature of current political and academic discourse is the argument that the unprecedented threat to our way of life warrants restrictions of civil liberties and human rights.\(^{59}\) Conversely, it may be argued that in times of crisis the State, more than ever, must adhere to its defining principles.\(^{60}\) As Michaelson suggests there are a number of jurisprudential problems with the current approach such as a lack of adequate consideration of the philosophical and conceptual underpinnings of the notion of balancing citizenship and security.\(^{61}\) The limitation criterion fortifies the spirit of the rule of law and enables it to overcome the tension between the freedoms of the individual and national security objectives.\(^{62}\) It therefore results in an improved and more uniformed assessment of acts of denationalisation.\(^{63}\)


\(^{58}\) Kirby, above n 11, 241; Villiger, above n 11, 80.

\(^{59}\) Michaelson, ‘Balancing Civil Liberties Against National Security?’ above n 9, 1.

\(^{60}\) Ibid.


\(^{62}\) Sebastian de Brennan, ‘The Internationalisation of Terrorism Winning the War while preserving democratic rights– a balance gone wrong’ (2004) 11 *Australian*
IV APPLICATION OF THE LIMITATION CRITERION

A Prescribed by law

The requirement that any limitation of a human right must have a clear legal basis is widely recognised. To meet this requirement a law must be shown to be adequately accessible and formulated with sufficient precision to enable a person to regulate their conduct, and foresee to a reasonable degree the consequences of their action. The Bill, when initially introduced, seemingly failed to satisfy this requirement. The PJCIS made a number of recommendations with respect to the proposed conduct-based provisions of the Bill. In particular, the PJCIS report raised concerns regarding the conduct-based provisions contained in section 33AA and section 35 of the Bill. The PJCIS included in its list of recommendations the need for clarification that conduct leading to loss of citizenship was intended to be considered in light of similar provisions in the Criminal Code Act 1995. The PJCIS also suggested that greater clarification was needed to address the vague and overly broad scope of the term ‘in the service of’ a declared terrorist organisation contained in proposed section 35. Further, the PJCIS recommended that the Bill be amended to ensure that the provision of humanitarian assistance, and acts done unintentionally or under duress, were not captured in the scope of ‘in the service of’ a declared terrorist organisation.

In response to the PJCIS report the Government made significant amendments to the conduct-based provisions reflected in sections 33AA and 35 of the Bill. For example, the Government responded to the PJCIS' concerns by clarifying that conduct leading to loss of citizenship is intended to be considered in light of the meaning of the equivalent provisions in the Criminal Code Act 1995.

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63 De Brennan, above n 67, 67; Alex Conte, Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australian and New Zealand (Springer, 2010) 421.
66 Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth), 1.
68 Ibid 87-107.
70 Gross, above n 67, 56.
Code Act 1995 and by providing greater clarity as to the scope of ‘in the service of’ a declared terrorist organisation.

In light of these amendments it is reasonable to conclude that the Act is formulated with sufficient precision to meet the requirement that limitations on human rights be prescribed by law.

B Proper purpose

Any limitation of a human right must also be in pursuit of a proper purpose. A proper purpose is one that is necessary and addresses an area of public or social concern, that is pressing and substantial enough to warrant limiting the right.

1. National security

A purported objective of both the Bill and Act is ‘to broaden the powers relating to the cessation of Australian citizenship for those persons engaging in terrorism and who are a serious threat to Australia and Australia’s interests’.

The Department of Immigration and Border Protection, in support of the Act, provided the following overview of the threat posed by terrorist acts committed by Australian citizens:

Since the terror level was raised last September, there have been two terrorist attacks. Twenty-three Australians have been charged as a result of eight counter-terrorism operations—almost one third of all terrorism-related arrests since 2001. Some 120 Australians are known to be fighting with terrorist organisations. Around 155 Australians are known to be supporting them with financing and recruitment. About 25–30 Australians have so far been killed in Syria and Iraq as a result of their involvement in the conflict.

The jurisprudence of the international community reflects the belief that national authorities are most aptly placed to determine the existence of a threat to national security.
State practice would support this trend of deferring to domestic authorities in regards to matters of national security. Many States have provided for deprivation of citizenship in response to acts seriously prejudicial to the vital interests of the State. The United Kingdom and Canada have amended legislation to allow for the withdrawal of nationality from people who join a foreign army, or that render services to a foreign or enemy State. State custom would therefore suggest that any infringement of the right to nationality, in pursuit of ensuring national security, satisfies the requirement of proper purpose.

2. Allegiance

Another purported objective of the Act is to ‘ensure the community of Australian citizens is limited to those who continue to retain an allegiance to Australia’. The Act’s justification for depriving citizenship is then to be found in the understanding of citizenship as a form of allegiance.

Deprivation of citizenship in response to the broken bond of allegiance has often been used to explain a theory of constructive renunciation. Under a theory of constructive renunciation, the foreign fighter is not deprived of nationality by the State, but rather voluntarily renounces citizenship through their conduct. Section 33AA of the Act allows such constructive renunciation, holding that:

Subject to this section, a person aged 14 or older who is a national or citizen of a country other than Australia renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in conduct specified in subsection (2).

Conduct inconsistent with the duty of loyalty to the State, such as conduct seriously prejudicial to the vital interest of the State, has long been held to be a valid exception to the prohibition of arbitrary deprivation of citizenship.
This exception is related to the main duty that citizens have towards their State, namely the duty of loyalty. Thus, when the duty of loyalty is breached, it is well within the State’s power to sever the formal link between itself and the citizen. Consequently, the Act satisfies the requirement of in pursuit of a proper purpose.

3. **Sole purpose of expulsion**

It has been argued that where the purpose, or primary effect, of denationalisation is to prevent a former citizen from returning to his or her country, denationalisation would violate the common rights and freedoms recognised under international law. This view finds some support in the accompanying comments of the International Law Commission to Article 8 of the *Draft Articles on the Expulsion of Aliens* (Draft Article 8), ‘a State shall not make its citizenship an alien, by deprivation of nationality, for the sole purpose of expelling him or her’.

A number of prominent academics have argued that the Act violates Draft Article 8, as the primary effect of the act of denationalisation is to prevent the ‘newly minted alien’ from entering Australia or to allow for their expulsion.

However, it is beyond the scope of this article to address the question of whether or not the requirement of proper purpose includes purposes which are not expressly stated, but which are directly served by an act of denationalisation. Furthermore, such considerations are unnecessary. Utilising the limitation criterion allows for an assessment of the Act’s compatibility with international law without needing to extend the natural interpretation of the requirement of proper purpose, thereby avoiding legal uncertainty caused by ad-hoc interpretive practices.

**C Rational connection**

A limitation of the right to nationality must also be rationally connected to the pursuit of a proper purpose. The existence of a rational link will normally be accepted if the measure is logically capable of furthering the objective.

The test of suitability is usually very broadly defined and requires only that the Government introduce legislative measures that are generally suitable to

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87 Molnar, above n 32, 82.
88 Hannum, above n 70, 62; *Civil and Political Rights Treaty*.
91 Molnar, above n 32, 84-85; Guy S. Goodwin-Gill, ‘Mr Al-Jedda, Deprivation of Citizenship, and International Law (Paper delivered at a Seminar at Middlesex University, 14 February 2014); Macklin, above n 25, 11.
93 Barak, above n 54, 131.
achieve the intended purpose. As Michaelson suggests the requirement may rightly be conceived as ‘no completely unsuitable measures may be undertaken’. The Deputy Commissioner of National Security of the Australian Federal Police and the Deputy Director-General of the Australian Security Intelligence Organisation have noted that the Act is rationally connected to Australia’s ability to keep problems offshore and thereby minimise the direct threat to the Australian community posed by terrorists.

Furthermore, if allegiance is understood as attachment to the core principles of a community then denationalising those who hold contrary values to those of a peaceful and democratic community may be necessary to ensure that the Australian community is limited to those who retain an allegiance to Australia.

However, there are those that suggest that the act of denationalisation is not suitable to protecting Australian interests. In exile, terrorists may pose a greater threat to Australia. Further, the potential threat posed by terrorists may be increased, if they are residing in countries incapable of proper monitoring. Exiling terrorists is arguably more likely to promote unrest and terrorism than contain it. It is not enough to put forward a legitimate objective if the measure limiting the right would not make a real difference to achieving that objective.

Given the low threshold requirement of ‘rational connection’ it is reasonable to conclude that the Act satisfies the requirement of a rational connection; and that the act of denationalisation is logically capable of safeguarding the security and vital interests of the State.

D Proportionality

Proportionality plays a key role in the international human rights system including the European Convention for the Protection of Human Rights and

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94 Michaelsen, ‘Reforming Australia’s National Security Laws, above n 9, 41.
95 Australian Capital Territory, Parliamentary Inquiry Into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, House of Representatives, 5 August 2015, 7 (Deputy Director-General, Counter-Terrorism, Australian Security Intelligence Organisation); Australian Capital Territory, Parliamentary Inquiry Into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, House of Representatives, 10 August 2015, 7 (Michael Phelan, Deputy Commissioner National Security, Australian Federal Police).
96 Van Wass, above n 69, 478.
98 Ibid.
99 Ibid.
100 Ibid.
Fundamental Freedoms and the ICCPR, with a number of articles in these instruments expressly invoking proportionality.

In considering whether a limitation of the right to nationality is proportionate, one must consider: a) whether the measure is the least restrictive of human rights among all the adequate options that could be applied; b) whether there are effective safeguards or controls over the measures; and c) proportional stricto sensu.

Fundamentally, what many of the critics of the Act have in common is a concern that extreme laws dismantle Australia’s criminal justice system in the name of combatting terrorism. It is argued that greater clarification is needed of the concept of terrorism in order to justify the erosion of fundamental human rights.

1. Least restrictive means test

The requirement of the least-restrictive means test requires the assurance that the measure does not curtail individual rights any more than is necessary to achieve the stated policy goals. Thus the Government must refrain from interfering with the right to nationality if it can accomplish the same policy objective through a less drastic measure.

Laura Van Wass suggests ‘it must be noted that threats to national security by foreign fighters have been met with an array of policy responses of which the powers of deprivation of nationality is just one’. Alternative measures, which provide a less intrusive means of countering terrorism, include imposing travel bans as well as criminal law penalties. Likewise, Sudrishti Reich and Linda Kirk have suggested that:

the protection of the Australian community from persons who engage in behaviour or activities contrary to the anti-terrorism laws of Australia, can be achieved by them being charged with relevant crimes, tried and convicted by a court of law of these crimes, and sentenced accordingly. As there are existing criminal laws to deal with the behaviour that will

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103 Nicholas Emiliou, above n 10, 6; Attorney-General’s Department (Cth), above n 10.
104 Hannum, above n 70, 8; United Nations Children’s Fund, Submission No 24 to Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, July 2015; George Williams, Andrew Lynch Gilbert and Tobin Centre of Public Law, Submission No 25 to Joint Committee on Intelligence and Security, Inquiry into the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015, July 2015, 2 (disagree).
105 Michaelsen, ‘Balancing Civil Liberties Against National Security?’ above n 9, 4.
106 Ibid.
107 Van Wass, above n 69, 478-479.
lead to renunciation/cessation of citizenship under the amendments and which will result in the incarceration of persons found guilty of relevant offences, thereby protecting the Australian community, it cannot be said that the amendments are proportionate to their stated purpose.  

2. Safeguards

Another consideration incorporated within the requirement of proportionality is whether the act of denationalisation has met other safeguards enshrined in international human rights law. Procedural safeguards are essential to prevent abuse and arbitrariness in the application of the law. A number of procedural standards and safeguards are protected under international law. One such safeguard is the right to review.  

The right to review as contained in Article 2(3) of the ICCPR and many other treaties provides an opportunity for overturning disproportionate or unreasonable denationalisation decisions and stands as a cornerstone of procedural guarantees.  

The Act represents a significant improvement from the initial Bill, which failed to elucidate how an application for declaratory relief regarding the automatic loss of citizenship would operate in practice. However, despite its improvements the Act does not provide sufficient procedural safeguards to ensure that a person who wrongfully lose their citizenship is able to seek effective review and redress. A dual national who loses their Australian citizenship may face significant practical hurdles in seeking access to courts. Anyone who had been deprived of their Australian citizenship in such circumstances would be unlikely to be able to remain in Australia, as denationalisation results in the simultaneous loss of the right of abode in the Australia and so paves the way for possible immigration detention, deportation or exclusion from Australia. The Act does not take into consideration the practical effect of the cessation of citizenship on the right to an effective remedy.  

Furthermore, while allowing review of a determination in the High Court or the Federal Court of Australia the Act does not provide for merits review. In its report the PJCHR noted that the availability of judicial review of these decisions ‘represents a considerably limited form of review in that it allows a

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109 Reich and Kirk, above n 22, 11.
111 Edwards, above n 33, 23; Macklin, above n 25, 1.
113 Molnar, above n 32, 78.
114 Australian Citizenship Amendment Act; Australian Citizenship Amendment Bill.
115 Barak, above n 54, 131.
court to consider only whether the decision was lawful ... [t]he court cannot undertake a full review of the facts, that is the merits of a particular case to determine whether the case was decided correctly.\textsuperscript{116}

The assessment of the cessation of citizenship powers against Article 2 of the ICCPR raises questions as to whether a person who has lost their citizenship will have access to an effective remedy. It is this article’s assessment that the limitation fails the proportionality assessment and amounts to an arbitrary interference with the right to nationality.\textsuperscript{117}

3. \textit{The greater the interference the less likely it is to be considered proportionate}

By far the most complex step of the proportionality test requires an analysis of the appropriateness of the legislative action.\textsuperscript{118} It is not sufficient that a State decide that a particular restriction may be desirable or politically expedient.\textsuperscript{119} Rather, the legislative action must be shown to create an acceptable burden.\textsuperscript{120}

Citizenship has been widely treated as embodying the ‘highest normative value’.\textsuperscript{121} Theorists such as Linda Bosniak argue that citizenship is: a legal status, basic human right, political activity and a form of collective identity.\textsuperscript{122} Hannah Arendt also suggests that citizenship is the ‘right to have rights’.\textsuperscript{123} By this she means that whilst citizenship in-and-of-itself is a human right, it is also an essential basis or threshold requirement for the subsequent conferral of ancillary rights.\textsuperscript{124} Denationalisation, therefore, has profound consequences.\textsuperscript{125} Denationalisation places the individual concerned in a legal vacuum regarding the enjoyment of their fundamental rights and freedoms.\textsuperscript{126}

The greater the extent of any interference with human rights, the less likely it is to be considered proportionate.\textsuperscript{127} The Act has a two-fold effect. First, it diminishes the mutual rights and duties between an individual and the State. Second, it severs the critical bond between the State, an individual, and international law. In light of this it is clear that the Act has dramatic consequences for the realisation and protection of human rights. It constitutes a disproportionate interference of the right to nationality.

\textsuperscript{116} Guide to Human Rights, above n 44, 12 [2.91].
\textsuperscript{117} Ibid.
\textsuperscript{118} Michaelsen, ‘Reforming Australia’s National Security Laws, above n 9, 42.
\textsuperscript{119} Hannum, above n 70, 27.
\textsuperscript{120} Guide to Human Rights, above n 44, 12.
\textsuperscript{122} Ibid 453.
\textsuperscript{123} Hannah Arendt, The Origins of Totalitarianism (Harcourt, 1994).
\textsuperscript{124} Kesby, above n 42, 1; Kim Rubenstein, ‘Advancing Citizenship: The Legal Armory and Its Limits’ (2007) 8 Theoretical Inquiries Law 509, 513.
\textsuperscript{125} Weis, above n 33, 669; Kim Rubenstein, Australian Citizenship Law in Context (Lawbook, 2002).
\textsuperscript{126} Molnar, above n 32, 67; Van Wass, above n 69, 485.
\textsuperscript{127} Guide to Human Rights, above n 44, 12.
V CONCLUSION

Australia’s national security is threatened by the rise of terrorism. In response to this threat Australia amended the Citizenship Act to allow for the denationalisation of Australians who engaged in terrorism and who are a serious threat to Australia and Australia’s interests.

Matters of national security naturally enliven debate regarding the protection of human rights and the circumstances which warrant limiting such rights. This is in part because such situations engage the continual struggle between State sovereignty and the role of international law in protecting human rights. The use of denationalisation as a policy response to foreign-fighters and threats of violence and terror reflects a contentious area of debate in which the sovereign right of States, and the rights of individuals protected under international law are combatively engaged.

Traditionally, issues of citizenship conferral and loss have been held to be the exclusive domain of national authorities. However, developments in international law have proscribed limits to the extent to which municipal law may limit the right to nationality. The prohibition of the arbitrary deprivation of citizenship constitutes such a limitation, and represents the balance to be struck between State sovereignty and international law.

It is not surprising, given the evolving nature of international legal norms, that there exists considerable confusion regarding the prohibition of arbitrary deprivation of citizenship. This confusion has had dramatic consequences with regard to the protection of human rights. The indiscriminate approach to assessing the Bill’s compliance with international law was unsuitable and led to dangerous confusion and legal uncertainty. For one thing, the ad-hoc approach taken to assessing the Bill failed to prevent the acceptance of the Act and the expansion of state powers to allow for acts of denationalisation.

This article has applied the well-established principle, the limitation criterion, to the Act, and has argued that the limitation criterion provides a coherent and well-reasoned principle for assessing the appropriateness of acts of denationalisation against the prohibition of the arbitrary deprivation of citizenship. More significantly, this article suggests that the limitation criterion provides a uniform approach to balancing State sovereignty with the role of international law in protecting human rights. It is also capable of

129 Explanatory Memorandum, Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth).
130 Van Wass, above n 69, 485.
131 Weis, above n 33, 3.
132 Van Wass, above n 69, 485.
133 UDHR, UN Doc A/810, Article 15(2).
134 Michaelsen, ‘Balancing Civil Liberties Against National Security?’ above n 9, 1; Golder and Williams, above n 9, 46; Attorney-General’s Department (Cth), above n 10.
providing legal certainty and adequate protection of the right to nationality.135 The Act fails to satisfy two components of the limitation criterion; the requirement that a limitation of the right to nationality be prescribed by law, and that the limitation be proportionate to the objective sought. As a result, this article has shown the Act to be an arbitrary deprivation of citizenship, contrary to international law.

The limitation criterion should form the basis for reform of Australia’s national security legislation and examination in particular of Australia’s citizenship law.

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135 Michaelsen, ‘Reforming Australia’s National Security Laws, above, 34.
SEPARATION OF POWERS AT STATE LEVEL – GOING THE WHOLE HOG INSTEAD OF MAKING THE DOG BARK MANY TIMES

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ABSTRACT

According to orthodox tenets of Australian constitutional law, the doctrine of separation of powers does not apply at State level. Nevertheless, the decision in *Kable v Director of Public Prosecutions (NSW)* had the effect of importing aspects of separation of powers into State law. This paper argues that the changes wrought by *Kable* and subsequent cases applying its rule have so attenuated the orthodox position that the time has come to abandon it. Furthermore, the paper argues that idea that separation of judicial power is not a feature of State Constitutions is at odds with the rule of law and democracy, and that fidelity to these values, as applied in decisions on separation of judicial power by the courts in the United Kingdom and elsewhere in the Commonwealth, provides an alternative basis upon which to find that separation of judicial power applies to the States.

I INTRODUCTION

Part II of this paper discusses the decision in *Kable v Director of Public Prosecutions (NSW)*¹ (hereafter referred to as *Kable*), and the cases that have applied the rule contained in it, identifying the characteristics of courts which State legislation may not undermine. Part III addresses the question of to what extent the rule that separation of judicial power does not exist at State level can be said to survive in the wake of *Kable* and its progeny. Part IV discusses the implication of separation of judicial power in Westminster-style constitutions in light of the doctrine which originated in *Liyanage v R* and which has been significantly extended in subsequent cases by the courts in the United Kingdom. This part of the paper argues that decisions by State Supreme Courts in Australia rejecting the applicability of separation of judicial power are open to question in light of these decisions. Part V concludes by arguing that the steady extension of *Kable* and the development in overseas case law since *Liyanage* provide separate grounds for the High Court to find that the doctrine of separation of judicial power is part of State constitutional law.

II THE KABLE DOCTRINE AND ITS INCREMENTAL GROWTH

Constitutional orthodoxy is to the effect that whereas the Commonwealth Constitution embodies separation of powers between the judicial branch on

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¹ (1996) 189 CLR 51.
the one hand and the legislative and executive branches on the other (the consequence of which is that only Chapter III courts may exercise the judicial power of the Commonwealth\(^2\) and that Chapter III courts may not exercise non-judicial functions),\(^3\) in the States and Territories\(^4\) the rule is to the contrary. State Constitutions are held not embody separation of judicial power,\(^5\) and that State Parliaments may vest judicial functions in non-judicial bodies\(^6\) and State courts may be vested with non-judicial functions.\(^7\) The Constitutions of New South Wales\(^8\) and Victoria\(^9\) contain entrenched provisions protecting the tenure of judges, but in all other respects, and in all other States, the protection of the judicial branch from legislative interference relies on unentrenched statutes.\(^10\) To the outside observer this anomaly of Australian constitutional law must seem bizarre, particularly given the fundamental importance of separation of judicial power to the rule of law, which is presumed to be respected in all Australian jurisdictions.

Although, as will be discussed below, the courts maintain that separation of powers does not operate at State (and Territory)\(^11\) level, the survival of that rule has become all the more puzzling in light of the decision in *Kable v Director of Public Prosecutions (NSW)*\(^12\) (hereafter referred to as *Kable*), which marked a dramatic shift in the law relating to separation of powers at State level. The doctrine established in that case is that because the existence of State Supreme Courts is presumed under s 73(ii) of the Commonwealth Constitution, and because State Courts are the repositories of the judicial power of the Commonwealth (in that from time to time they exercise the judicial power of the Commonwealth under cross vesting legislation) under s 77(iii) of the Constitution, those courts cannot be required to perform tasks which are incompatible with the judicial function. This is because the exercise of such tasks was incompatible with the existence of an integrated court system established by Chapter III of the Constitution of which the State courts are a part. As McHugh J stated in *Kable*\(^13\)

> ... in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers. This is because it is a necessary implication of the Constitution’s plan of an Australian judicial system with State courts invested with federal jurisdiction that no government can act in a way

\(^2\) As first held in *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54.

\(^3\) *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

\(^4\) Territory courts are bound by the *Kable* doctrine, as held in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146.

\(^5\) See, for example *Mabo v Queensland (No. 1)* (1988) 166 CLR 186.

\(^6\) See for example s 85(8) of the *Constitution Act 1975* (Vic) and the decision in *Collingwood v Victoria [No. 2]* [1994] 1 VR 652.

\(^7\) See for example *Momcilovic v The Queen* (2011) 245 CLR 1.

\(^8\) *Constitution Act 1902* (NSW) s 7B as read with Part 9.

\(^9\) *Constitution Act 1975* (Vic) s 18(2AA) as read with Part III.


\(^11\) *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322. In this article, the argument that is made in relation to State courts should be read as applying to Territory courts as well.

\(^12\) (1996) 189 CLR 51.

\(^13\) Ibid 118.
that might undermine public confidence in the impartial administration of the judicial functions of State courts.

A key aspect of the decision in *Kable* was that the Commonwealth Constitution does not permit ‘differing grades of justice’ at federal and State levels.\(^\text{14}\) Although in subsequent cases some members of the court held that this statement was limited in its application to State courts in the exercise of federal jurisdiction,\(^\text{15}\) by the time cases such as *South Australia v Totani*\(^\text{16}\) and *Wainohu v New South Wales*\(^\text{17}\) and were decided, it had become established, as Goldsworthy states,\(^\text{18}\) that

The ‘institutional integrity’ of a state court has become the touchstone for validity, without any need to show an adverse effect on the court’s exercise of federal jurisdiction.

In passing it can be noted that an interesting aspect of *Kable* is that when the New South Wales Supreme Court was seized of the case, it related wholly to State law, and did not involve the court exercising the judicial power of the Commonwealth. It was only because counsel raised the argument that State courts might (in other cases) be required to exercise the judicial power of the Commonwealth that the High Court considered the question of whether the legislation involved in *Kable* impermissibly diminished the integrity of the Supreme Court. Some have argued that counsel thereby artificially recited the case into federal jurisdiction.\(^\text{19}\) However, it should be noted that the principal argument advanced on appeal was that separation of powers was part of the New South Wales Constitution, and that the argument about States exercising federal jurisdiction was a subsidiary argument, advanced in case the principal argument should be rejected by the court, as indeed it was.

Despite its radical nature, the *Kable* decision initially appeared to be confined to its particular facts, and led to only one successful challenge of a State law during the ten years after it was made.\(^\text{20}\) This led Kirby J to suggest that it had been treated as ‘a constitutional guard-dog that would bark but once’.\(^\text{21}\) Yet a decade after the decision, a line of cases saw State laws successfully challenged through an application of the *Kable* doctrine.\(^\text{22}\)

In *International Finance Trust Company Ltd v New South Wales Crime Commission*\(^\text{23}\) the court invalidated a provision requiring the New South

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\(^{14}\) (1996) 189 CLR 51, 103 (Gaudron J). See also 111-15 (McHugh J) and 137-9 (Gummow J).

\(^{15}\) See, for example, *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575, 598-9 [37] (McHugh J).

\(^{16}\) (2010) 242 CLR 1, 48 [70] (French CJ).

\(^{17}\) (2011) 243 CLR 181, 228-9 [105] (Gummow, Hayne, Crennan and Bell JJ).


\(^{19}\) Ibid, 78-9, particularly footnote 21.


\(^{22}\) For a recent survey of these cases see Suri Ratnapala and Jonathan Crowe, ‘Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power’ (2012) 36 Melbourne University Law Review 175.

Wales Supreme Court to hear *ex parte* an application for an order for indefinite sequestration of property on mere suspicion of wrongdoing, which was able to be lifted only on proof that the property was lawfully acquired. The High Court held that the court had been vested with ‘a function that was repugnant to a fundamental degree to the judicial process as understood and conducted throughout Australia’.24

In *Kirk v Industrial Court of New South Wales*25 the court invalidated a provision removing the power of the New South Wales courts to review decisions of lower tribunals on grounds of jurisdictional error.26 The High Court held that Chapter III prohibits State Parliaments from legislating so as to alter their Supreme Courts in such a way that those courts no longer meet the description of a ‘Supreme Court’ as that term is understood in the Commonwealth Constitution. Because a defining characteristic of State Supreme Courts is their capacity to review the decisions of inferior courts and tribunals on grounds of jurisdictional error, legislation removing the power to review on that ground would deprive a State Supreme Court of one of its essential elements.

In *South Australia v Totani*27 a statute requiring a court to issue control orders against a person simply because they were a member of a prescribed organisation without having themselves committed an offence was struck down. This case is notable in that it related to Magistrates Courts which, unlike Supreme Courts, are not mentioned in the Commonwealth Constitution. Nevertheless, the High Court invalidated the provision on the ground that Chapter III requires institutional integrity and independence of all State courts. In this case curial independence was undermined because the Magistrates Court was effectively being required to act as a rubber stamp and interfere with a person’s freedom at the behest of the executive simply because that person belonged to an organisation, rather than because they were proved to have engaged in wrongdoing as individuals.

Most recently, a statute requiring that judges of the New South Wales Supreme Court, acting as *persona designata*, issue control orders against organisations simply on the basis of suspicions alleged by the police, resulting in the freezing of the organisation’s assets and the prohibition of its members associating with each other, was invalidated in *Wainohu v New South Wales*.28 The High Court held that the bounds of the *persona designata* doctrine had been exceeded. The function conferred on the judge was incompatible with the institutional integrity of the Supreme Court, as it involved giving orders curtailing individual liberty simply on the basis of allegations made by the executive; and in the absence of reasons, there was no

24 Ibid 367 (Gummow and Bell JJ).
26 It should be noted that while the decision in *Kirk* was not based on *Kable* itself, it applied a finding in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ) to the effect that State Supreme Courts had to retain the essential characteristics of a court (see *Kirk* 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)).
way in which a person subject to an order could challenge it. The High Court emphasised that the foundation of the *Kable* principle was that the Commonwealth Constitution does not permit differing grades of justice at federal and State levels, which is why federal or State legislation which undermines the institutional integrity of courts will be held invalid.

A difficulty in analysing cases applying the *Kable* doctrine is, as Gummow, Hayne and Crennan JJ stated in *Forge v Australian Securities and Investments Commission*, that the courts have not enunciated a definitive, all-embracing statement of the defining characteristics of a court from which legislation may not constitutionally detract. Yet one can say that the cases discussed above have at a minimum established that the *Kable* doctrine requires that the existence of State Supreme Courts must be maintained, that courts (Supreme Courts as well as lower courts) must be independent and impartial, must exercise their powers in accordance with the principles of procedural fairness and open justice, cannot be deprived of the defining features of a court and cannot be given non-judicial functions (including via the persona designata device) which are incompatible with the role of a court.

## III TO WHAT EXTENT DOES THE ABSENCE OF SEPARATION OF POWERS SURVIVE AT STATE LEVEL?

Given the breadth of the rules discussed in the previous paragraph, the question which must now be answered is whether the rule that separation of judicial power does not exist at State level has become so attenuated through incremental development of the *Kable* doctrine that the time has now come to abandon it.

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29 (2006) 228 CLR 45 at 76 [64].
31 This is because their existence is contemplated by s 73(ii) of the Commonwealth Constitution, which provides for appeals from State Supreme Courts to the High Court – see *Kable* 103 (Gaudron J), 111 (McHugh J) and 139 (Gummow J), *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ) and *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 580 [96] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
32 In *Totani* the requirements of independence and impartiality were held to apply to the Magistrates Court of South Australia.
One way to approach this is to ask to whether those aspects of separation of power (that only courts may exercise judicial powers\textsuperscript{38} and that courts may not exercise non-judicial powers\textsuperscript{39}) which exist at Commonwealth level, but which appear still to exist at State level (even after the decisions discussed in Part II of this article) would survive review under the \textit{Kable} principles if they came before the High Court. In other words, would the remaining differences which still appear to exist between separation of powers at State and Commonwealth level be eliminated if the \textit{Kable} doctrine was applied to them?

In \textit{Fardon v Attorney-General (Queensland)}\textsuperscript{40} Callinan and Heydon JJ stated that

\begin{quote}
Although the test, whether, if the State enactment were a federal enactment, it would infringe Ch III of the Constitution, is a useful one, it is not the exclusive test of validity. It is possible that a State legislative conferral of power which, if it were federal legislation, would infringe Ch III of the Constitution, may nonetheless be valid. Not everything by way of decision-making denied to a federal judge is denied to a judge of a State. So long as the State court, in applying legislation, is not called upon to act and decide, effectively as the alter ego of the legislature or the executive, so long as it is to undertake a genuine adjudicative process and so long as its integrity and independence as a court are not compromised, then the legislation in question will not infringe Ch III of the Constitution.
\end{quote}

This statement was subsequently adopted by French CJ in \textit{South Australia v Totani}.\textsuperscript{41} Yet looking at the terminology used by the High Court in \textit{Kable} and subsequent cases in which \textit{Kable} has successfully been used to invalidate State laws, would State laws which did things which would be found invalid if done to a Commonwealth court survive review if done to a State court?

Consider first the aspect of separation of judicial power at Commonwealth level which prohibits the vesting of judicial power on a body other than a court:\textsuperscript{42} Although the High Court has yet to hear a challenge against a State law vesting judicial power in a body other than a court, given the requirement enunciated in \textit{Kable} that the Constitution presumes the existence of State Supreme Courts I would argue that it is highly unlikely that a law which vested judicial power in a body other than a court would be upheld. What point would there be in maintaining the existence of courts if they could be left as empty shells as a result of a State Parliament transferring their powers being transferred to non-judicial bodies? If the Constitution presumes the existence of State Supreme Courts, that must mean courts which cannot have judicial power removed from them. Having a ‘State court system’ where judicial

\textsuperscript{38} As first held in \textit{New South Wales v Commonwealth (Wheat Case)} (1915) 20 CLR 54.
\textsuperscript{39} \textit{R v Kirby; Ex parte Boilermakers’ Society of Australia} (1956) 94 CLR 254.
\textsuperscript{40} (2004) 223 CLR 575, 655-6 [219]. The same point was also made at 614 [87] (Gummow J) and 629 [144] (Kirby J).
\textsuperscript{41} \textit{South Australia v Totani} (2010) 242 CLR 1, 66 [145].
\textsuperscript{42} Found to be offensive to the doctrine of separation of powers in \textit{New South Wales v Commonwealth (Wheat Case)} (1915) 20 CLR 54, \textit{Waterside Workers’ Federation of Australia v JW Alexander Ltd} (1918) 25 CLR 434 and \textit{Australian Communist Party v Commonwealth} (19851) 83 CLR 1, to name but a few.
powers were in reality exercised by bodies other than courts would amount to mere formal compliance with the rule laid down in Kable and would therefore be held invalid.

Next, if a State Parliament was to enact ad hominem legislation declaring a person guilty of an offence, which the High Court said in Polyukhovich v Commonwealth\textsuperscript{43} would be a breach of separation of judicial power under Chapter III, how could such a law, in which the State Parliament would be doing directly what it was unable to do indirectly in Kable, be found to be constitutional?\textsuperscript{44} That would surely not be reconcilable with the decision in Kirk, where it was held that deprivation of an essential function of a court (in that case common law judicial review) was inconsistent with Kable.

Turning now to the second dimension of separation of judicial power – the impermissibility of vesting courts with non-judicial functions – in their summary of the effect of Kable on State courts, Joseph and Castan state\textsuperscript{45}

States cannot vest those courts and judges with powers that undermine, or otherwise enact legislation which undermines, the institutional integrity of those courts if those courts are capable of being vested with federal jurisdiction under Chapter III.

Yet surely that would be an equally accurate summary of the rationale for the decision in cases such as R v Kirby; Ex parte Boilermakers’ Society of Australia,\textsuperscript{46} Grollo v Palmer\textsuperscript{47} and Wilson v Minister for Aboriginal and Torres Strait Islander Affairs.\textsuperscript{48} There is no relevant difference between the law on the persona designata device as stated in Wainohu and that which exists in the federal sphere, so although Joseph and Castan note that the starting points are different, in that States can confer non-judicial powers on State courts, whereas the Commonwealth can confer such powers only if an exception applies,\textsuperscript{49} is not the same result being reached (albeit from different starting points) simply because the rationale – preservation of the integrity of the courts – is the same under the Chapter III cases as well as under Kable?

Next, consider the following summary of the law relating to State judicial power given by French CJ in Totani:\textsuperscript{50}

The consequences of the constitutional placement of State courts in the integrated system include the following:

\textsuperscript{43} (1991) 172 CLR 501.
\textsuperscript{44} This issue was raised by counsel in Duncan v New South Wales [2015] HCA 13, but the court unanimously held at [4] (French CJ, Hayne, Kiefel, Bell, Gageler, Keane and Nettle JJ) that the legislation being challenged did not amount to an exercise of a judicial power by the New South Wales Parliament and that therefore the issue of separation of powers did not arise.
\textsuperscript{45} Sarah Joseph and Melissa Castan, Federal Constitutional Law – A Contemporary View (Lawbook, 4\textsuperscript{th} ed, 2014) 244.
\textsuperscript{46} (1956) 94 CLR 254.
\textsuperscript{47} (1995) 184 CLR 348.
\textsuperscript{48} (1996) 189 CLR 1.
\textsuperscript{49} Joseph and Castan, above n 45, 245.
\textsuperscript{50} South Australia v Totani (2010) 242 CLR 1, 47-8 [69].
1. A State legislature cannot confer upon a court of a State a function which substantially impairs its institutional integrity and which is therefore incompatible with its role as a repository of federal jurisdiction.

2. State legislation impairs the institutional integrity of a court if it confers upon it a function which is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.

3. The institutional integrity of a court requires both the reality and appearance of independence and impartiality.

4. The principles underlying the majority judgments in Kable and further expounded in the decisions of this Court which have followed after Kable do not constitute a codification of the limits of State legislative power with respect to State courts. Each case in which the Kable doctrine is invoked will require consideration of the impugned legislation ... (Footnotes within quote omitted)

If one was instead to evaluate the first three points for their adequacy as an explanation of the law relating to separation of judicial power at Commonwealth level, would they be found incomplete? I would suggest not. There is no difference between separation of judicial power on the one hand and the preservation of the independence and impartiality of the courts, their exercise of their powers in accordance with procedural fairness and not making them do things which are incompatible with their functions as a court on the other. These factors – required of State courts by Kable – are constituent elements of the doctrine of the separation of judicial power which applies to Commonwealth courts. So if all these things must now be complied with, what is left of the lack of separation of judicial power at State level? Or, to state it positively, does not compliance with the Kable doctrine in fact require the same judicial independence as is enjoyed by Chapter III courts? Similarly, if, as established in Kable itself, it was not permissible to vest the New South Wales Supreme Court with the function of rubber-stamping a decision of the executive because that would have impaired the institutional integrity of the court, then surely any other examples of vesting with functions which had the same effect would also be unconstitutional – just as it would be in the case of Chapter III courts? In which case, why not say that the doctrine of separation of judicial power now applies at State level?

It is indeed true that justices of the High Court continue to state that the established doctrine remains in force. Thus, in Baker v The Queen it was held that the restrictions imposed on State courts by Kable are 'less stringent' than those imposed on Chapter III courts by the doctrine of separation of judicial power, and in Assistant Commissioner Condon v Pompano Pty Ltd, the court emphasised that notwithstanding the development of the Kable doctrine, separation of judicial power did not apply at State level. Similarly, in South Australia v Totani, French CJ said

The absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not

52 (2013) 252 CLR 38 per Hayne, Crennan, Kiefel and Bell JJ at [125-6].
53 South Australia v Totani (2010) 242 CLR 1, 45 [66].
detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.

With respect, there are two problems with this. First, the court has failed to enunciate a principle or test which is to be used to distinguish between ‘full’ separation of judicial power at Commonwealth level and the ‘light’, or less stringent, restrictions at State level. More fundamentally, however, the problem with these statements is that they cannot be reconciled with the statement in *Kable* to the effect that the Commonwealth Constitution does not permit ‘differing grades of justice’ at federal and State levels - a statement which was re-affirmed *South Australia v Totani* and *Wainohu v New South Wales*. If none of the aspects of separation of judicial power at it applies to Commonwealth courts is dispensable – in other words, if all of them are required in order to protect the institutional integrity of the courts – then why are they all not equally required at State level? If the doctrine of separation of judicial power exists to protect the independence and integrity of Chapter III courts, how can its incomplete application to State courts as repositories of Chapter III courts be justified in light of the statement that there are not differing grades of justice in the integrated system of courts? If the absence of full separation of judicial power at State level means that there is a lower standard of institutional integrity at that level, then surely that does amount to a differing grade of justice? Why should people, in so far as they are subject to State law, be any less entitled to the protection of a judicial system which enjoys less than complete protection?

I would argue that the position has been reached where despite the fact that justices of the High Court continue to state that the doctrine of separation of judicial power does not apply to State courts, the decisions that the court makes are no longer consistent with that mantra, because the applications of *Kable* indicate separation in all but name. Surely it is now timely to recognise that if followed to their logical conclusion, the principles contained in *Kable* and the cases which have followed it require that the court take the final step of formally stating that separation of judicial power exists at State level. *Kable* began a process whereby the rule that separation of judicial power does not exist at State level was hollowed out like a Swiss cheese, to the extent that there is now a great deal of air and very little cheese.

IV  FEDERALISM VERSUS THE RULE OF LAW AND DEMOCRACY

There is no doubt that were the High Court to take the step advocated in this article it would be seen as radical. Academic commentary on *Kable* and the cases which have followed it has been divided. According to Carney, the cases

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54 (1996) 189 CLR 51, 103 (Gaudron J). See also 111-15 (McHugh J) and 137-9 (Gummow J).
56 (2011) 243 CLR 181, 228-9 [105] (Gummow, Hayne, Crennan and Bell JJ).
leave unclear the precise difference between the restrictions placed by Chapter III on federal and State courts respectively.\(^{57}\) Aroney notes that Kable has led to convergence between the law governing the judicial branch at Commonwealth and at State levels to the extent that a 'miniature' version of separation of judicial power at State level.\(^{58}\) Other commentators, such as Twomey, McLeish and Irvine see an expansion of Kable, and the trend towards convergence, as being subversive both of federalism and the legislative authority of State parliaments.\(^{59}\)

Two responses can be made to this. First, as stated by Hayne J in South Australia v Totani,\(^{60}\)

Kable dealt with one respect in which the Constitutions of the States are affected by the federal Constitution: The legislative powers of the States are not unlimited. The relevant limitation is not one which follows from any separation of judicial and legislative functions under the Constitutions of the States. Rather, it is a consequence that follows from Ch III establishing, in Australia, 'an integrated Australian legal system, with, at its apex, the exercise by this Court of the judicial power of the Commonwealth'.

In other words, one can treat Kable and its extensions not as a challenge to federalism, but rather as a necessary implication of it – that if a federation has an integrated system of justice then, irrespective of the absence of separation of judicial power in State constitutions, it is a logical consequence of that integration for there to be a rule that only bodies meeting the description of 'courts' and adhering to certain requirements relating to how courts operate should be vested with judicial power, and that those courts should not be vested with such non-judicial functions as are incompatible with their role as courts. Subjecting the States to such a rule would be no more subversive of federalism than it was, for example, for the High Court to find that since federal, State and local politics are intertwined, the implied freedom of political communication bound State Parliaments.\(^{61}\)

The second response is that, assuming that, contrary to the argument advanced in the preceding paragraph, one accepts the proposition advanced by opponents of the extension of Kable that convergence is antithetical to federalism, why should federalism trump the extension of the doctrine of separation of judicial power? No doubt the answer that would be given to this is that it is required by fidelity to the text of State constitutions which, as a line

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\(^{58}\) Aroney et al, above n 30, 605.


\(^{60}\) South Australia v Totani (2010) 242 CLR 1, 81 [201].

of cases have confirmed, do not incorporate separation of judicial power, as well as to the principle of the preservation of State autonomy under federalism. But if this issue is to be characterised as a clash between textual fidelity and federalism on the one hand versus the principles underpinning separation of judicial power on the other, then I would argue that the latter should trump the former.

When distilled to its fundamentals, the doctrine of separation of judicial power and the principles that flow from it serve the rule of law, a doctrine which, as Dixon J stated in *Australian Communist Party v Commonwealth*, is an assumption upon which the Constitution ought to be interpreted – a statement which has been reaffirmed in several High Court decisions. Federalism is a mechanism devoid of any value content – a just legal order can exist in the absence of federalism. By contrast, the rule of law is a value without which a just legal system certainly cannot exist, and it is for that reason that I would argue it should be given priority over adherence to federalism in this contest.

It is true that the rule of law is an elastic concept, occupying a continuum which ranges from what Tamanaha refers to as ‘thin’ conceptions requiring only legality to ‘thick’ conceptions requiring that the content of the law conform to some concept of justice. Nevertheless, even thin conceptions of the rule of law require separation of powers which, as Hunter-Schulz has argued, means the (full) separation of powers found in Chapter III of the Commonwealth Constitution. Furthermore, I would argue that the capacity which, in the absence of full separation of powers, State Parliaments apparently have (in the absence of a contrary finding applying the *Kable* principles) to vest judicial power on a body other than a court, and to enact *ad hominem* legislation declaring someone guilty of an offence, is incompatible with the rule of law, however narrowly that concept may be defined. This is particularly the case given that the Commonwealth Constitution protects only


64 (1951) 83 CLR 1, 193.


a few individual rights, and the State Constitutions none at all. Thus, as is argued by Fearis,69 the major part of the burden of protecting process rights thus falls upon the rule of law, of which the existence of a judicial branch protected by separation of judicial power is a vital component.

Support for the principle that the rule of law requires separation of judicial power, is provided by a number of decisions from several common law jurisdictions, which have found that separation of judicial power is a fundamental principle of Westminster Constitutions. Little attention has been focussed on these in Australia, and none of the academic critique of rule of law as an argument supporting Kable and its extension has addressed them. This is doubtless due to the fact that when cases were brought before Australian courts arguing that separation of judicial power was implicit in State Constitutions using Liyanage v The Queen70 as precedent, all were unsuccessful, with Liyanage being distinguished either on the ground that the Constitution of Sri Lanka to which it related was entrenched, whereas this was not true (either wholly or in relation to the judiciary) in the case of some of the Australian States, or on the ground that in Sri Lanka the Charter of Justice 1833 (UK) expressly conferred exclusive judicial power on the courts, which was also not true of any of the State Constitutions.71

Yet I would argue that neither of these facts provide relevant points of distinction from Liyanage: The fact that a Constitution, or those parts relating to the judiciary, is not entrenched does not mean that an implication that separation of the judicial power cannot be read into it as it stands, even if that implication could be over-ridden by subsequent constitutional amendment (with, it might be added, all the attendant political cost that would be borne by a government enacting such an amendment). Furthermore, the decision in Liyanage itself was not reached on the basis that the laws under challenge, which interfered with the independence of the courts, had not been enacted in compliance with the entrenchment provisions in the Constitution. The decision was based squarely on the fact that the allocation of powers to the judiciary in a separate chapter meant that separation of judicial power was implied in the Constitution.72 So far as the argument relating to the express conferral of judicial power exclusively on the courts is concerned, this fact was relied upon by the court in Liyanage as evidence of the fact that it had not been necessary to mention the exclusivity of judicial power in the Constitution – but, as will be demonstrated in the discussion of cases subsequent to Liyanage, the absence of any exclusive conferral (either in the Constitution or in any other statute) is not a necessary precondition for a finding that separation of judicial power is implicit in Westminster-style Constitutions.

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70 [1967] 1 AC 259.
71 These cases and the grounds upon which they failed are summarised in Carney, above n 57, 344-8.
The first of the cases which followed Liyanage is *Hinds v The Queen*,73 in which the Privy Council held that the doctrine of separation of judicial power was implied in the *Jamaica (Constitution) Order in Council 1962* as a Constitution following the Westminster model.74 The Council further held that an implication was to be read into the Constitution despite the absence of express wording establishing separation of powers,75 although the fact that the judiciary was mentioned in a separate Chapter of the Constitution strengthened the implication of the doctrine.76 Accordingly the Council held that only courts staffed by judges enjoying security of tenure could exercise judicial power77 and that legislation purporting to transfer their jurisdiction to lower courts staffed by judicial officers who did not enjoy the same security of tenure was invalid. The Council also held invalid a provision in the legislation which mandated a sentence of imprisonment during the pleasure of the Governor-General, on the basis that the imposition of an indeterminate sentence, the duration of which was to be determined by the executive, amounted to an impermissible conferral of the judicial power of sentencing upon the executive.78

*Hinds* was applied in *Ali v The Queen*,79 in which the Privy Council held that where a Mauritian statute conferred on the executive the power to choose before which court to prosecute an offence and required that the court impose a mandatory sentence, the combined effect of these provisions was to confer on the executive the judicial function of determining sentence, which was incompatible with the doctrine of separation of judicial power implied in the Mauritian Constitution.80

The next two cases are important because of the broadening of the theory upon which the doctrine of separation of judicial power was based. In *Director of Public Prosecutions of Jamaica v Mollison*,81 the Privy Council held invalid a statute which provided that commission of a certain offence was punishable by detention at the Governor-General’s pleasure, on the ground that the judicial function of sentencing could not be conferred on the executive under the Westminster model.82 What is most significant about this case however is that Bingham LJ based his reasoning not only on the allocation of powers to three branches in the text of the Constitution, but on the broader

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74 Ibid 212D, 213C-D (Diplock LJ).
75 Ibid 212F.
76 Ibid 213A.
77 Ibid 213C-H, 220G.
78 Ibid 226C-227B.
80 Ibid 104E-H (Keith LJ). That separation of judicial power is implied in Mauritius’ Westminster-style Constitution was re-affirmed in *Ahnee v Director of Public Prosecutions* [1999] 2 AC 294, 303 (Steyn LJ).
81 [2003] 2 AC 411.
82 Ibid 424 (Bingham LJ). One should also note that the same conclusion was reached by Supreme Court in Ireland, which although not a member of the Commonwealth has a Constitution embodying the Westminster system – see *Deaton v Attorney-General and the Revenue Commissioners* [1963] IR 170, 182-4 (O'Dalaigh CJ) and *The State v O'Brien* [1973] IR 50, 59-61 (O'Dalaigh CJ), 67-75 at 59-64 (Walsh J).
ground that separation of judicial power was required in order to uphold the
rule of law.\footnote{83}

This shift in reasoning became even more pronounced in R (Anderson) v
Secretary of State for the Home Department,\footnote{84} which was a case originating
in the United Kingdom, and thus not based on a written constitution. In this
case the House of Lords declared incompatible with Article 6(1) of the
Convention for the Protection of Human Rights and Fundamental Freedoms
(which forms Schedule I of the Human Rights Act 1998 (UK)) s 29 of the
Crime (Sentences) Act 1997 (UK), which vested in the Attorney-General the
power to determine the minimum tariff to be served by a person sentenced to
life imprisonment. Article 6(1) protects the right to a fair hearing by an
independent and impartial tribunal, and the court found that it was
incompatible with that right for a member of the executive to determine the
duration of sentences, as that was a judicial function.\footnote{85} Of particular note was
then statement by Steyn LJ\footnote{86} that the concept of separation of judicial power
‘based on the rule of law, is a characteristic feature of democracies’. This is
important is because separation of judicial power was justified not only by
reference to the rule of law, but also by reference to democracy. In other
words, contrary to academic critique of Kable in Australia, which has been
based on that decision’s erosion of State legislative competence, ‘democracy’
was seen as something broader than just the ability of voters to elect a
legislature which then has \textit{carte blanche} to exercise law-making powers, and
instead was held to include a \textit{restraint} on legislative power, at least in so far as
separation of judicial power is concerned.

This innovative approach was again applied in State of Mauritius v
Khoyratty.\footnote{87} In this case, the Privy Council heard a challenge against the
constitutional validity of legislation which had purported to amend the
Constitution in such a way as to remove from the courts the power to grant
bail in cases involving drug-dealing. The section which had been amended
was not entrenched. However, the appellant’s argument was that because s 1
of the Constitution of Mauritius stated that Mauritius was ‘a democratic state’,
the constitutional amendment relating to bail was invalid because separation
of judicial power was required in a democracy, and the amendment had not
complied with the entrenched procedures required for amendment of s 1. The
Privy Council upheld the appeal on the ground that separation of judicial
power was a requirement of democracy, and that since the removal of the bail
jurisdiction of the courts constituted a legislative derogation from judicial
power in breach of the separation doctrine, it should have been enacted in
compliance with the entrenched procedures for amendment of s 1, and that
since those procedures had not been complied with, the provisions were
invalid.\footnote{88} In his decision, Steyn LJ stated\footnote{89}
The idea of democracy involves a number of different concepts. The first is that the people must decide who is to govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.

Steyn LJ went on to say that that approach could be ‘treated as settled law in the United Kingdom’ – in other words, that because the United Kingdom was a democracy, separation of judicial power would apply there too. In so doing, Steyn LJ quoted the statement by Bingham LJ in *A v Secretary of State for the Home Department*,\(^\text{90}\) that

It is of course true that judges in this country are not elected and are not answerable to Parliament. It is also of course true, as pointed out in para 29 above, that Parliament, the executive and the courts have different functions. But the function of independent judges charged to protect and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney-General is fully entitled to insist on proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.

In similar vein in *Khoyratty* Rodger LJ stated\(^\text{91}\)

... it is a hallmark of the modern idea of the democratic state that there should be a separation of powers between the legislature and the executive, on the one hand, and the judiciary on the other.

while Mance LJ referred to\(^\text{92}\)

...the basic democratic principles of the rule of law and the separation of judicial and executive powers which serve as primary protection of individual liberty...

To summarise the above, the post-*Liyanage* cases saw an evolution in the theoretical basis underpinning the doctrine of separation of judicial power: In *Hinds* and *Ali* the Privy Council based an implication of separation of judicial power simply upon the fact that distinct parts of the constitutions of the jurisdictions from which the cases came allocated powers to three branches of government. In *Mollinson* the basis for the implication was broadened to cover both textual structure and the rule of law. In *Khoyratty, A* and *Anderson* the justification was broadened still further, so that the doctrine now no longer relies on textual implications but is founded simply on the idea that separation of judicial power is a fundamental feature of the democratic state.

When compared to these cases, the state of the law in Australia as reflected in the cases on the issue of separation of judicial power at State level appears archaic. The same is true of academic comment critical of *Kable* and its

\(^{\text{90}}\) [2005] 2 AC 68, 110.
\(^{\text{91}}\) State of Mauritius *v Khoyratty* [2007] 1 AC 80, 97.
\(^{\text{92}}\) Ibid 99.
extension, which unduly prioritises federal theory and plenitude of State legislative power, devalues the rule of law and is founded on an unsophisticated and narrow view of democracy. All State constitutions in Australia are based on democracy – or, as the High Court refers to it, on representative government.\(^93\) If, as has been held in the cases discussed above, separation of powers is to be seen as a fundamental feature of the democratic state, then these cases could be used as the basis for a finding by the High Court that separation of judicial power is implicit in State constitutions.

While it is true that to do this would be effectively to impose a restriction on the legislative competence of polities which have unentrenched constitutions, this is nothing novel in Australian constitutional history: The subjection of the States to the implied right to political communication,\(^94\) and potentially the implied right to vote\(^95\) as well, of course, as the limits already placed on them by *Kable* and its progeny, all stand as precedents for that. There is therefore no reason in principle for the High Court not to extend the *Kable* doctrine in the manner suggested.

I would therefore argue that it is open to the High Court, when a suitable case arises, to draw on developments elsewhere in the Commonwealth and declare that the preservation of the rule of law requires that the *Kable* doctrine be extended so as to provide that State and territory legislatures may not legislate inconsistently with the doctrine of separation of judicial power.\(^96\) This could be done either as an implication arising from a State Constitution considered on its own or, in order to immunise such a finding from express amendment of that Constitution to the contrary (although one hopes that a State Parliament would not take a step so offensive to the rule of law), then as an extension of the *Kable* principle. The latter approach would be based upon the fact that State courts are components of an integrated justice system within the framework of representative government, and that modern conceptions of the rule of law within such a framework require that the doctrine of separation of judicial power should apply to all courts. Since the State Parliaments cannot legislate contrary to the requirements of Chapter III, they would not be able to over-ride such a finding.

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\(^96\) That this is the logical conclusion of the *Kable* doctrine is supported by Matthew Groves and Janina Boughey, ‘Administrative Law in the Australian Environment’ in in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 3, 21.
Annian-Welsh and Williams have pointed to the unrealised potential in the incompatibility standard in *Kable*, stating that it provides ‘a basis for potentially far-reaching and substantive restrictions on government’s capacities to usurp, control or improperly influence the decision-making powers of state and territory courts.’ Whether the High Court as currently constituted would take the step proposed in this article is a different question - but that is no reason not to make the argument.

V CONCLUSION

The arguments advanced in this article can be summarised as follows:

First, *Kable* and the cases which have followed it have imported into State law a set of principles which in aggregate cover the same ground as those which underpin the doctrine of separation of judicial power at Commonwealth level. I have argued that the High Court ought to take the final step of declaring that it is a requirement of the operation of an integrated system of courts that separation of judicial power applies at State and Territory level. To refer to the analogy in the title of this article, the dog has barked so many times that there is no need to make it bark any further.

Second, I have argued that objections to the extension of the *Kable* principle based on federal considerations and notions of State legislative autonomy ought to give way to the theory that the rule of law and democracy - both of which are fundamental concepts of Australian constitutions at all levels - mandate separation of judicial power. Authority from the United Kingdom provides justification for the High Court to extend the *Kable* doctrine in this way.

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98 Ibid 623.
INTEGRATION OF JUDICIAL DECISIONS IN MULTIPLE PROCEEDINGS BEFORE THE WTO AND RTAS: THE POTENTIAL RELEVANCE OF ARTICLE 32 OF THE VCLT

SON TAN NGUYEN *

ABSTRACT

In the last several decades there has been an exponential growth in the number of Regional Trade Agreements (RTAs). In addition to creating a wide overlap of substantive rights and obligations with the World Trade Organisation, many RTAs are also equipped with legalized dispute settlement mechanisms, which operate independently from the compulsory, automatic and exclusive system of WTO dispute settlement. This parallel of substantive commitments and legalised mechanisms may potentially result in conflicts of jurisdiction where a single dispute is submitted simultaneously or consecutively to both fora. It has been well addressed in various studies that if such conflicts arise, there is currently no legal rule that can satisfactorily determine which forum should have jurisdiction. As a result, multiple proceedings appear unavoidable. This article seeks to offer a new way to look into the jurisdictional tension between the WTO and RTAs. It will be argued that in the absence of effective rules to determine jurisdictional priority, Article 32 of the Vienna Convention on the Law of Treaties may provide a practical and useful technique to minimise the negative consequences of multiple proceedings, i.e. inconsistent interpretations and findings over essentially the same disputes.

I INTRODUCTION

The number of regional trade agreements (RTAs) has grown exponentially in the last several decades.¹ They create a wide overlap of substantive rights and obligations with the WTO.² Many of them also include legalised dispute settlement mechanisms³ operating in parallel to the compulsory and exclusive

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¹ As of 20 June 2017, 279 RTAs were in force. World Trade Organization, Regional Trade Agreements Gateway <http://www.wto.org/english/tratop_e/region_e/region_e.htm>.


³ See, e.g., Amelia Porges, ‘Dispute Settlement’ in Jean-Pierre Chauffour and Jean-Christophe Maur (eds), Preferential Trade Agreement Policies for Development (World Bank, 2011) 467; David Morgan, ‘Dispute Settlement under PTAs: Political or Legal?’ in
system of dispute settlement under the WTO. Previous studies have found that the parallel of substantive commitments and legalised dispute settlement mechanisms may potentially result in conflicts of jurisdiction, where a single dispute is submitted in parallel or consecutively to both fora. Even though no such cases have materialised, what happened in Mexico - Taxes on Soft Drinks, Argentina - Poultry Anti-Dumping Duties, US - Cattle, Swine and Grain, and US - Tuna II suggests that multiple proceedings over the same


Panel Report, Mexico - Tax Measures on Soft Drinks and Other Beverages, WTO Doc WT/DS308/R (7 October 2005) (Mexico - Taxes on Soft Drinks); Appellate Body Report, Mexico - Taxes on Soft Drinks, WTO Doc WT/DS308/AB/R (6 March 2006). In this case, for many years the US had been blocking the establishment of a NAFTA panel to examine Mexico’s claim under NAFTA concerning the market access of its cane sugar to the US market. In response, Mexico imposed a tax on US’s soft drinks and other beverages; and this, in turn, led the US to initiating a dispute before the WTO to challenge the tax measures.

Panel Report, Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil, WTO Doc WT/DS241/R (22 April 2003) (Argentina - Poultry Anti-Dumping Duties). In this case, Brazil requested the WTO panel to find Argentina’s antidumping measures inconsistent with the WTO Anti-Dumping Agreement. However, prior to this WTO dispute, Brazil had already challenged the measures before a Mercosur tribunal.

Request for Consultations from Canada, United States - Certain Measures Affecting the Import of Cattle, Swine and Grain from Canada, WTO Doc WT/DS144/1 (29 September 1998) (US - Cattle, Swine and Grain). In this instance, Canada filed parallel requests for consultations under both the NAFTA and WTO procedures involving exactly the same US measures and similar WTO and NAFTA provisions. However, neither of these proceeding escalated to an adjudicative phase.

Request for Consultations by Mexico, United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WTO Doc WT/DS381/1(28 October 2008) (US - Tuna II); Panel Report, US - Tuna II, WTO Doc WT/DS381/R (15 September 2011); Appellate Body Report, US - Tuna II, WTO Doc WT/DS381/AB/R (16 May 2012). In this case, Mexico initiated a WTO dispute to challenge the measures imposed by the US concerning the importation, marketing and sale of tuna and tuna products. However, the US strongly disagreed with Mexico’s decision to bring the dispute to the WTO because in the US’s view, the dispute must be adjudicated at NAFTA under NAFTA Article 2005.4. The US then filed a NAFTA dispute concerning Mexico’s failure to move the tuna-dolphin dispute from the WTO to the NAFTA forum.
dispute may possibly occur before the WTO and RTA fora.10 If this is the case, it might be possible that judicial bodies at different fora may provide different, even conflicting, findings over the same dispute,11 undermining the predictability and consistency of international law.

The inconsistent findings produced by a North American Free Trade Agreement (NAFTA) Chapter 19 panel and a WTO panel in the softwood lumber dispute (Lumber IV) perhaps present a good example for the risk of incompatible judicial findings resulted from multiple proceedings.12 In Lumber IV, the US International Trade Commission (USITC) determined that Canadian softwood lumber exports to the United States were threatening to injure the domestic industry.13 Canada challenged that determination by filing three requests for panel review under NAFTA Chapter 19.14 The NAFTA Chapter 19 panel decided that the evidence did not support a finding of threat of injury.15 In parallel to these NAFTA requests, Canada also made three

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11 Two disputes are the same if they involve the same parties, the same object, and the same grounds (legal claims). Strictly speaking, in multiple proceedings, the WTO and RTA disputes are not exactly the same because they are formally framed and adjudicated based on different bodies of law, namely, WTO law and RTA law respectively. However, the parties to these disputes may be the same as there is a wide overlap of membership between two regimes (an RTA is generally formed by a subset of WTO Members). The object or relief may also be the same or similar because identical or similar trade retaliatory measures are often included under both regimes, and parties may pursue these forms of relief in both proceedings. Most importantly, the legal rights and obligations on which the WTO and RTA claims are framed may be similar or identical because there is also a wide overlap of substantial rights and obligations between the WTO and RTAs. As a result, in multiple proceedings, WTO and RTA disputes might be viewed as essentially the same or related. It has been well-established that multiple proceedings over essentially the same or related disputes should be regulated. Kwak and Marceau, for example, pointed out that ‘contrary findings based on similar rules [...] would have unfortunate consequences for the trust that the states are to place in their international institutions’, undermining legal certainty and predictability of international law. Kyung Kwak and Gabrielle Marceau, above n 3, 474. See, e.g., Campbell McLachlan, ‘Lis Pendens in International Litigation’ (2008) 336 Recueil Des Cours 199, 217; Yuval Shany, ‘The First MOX Plant Award: The Need to Harmonize Competing Environmental Regimes and Dispute Settlement Procedures’ (2004) 17 Leiden Journal of International Law 815, 825.

12 For an excellent summary and discussion of these conflicting findings, see, e.g., Sarah E. Lysons, ‘Resolving the Softwood Lumber Dispute’ 32 Seattle University Law Review 407, 422-8; Maureen Irish, Regional Trade, the WTO and the NAFTA Model’, in Ross P Buckley, Vai Io Lo, Laurence Bouille (eds), Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements (Wolters Kluwer, 2008) 87, 105-7.


15 See Panel Report, United States - Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada, WTO Doc WT/DS257/R (29 August 2003); Panel Report, United States - Final Dumping Determination on Softwood Lumber from Canada, WTO Doc WT/DS264/R (13 April 2004); Panel Report, United States -
similar challenges before the WTO, alleging that the US violated its WTO obligations. The WTO panel found in favour of Canada. To implement this panel ruling, the USITC made a new determination of threat of injury. Canada continued to challenge the consistency of this redetermination with the WTO original ruling. This time the WTO compliance panel found in favour of the US, stating that the USITC redetermination was not inconsistent with the United States’ obligations under the Anti-Dumping Agreement and the SCM Agreement. Even though this decision by the WTO compliance panel was then reversed by the Appellate Body, at least for a time it was directly inconsistent with the ruling of the NAFTA Chapter 19 panel.

At the WTO, General Agreement on Tariffs and Trade (GATT) Article XXIV does not refer to RTA adjudicative mechanisms, nor does the Dispute Settlement Understanding (DSU) regulate relations between the two systems. As a result, there is no WTO mechanism that can effectively prevent parties from submitting a single dispute to more than one forum. Outside the WTO, there are some norms that may potentially be able to regulate multiple proceedings. These include the choice of forum clauses included in various RTAs, and common jurisdiction-regulating norms such as res judicata, lis pendens, forum non conveniens, comity, and abuse of rights. However, it has been well-established that these norms may not be able to be applied in WTO disputes. The main barrier is DSU Article 23 which states clearly that

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16 Maureen Irish, above n 12, 105.
19 Maureen Irish, above n 12, 106.
23 See, e.g., Yuval Shany, The Competing Jurisdictions, above n 5. Res judicata refers to the general doctrine that an earlier and final adjudication by a court or arbitration is conclusive in subsequent proceedings involving the same subject. Lis pendens, literally meaning ‘a law suit pending’, is a concept describing a factual situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different States at the same time. Declining jurisdiction has been the most common response to parallel proceedings, though the techniques vary significantly between legal traditions. See Son Tan Nguyen, ‘The Applicability of Res Judicata and Lis Pendens in World Trade Organization Dispute Settlement’ (2013) 25(2) Bond Law Review 123.
24 See, e.g., Kyung Kwak and Gabrielle Marceau, above n 3; Son Tan Nguyen, ‘The Applicability of Res Judicata and Lis Pendens in World Trade Organization Dispute Settlement’, above n 23; Son Tan Nguyen, ‘The Applicability of Comity and Abuse of Rights
in resolving WTO disputes, Members must have ‘recourse to, and abide by, the rules and procedures’ of the DSU.\textsuperscript{25} It is unrealistic to expect that WTO adjudicators who are extremely mindful of their limited mandate would go against this explicit treaty language and apply norms that would override WTO jurisdiction. Inherent powers, though they may exist,\textsuperscript{26} might not be a sufficiently concrete basis to enable WTO tribunals to proceed so far.\textsuperscript{27} Therefore, WTO tribunals will retain jurisdiction, regardless of any non-WTO norm that may point in the opposite direction. Obviously, there may be no legal solution that can satisfactorily establish jurisdictional priority between the WTO and RTA fora.\textsuperscript{28} Multiple proceedings might thus be unavoidable.

It will be argued in this article that there seem to be currently no international legal rules that can satisfactorily eliminate the risks of multiple proceedings over essentially the same disputes before the WTO and RTA fora. In this context, Article 32 VCLT might provide useful alternatives. This is not a magic tool, but it can to some extent minimise the risks of inconsistent interpretations and rulings over similar or identical rules. To address these issues, this article will first consider the constraining force of judicial decisions in international law. It will then discuss whether judicial decisions can be used as supplementary means of interpretation under Article 32 VCLT. The last section will examine how WTO and RTA tribunals could use judicial decisions of the other forum as supplementary means of interpretation under Article 32 VCLT.

\section*{II \quad THE CONSTRAINING FORCE OF JUDICIAL DECISIONS IN INTERNATIONAL LAW}

The use of supplementary means of interpretation is dealt with in Article 32 VCLT, which specifies that:

\begin{quote}
[r]ecourse may be had to supplementary means of interpretation, \emph{including} the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
\begin{enumerate}[label=(\alph*)]
\item leaves the meaning ambiguous or obscure; or
\item leads to a result which is manifestly absurd or unreasonable.\textsuperscript{29}
\end{enumerate}
\end{quote}

This article discusses the use of judicial decisions as supplementary means of interpretation under Article 32 VCLT. Thus, the first natural question is why

\begin{thebibliography}{9}
\bibitem{WorldTradeDisputeSettlement} in World Trade Organisation Dispute Settlement’ \textit{(2016) 35(1) University of Tasmania Law Review} 95.
\bibitem{DUS} DUS, article 23.
\bibitem{MitchellHeaton} Andrew D. Mitchell and David Heaton, ‘The Inherent Jurisdiction of WTO Tribunals: Selected Application of Public International Law Required by Judicial Function’ \textit{(2010) 31 Michigan Journal of International Law} 559; Appellate Body Report, \textit{Mexico - Taxes on Soft Drinks}, WTO Doc WT/DS308/AB/R (6 March 2006) [45] (stating that WTO tribunals ‘have certain powers that are inherent in their adjudicative function’).
\bibitem{Brown} Chester Brown, \textit{A Common Law of International Adjudication} (Oxford University Press, 2007), 78 (emphasizing that ‘international courts cannot simply assert the existence of inherent powers as a type of carte blanche to do whatever they want’).
\bibitem{KyungMarceau} Kyung Kwak and Gabrielle Marceau, above n 3, 484.
\bibitem{VCLT} VCLT, article 32 (emphasis added).
\end{thebibliography}
judicial decisions merit a consideration by international tribunals. The next sections will explain why judicial decisions should be considered by tribunals.

A The De Facto System of Precedent in International Law

In most national legal systems, coherence and predictability of judicial decisions are normally guaranteed through reliance on precedent, whether in the form of a de jure (formal) doctrine, as in many common-law jurisdictions, or through a de facto case law, as practiced in many civil-law traditions. In a de jure stare decisis system, ‘there is a legal obligation incumbent on the adjudicator to accord due respect to its prior decisions’, whereas in a de facto stare decisis system, adjudicators follow precedent without legally being bound to do so. In international law, courts and tribunals do not apply the doctrine of precedent in its de jure form, but generally follow prior cases, thus effectively developing and enforcing a de facto doctrine of precedent. In the words of Reinisch, ‘most international courts and tribunals officially disavow the principle of binding precedent, while at the same time they effectively espouse it’.

The ICJ Statute, for example, contains a provision that is often conceived as an exclusion of a formal stare decisis doctrine. In particular, Article 59 provides that ‘[t]he decision of the Court has no binding force except between the parties and in respect of that particular case’. However, in fact, past decisions are often relied on in subsequent decisions and they are highly persuasive to the Court. The Court itself justifies this practice as follows:

it is not a question of holding [the parties in the current case] to decisions reached by the court in previous cases. The real question is whether in this case, there is cause not to follow the reasoning and conclusions of earlier cases.

WTO tribunals also follow an analogous approach. In US - Shrimp (Article 21.5 - Malaysia), the Appellate Body stated that:

[a]dopted panel reports are an important part of the GATT acquis. They

33 August Reinisch, above n 30, 497.
are often considered by subsequent panels. They create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute.\footnote{38} In\textit{ United States - Stainless Steel (Mexico)}, the Appellate Body even ‘raises its tone a notch’ and suggests that a failure to do so by a panel might amount to a violation of the obligation to conduct an objective assessment of the matter before it.\footnote{39} Particularly, the Appellate Body held that:

\begin{quote}
[w]e are deeply concerned about the Panel's decision to depart from well established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system ...
\end{quote}

These WTO rulings seem to be fully consistent with Article 3.2 of the DSU, which clearly specifies that a central objective of the WTO dispute settlement system is to provide ‘security and predictability’ to the multilateral trading system.\footnote{40}

The approach taken by WTO tribunals has led commentators to a forceful, and to the current author, concrete, observation that even though the WTO has no\textit{} \textit{de jure} doctrine of precedent, it effectively applies such a doctrine in practice.\footnote{41}

Other international courts and tribunals have also effectively developed a\textit{} \textit{de facto} system of precedent.\footnote{42} In\textit{ Prosecutor v Kupreskic' et al}, the ICTY Trial Chamber held that:

\begin{quote}
general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific areas. This being so, it is only logical
\end{quote}

\footnotesize{
\begin{itemize}
\item \footnote{39} Armin von Bogdandy and Ingo Venzke, ‘Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12(5) \textit{German Law Journal} 979, 991-2.
\item \footnote{41} DSU, article 3.2.
\item \footnote{43} Gideon Boas, \textit{Public International Law: Contemporary Principles and Perspectives} (Edward Elgar, 2012) 113.
\end{itemize}
}
that international courts should rely heavily on such jurisprudence.\textsuperscript{44}

The trend also eloquently manifests itself in investment treaty arbitral decisions and has been discussed in a rich body of literature.\textsuperscript{45} In the annulment proceeding in \textit{Amco v Indonesia}, the \textit{ad hoc} Committee, for instance, reasoned that:

\textit{[n]either the decisions of the International Court of Justice in the case of the Award of the King of Spain nor the Decision of the Klockner \textit{ad hoc} Committee are binding on this \textit{ad hoc} Committee. The absence, however, of a rule of stare decisis in the ICSID arbitration system does not prevent this \textit{ad hoc} Committee from sharing the interpretation given to Article 52(1)(e) by the Klockner \textit{ad hoc} Committee.}\textsuperscript{46}

Apparently, Lord Denning’s succinct observation that ‘international law knows no rule of stare decisis’ reflects only one part of the more complex picture about the authority of prior decisions in international dispute settlement.\textsuperscript{47} The missing part is that while there is no \textit{de jure} doctrine of precedent as known in the common-law jurisdictions, international courts and tribunals in fact tend to rely on prior judicial decisions to decide the case at hand, suggesting that there may exist ‘at least’ a \textit{de facto} system of precedent in international law.\textsuperscript{48}

The existence of the \textit{de facto} system of precedent in international law seems to be rooted deeply in the need to enhance legal certainty and predictability. The indispensability of these values has been widely accepted in doctrine. Kaufmann-Kohler, for example, suggests that the rule of law can only emerge ‘if it is consistently applied so as to be predictable’.\textsuperscript{49} Similarly, to Lauterpacht, certainty and predictability are ‘the essence of the orderly administration of justice’ since the ultimate object of law as a tool ‘to secure order must be  

\textsuperscript{44}Kupreškić, Kupreškić, Kupreškić, Josipović, Papić and Santić (Kupreškić et al) (Judgement) (International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No IT-95-16-T, 14 January 2000) [537].


\textsuperscript{46}Amco Asia Corporation and Others v Republic of Indonesia (1993) 1 ICSID Reports 521, 444.


\textsuperscript{48}Gideon Boas, above n 43, 361.

\textsuperscript{49}Gabrielle Kaufmann-Kohler, ‘Is Consistency a Myth?’ in Emmanuel Gaillard and Yas Baniatemi (eds), \textit{The Precedent in International Arbitration} (Juris Publishing, 2008) 137, 144. See also Jeremy Waldron, ‘Stare Decisis and the Rule of Law: A Layered Approach’ (2012) 111(1) \textit{Michigan Law Review} 1, 31 (arguing that ‘the justification of stare decisis might depend to a large extent on the rule of law’).
defeated if a controversial rule of conduct may remain permanently a matter of dispute'.

Thus, the creation of rules that are consistent and predictable is characterised by Fuller as part of the ‘inner morality of law’, which is explained by Kaufmann-Kohler to imply that:

[w]hen making law, decision makers have a moral obligation to strive for consistency and predictability, and thus to follow precedents. It may be debatable whether arbitrators have a legal obligation to follow precedents - probably not - but it seems well settled that they have a moral obligation to follow precedents so as to foster a normative environment that is predictable.

Likewise, Brierly considers that reliance on prior decisions ‘is not wholly a matter of juridical theory or of the deliberate policy of judges’, but may acutely originate in ‘the natural desire of any court to maintain consistency in the application of law’. This brief survey into legal theory suggests that the preservation and enhancement of legal predictability and certainty might justify why international courts and tribunals often follow prior decisions. In essence, reliance on past decisions is a way to achieve legal certainty and predictability, which are in turn critical to the development of the rule of law and the organised administration of justice.

It is worth noting that scholars have increasingly revealed that the de facto system of precedent may not be confined within, but operate beyond, a single treaty regime. In a 2002 study, Miller conducted a close examination of the case law of nine international judicial bodies to determine whether each international judicial body refers to the decision of another. Miller found

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51 Lon L. Fuller, *The Morality of Law* (Yale University Press, Rev ed, 1969) 42 (emphasizing that ‘[t]he inner morality of law … embraces a morality of duty and a morality of aspiration. It … confront[s] us with the problem of knowing where to draw the boundary below which men will be condemned for failure, but can expect no praise for success, and above which they will be admired for success and at worst pitied for the lack of it’), cited in Gabrielle Kaufmann-Kohler, ‘Arbitral Precedent’, above n 30, 374.


54 See further, e.g., Jeremy Waldron, above n 59.


56 The international judicial bodies examined by Miller include the ICJ, the ECHR, the ECJ, the Inter-American Court of Human Rights (IACHR), WTO tribunals, the Iran - U.S Claims Tribunal, the ITLOS, the International Criminal Tribunal for the former Yugoslavia
that, up to the year 2000, there were 184 instances in which international tribunals refer to one another’s decisions, mostly to support their own reasoning. Accordingly, Miller concluded that ‘international tribunals do interact with one another, if not at the robust level found in domestic legal systems’. Consonantly, a close examination of various cases in which a cross-fertilisation has occurred between different courts and tribunals had enabled Brown to conclude that international courts and tribunals are willing, and in fact ready, to ‘look to the practice of other international courts on issues of procedure and remedies and draw on that practice’. Treves recently analysed the judgment of the Grand Chamber of the European Court of Human Rights in Mangouras, and noted that this is ‘a new valuable addition to the examples of cross-fertilisation between international courts and tribunals’. It seems now quite clear that the de facto stare decisis system may operate across regimes and potentially impact any subsequent pertinent tribunal applying international law. Notably, in these studies, judicial decisions are normally used to support tribunals’ reasoning, fill gaps, or clarify the meaning of a rule, rather than to directly change a meaning of a treaty rule.

B The Constraining Force of Judicial Decisions

The distinction between the de jure and de facto forms of the doctrine of precedent to some extent can provide a pragmatic basis for international courts and tribunals to rely on prior decisions. However, this pragmatic reliance on past decisions, as addressed by Boas, ‘leaves a sense of uncertainty about the meaning and scope of such developments and their impact on the sources of international law’. Regrettably, Boas went no further to clarify these ambiguities. One of the most unclear aspects in the de facto system of precedent is ‘what gives a prior holding its "binding" force? In a de jure system of precedent, the answer is straightforward: ‘the law itself’ which imposes a legal obligation on adjudicators to follow prior decisions. However, the answer is not so obvious in a de facto system of precedent. Bhala suggests that prior decisions are generally followed because ‘there is an unstated rebuttable presumption that the prior holding governs the new case’. This may be correct in a practical sense since it can reflect, at the facial level, the tendency to rely on prior decisions in international law. Nevertheless, to generalise that there is a presumption that new cases are

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57 Ibid 489, 499.
58 Ibid 498.
60 Mangouras v Spain (2012) 54 EHRR 25.
62 Nathan Miller, above n 55, 499; Gabrielle Marceau et al, above n 61, 530.
63 Gideon Boas, above n 43,114.
65 Ibid.
66 Ibid.
governed by prior cases is to grant too ambitious a role for prior decisions. The essential nature of a presumption is that it ‘can apply without the aid of proof and introduces a default position that trumps automatically in the absence of a rebuttal’.67 In this sense, prior decisions claim decisional exclusivity on an issue.68 However, legal reasoning in adjudication may be a more complex process with the involvement of various factors, especially the formal sources of international law. Regardless of how important prior decisions may potentially be, it is hard for them to claim an exclusive role in the reasoning process.

In fact, different to Bhala’s suggestion, prior decisions might constrain subsequent adjudicators and litigants in a gentler manner. The constraining force of judicial decisions seems to stem from, as observed by Reinisch, ‘the strength of the arguments’ expressed in the reasoning and findings of an award or decision.69 The more potent the arguments in prior decisions, the greater the argumentative effort that must be made by subsequent adjudicators and litigants to resist the authority of these arguments. Logically, if no compelling ground could be established to deviate from prior decisions, they should be adhered to. In this way, even though prior decisions do not create formal legalistic obligations, they may generate ‘argumentative burdens on the party seeking a different result from that reached in a pertinent previous decision’.70 Therefore, ‘if a comparable prior case exists and is referred to, a latter decisions-maker has less argumentative flexibility’.71 The operation of prior judicial decisions does not require a particular set of rules of precedent as in the case of a de jure stare decisis system. Instead, prior decisions in this particular case provide ‘a good reason or justification why the subsequent decision should be as argued, all other things being equal’.72 Notably, as argumentative burdens, prior decisions ‘can certainly be defeated by various means’, but they are a ‘real’ constraint because they require effort to deviate from them.73 The constraining force of prior decisions as argumentative burdens is similar, but less ambitious than a presumption since, unlike the latter, it does not claim decisional exclusivity on an issue. To borrow the figurative language of Jacob, argumentative burdens ‘add[] one further weight in an attempt to tip the scales, whereas the presumption is the string tying one side of the scales down and demanding to be cut loose by whoever wants to resist it’.74

Crucially, by imposing argumentative constraints, prior decisions do not appear to challenge the role of formal sources of international law. Surely, formal sources, as set out in Article 38 of the ICJ Statute, still remain as a fundamental aspect of international law.75 Nevertheless, they are, as succinctly

68 Ibid.
69 August Reinisch, above n 30, 509 (emphasis added).
71 Marc Jacob, above n 67, 1023.
72 Ibid 1024.
73 Ibid.
74 Ibid.
75 Marc Jacob, above n 67, 1011.
pointed out by Jacob:

not the only game in town when it comes to arguing and thus deciding cases; analogies, hypotheticals, consequentialist considerations, historical points, different kinds of logical or linguistic arguments, and the use of dictionaries, maps, graphs, or statistics, to name but a few, are all widespread modes of legal argument.76

Therefore, it would be a gross simplification to characterise the reasoning process as solely consisting of arguments that are based on formal sources. The process appears to be much richer; and even though vital, formal sources are only one element in the chain of reasoning.77 In this process, by exerting the authority in the form of argumentative constraints, judicial decisions do not replace the role of formal sources but supplement them to provide adjudicators adequate means to reach well-reasoned judgements. The functioning of judicial decisions in this manner seems to be particularly proper in a de facto stare decisis system, where judicial decisions cannot be employed to ‘disregard’ the relevant texts and the applicable law.78 Obviously, if used as argumentative constraints, rather than formal legalistic obligations, judicial decisions do not appear to confront the position of formal sources of international law.

Moreover, the understanding of the authority of prior decisions as argumentative burdens is also not contrary to the express exclusion of bindingness set out in Article 59 of the ICJ Statute. The purpose of this provision, as the ICJ’s predecessor said in 1926, ‘is simply to prevent legal principles accepted by the Court in a particular case from being binding upon another States or in other disputes’.79 In other words, each particular case must be decided individually and the reasoning and obligations of one case should not be slavishly transferred into another case without compelling explanation.80 It would be a stretch too far to read Article 59 as aiming to eliminate all potential impacts of prior judicial decisions on subsequent adjudicators and disputants. In the form of argumentative burdens, prior decisions, as noted above, are only a ‘small stone’ in the larger picture of legal reasoning.81 They do not try to impose definitive authority on a matter to the exclusion of all other arguments as formal legalistic obligations may do.82 Thus, the tender restriction created by prior decisions does not seem to fall into the ambit of the prohibition of bindingness specifically pronounced in Article 59.

Generally, even though prior decisions do not create formal legalistic obligations, they may be able to generate argumentative restraints on subsequent adjudicators and litigants. It is possible to deviate from these restraints, but it requires effort to do so. Also, as argumentative burdens, prior

76 Ibid.
77 Ibid.
78 Ibid 1009.
79 Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits) (1926) PCIJ (ser A) No 7, 19.
80 Marc Jacob, above n 67, 1018-9.
81 Ibid 1024.
82 Ibid 1019.
decisions do not seem to challenge the decisive roles of formal sources; nor do they appear to impose restriction in a way that is contrary to the express exclusion of bindingness in Article 59 of the ICJ Statute.

The constraining force of prior decisions might be the reasons why WTO Appellate Body in *US - Shrimp (Article 21.5 - Malaysia)* stated that ‘[a]dopted panel reports ... create legitimate expectations among WTO Members and, therefore, should be taken into account where they are relevant to any dispute’.83 The constraining force might also explain why the Appellate Body in *United States - Stainless Steel (Mexico)* expressed that ‘[w]e are deeply concerned about the Panel’s decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues’.84

III JUDICIAL DECISIONS AS SUPPLEMENTARY MEANS OF INTERPRETATION UNDER ARTICLE 32 VCLT

In light of the preceding analyses, it is obvious that judicial decisions undoubtedly merit a consideration by international tribunals. This section continues to discuss why judicial decisions should be considered by international tribunals on a clear theoretical framework rather than as a tacit technique under the *de facto* system of precedent.

International courts and tribunals have frequently referred to judgements of one another. However they are generally reluctant in expounding upon the theoretical foundation that enables them to do so.85 In this context, the rulings of the NAFTA Tribunal in *CCFT v US*,86 and the WTO panel and the Appellate Body in *EC - Chicken Cuts*,87 stand out from the general trend when they explicitly acknowledge that judicial decisions could be used as supplementary means of interpretation within the meaning of Article 32 of the VCLT.

Article 32 VCLT allows tribunals to have recourse to supplementary means of interpretation; and this was interpreted by the Tribunal in *CCFT v US* as

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86 The Canadian Cattlemen for Fair Trade (CCFT) v the United States of America (Award on Jurisdiction) (The Consolidated Arbitration under Chapter Eleven of the NAFTA and the UNCITRAL Arbitration Rules, 28 January 2008) (*CCFT v US*).

allowing adjudicators to also take into account judicial decisions. The reasoning of the Tribunal is revealing and thus worth scrutinising in some detail. The Tribunal first focused on the term ‘including’, and held that this term clearly indicates that there may be other supplementary means available to the interpreters, apart from the preparatory work of the treaty and the circumstances of its conclusion. Specifically, the Tribunal held that:

Article 32 VCLT permits, as supplementary means of interpretation, not only preparatory work and circumstances of conclusion of the treaty, but indicates by the word “including” that, beyond these two means expressly mentioned, other supplementary means may be applied.

This seems to be a compelling reading. Indeed, the prevailing view in international law is that the list of supplementary means, referred in Article 32, namely, preparatory work and circumstances of conclusion of the treaty, is not exhaustive. These means ‘serve as examples’, or at best, the ‘most commonly used’ ones, and ‘do not exclude other supplementary means of interpretation’. In a recent study, Villiger pointed out six other types of supplementary means that may be ‘included but not listed in Article 32’. Notably, ‘agreements and practice among a subgroup of parties to a treaty not falling into the ambit of authentic interpretation in Article 31’ are also considered by Villiger as supplementary means. Even though Villiger does not explain the meaning of the term ‘practice’, it might include judicial decisions related to the application and interpretation of the relevant agreements. It can be ascertained that by using the term ‘including’ in Article 32, the drafters of the VCLT seemed to intentionally ‘allow certain flexibility in the interpretative process’. The drafting history of the VCLT reveals that this was not an irrational choice but reflects a compromise of conflicting views as to whether and how the rules of interpretation should be included in the VCLT. Particularly, in the drafting process, some proposed to include principles, not rules, whereas others were concerned that putting any rule in the black-letter law might be too rigid and thus may hamper the judicial tasks. In this context, it was not surprising that the drafters had incorporated a

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88 Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 226.
89 CCFT v US, above n 72, [50] (emphasis in original).
91 Mark Eugen Villiger, above n 90, 445.
92 Richard Gardiner, above n 90, 302.
93 Mark Eugen Villiger, above n 90, 445.
94 Ibid 445 (emphasis in original). These include travaux préparatoires of an earlier version of the treaty; interpretative declarations made by treaty parties which do not qualify as reservations; documents not strictly qualifying as travaux préparatoires; the rational techniques of interpretation; agreements and practice among a subgroup of parties; and non-authentic translations of the authenticated text. Ibid 445-6.
95 Ibid 446 (emphasis added).
96 Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 225.
certain level of flexibility in the rules of interpretation as a way to achieve agreement.\textsuperscript{98} These analyses confirm that the Tribunal in \textit{CCFT v US} was correct in emphasising that the list of supplementary means in Article 32 is not exhaustive, and may include other supplementary means.

From this correct starting point, the Tribunal went on to reinforce the relevance of prior decisions by 'linking'\textsuperscript{99} Article 32 VCLT with Article 38 of the ICJ Statute.\textsuperscript{100} Even though the Tribunal did not explain why it referred to Article 38 of the ICJ Statute, its approach, as suggested by Fitzmaurice and Merkouris, might fit into the systemic method of treaty interpretation specified in Article 31(3)(c) VCLT, more exactly its customary equivalent since the US has not ratified the VCLT.\textsuperscript{101} Assessed against the framework of Article 31(3)(c), the Tribunal’s reference to Article 38 of the ICJ Statute seems to be a valid one. Indeed, the universal character of the ICJ Statute\textsuperscript{102} means that the rules contained in the ICJ statute are ‘applicable between the parties’.\textsuperscript{103} The remaining question is whether Article 38 is ‘relevant’ to the interpretation of Article 32.\textsuperscript{104} In this respect, the Tribunal appeared to address the relevancy when it stated that:

\begin{quote}
Article 38 [paragraph 1.d.] of the Statute of the International Court of Justice provides that judicial decisions are applicable for the interpretation of public international law as ‘subsidiary means’. Therefore, they must be understood to be also supplementary means of interpretation in the sense of Article 32 VCLT.\textsuperscript{105}
\end{quote}

Article 38 is widely accepted as outlining an informal list of sources of international law,\textsuperscript{106} with paragraphs 1(a), (b), and (c) being the formal sources, and paragraph 1(d) being the material or quasi-formal sources.\textsuperscript{107} Therefore, judicial decisions, which are listed in Article 38 (1)(d), are considered ‘not to create, but evidence, or indicate’ the existence of rules of international law.\textsuperscript{108} This is perhaps the relevance that the Tribunal was

\textsuperscript{98} Ibid.
\textsuperscript{100} \textit{CCFT v US}, above n 72, [50].
\textsuperscript{101} Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 228.
\textsuperscript{102} Article 93.1 of the UN Charter provides that ‘[a]ll Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice’. \textit{See Charter of the United Nations}, opened for signature 26 June 1945 (1945) 1 UNTS XVI (entered into force 24 October 1945) article 93.1.
\textsuperscript{103} Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 228.
\textsuperscript{104} Ibid.
\textsuperscript{105} \textit{CCFT v US}, above n 72, [50] (emphasis in original).
\textsuperscript{108} Malgosia Fitzmaurice and Panaos Merkouris, above n 85 229.
implying.\textsuperscript{109}

Thus, the Tribunal appeared to be correct in conceiving the relevance of Article 38 of the ICJ Statute. Nevertheless, there may be some issues with its wording.\textsuperscript{110} Specifically, it may not be entirely accurate to restate that ‘judicial decisions are applicable for the interpretation of public international law’ under Article 38(1)(d).\textsuperscript{111} Actually, Article 38 outlines the sources that the ICJ applies to resolve disputes; it does not deal with the interpretation of public international law.\textsuperscript{112} Similarly, the equation between the terms ‘subsidiary’ and ‘supplements’ may not be fully satisfactory. In the plain meaning, ‘subsidiary’ means ‘less important than but related to or supplementary to [something], whereas ‘supplementary’ means ‘completing or enhancing something’.\textsuperscript{113} The term ‘supplementary’ thus corresponds to the term complémentaire in French, rather than denoting ‘subsidiary’ means.\textsuperscript{114} Moreover, the drafting history of the VCLT reveals that the term ‘supplementary’ was also intentionally chosen to emphasise the nature of Article 32, that is, to complete the interpretation arrived at through Article 31, whereas the drafting history of the ICJ Statute indicates that the term ‘subsidiary’ was purposely used to highlight the subordination of judicial decisions to the formal sources.\textsuperscript{115} Thus, ‘subsidiary’ and ‘supplementary’ may not express the same meaning as read by the Tribunal.

Regardless of these weaknesses, the Tribunal did not seem to err in substance to conclude that judicial decisions can fall into the scope of article 32. As evidence of the existence of rules of international law, judicial decisions may certainly be able to shed useful light on the meaning of rules of international law arrived at through Article 31. They, therefore, might be reasonably used as supplementary means of interpretation within the meaning of Article 32.

Significantly, the Tribunal in \textit{CCFT v US} is not the only one in international law that grounds the use of judicial decisions on Article 32. The WTO panel and the Appellate Body in \textit{EC - Chicken Cuts}\textsuperscript{116} also follow an analogous approach. In this case, the panel had to decide whether the ECJ judgements in \textit{Dinter}\textsuperscript{117} and \textit{Gausepohl}\textsuperscript{118} could qualify as ‘circumstances of conclusion’ of the EC Schedule within the meaning of Article 32 VCLT.\textsuperscript{119} The panel started

\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} \textit{CCFT v US}, above n 72, [50] (emphasis in original).
\textsuperscript{112} Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 229.
\textsuperscript{113} Oxford Dictionary <http://oxforddictionaries.com>, cited in Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 229. See also Richard Gardiner, above n 90, 311.
\textsuperscript{114} Mark Eugen Villiger, above n 90, 446. See also Martins Paparinskis, ‘Investment Arbitration and the Law of Countermeasures’ (2008) \textit{British Yearbook of International Law} 264, 348.\textsuperscript{115} Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 229.
\textsuperscript{117} \textit{Dinter v Hauptzollamt Köln-Deutz} (C-175/82) [1983] ECR 969.
\textsuperscript{118} \textit{Fleisch GmbH v Oberfi-nanzdirektion Hamburg} (C-33/92) [1993] ECR I-3047.
its reasoning by citing *EC - Computer Equipment*,\(^ {120}\) in which the Appellate Body already stated clearly that Members’ classification *practice* and *legislation* that were applicable at the time of the Uruguay Round should have been taken into consideration as ‘circumstances of conclusion’ under Article 32.\(^ {121}\) On this basis, the panel further articulated that the list of the Appellate Body in *EC - Computer Equipment* was not exhaustive, but merely linked to the particular facts of that case, implying that ‘other unlisted items may also qualify’ as ‘circumstances of conclusion’.\(^ {122}\) In particular, the panel reasoned that:

the Appellate Body was merely making a pronouncement on the basis of the facts that were available to it in that case rather than seeking to provide an exhaustive list of items qualifying as “circumstances of conclusion” in all cases. This would suggest that a valid distinction cannot be drawn between, on the one hand, EC legislation and, on the other hand, ECJ judgements for the purposes of Article 32 of the *Vienna Convention*.\(^ {123}\) Accordingly, the Panel considers that court judgements, such as the *Dinter* and *Gausepohl* judgements, may be considered under Article 32...\(^ {124}\)

The Appellate Body essentially agreed with the panel on the above issues, and provided some general theoretical considerations as to whether court judgements fall into the scope of article 32. Noticeably, the Appellate Body stated that:

> Article 32 does not define exhaustively the supplementary means of interpretation to which an interpreter may have recourse. It states only that they include the preparatory work of the treaty and the circumstances of its conclusion. Thus, an interpreter has a certain flexibility in considering relevant supplementary means in a given case so as to assist in ascertaining the common intentions of the parties.\(^ {125}\)

This statement suggests that the Appellate Body did in fact follow the prevailing view in international law, as discussed above, as to the non-exhaustive nature of the list of supplementary means and the inherent flexibility in Article 32. This seems to be a desirable endorsement since it correctly emphasises that Article 32 should not be read in an ‘inflexible or rigid manner’.\(^ {126}\) Given the awareness of the inherent flexibility in Article 32, it was not surprising that the Appellate Body then ‘share[d] the Panel’s

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121 Ibid [86], [94].
123 This conclusion would seem to be particularly valid in relation to the present case where the ECJ judgements in question interpret EC legislation. In our view, it would be an odd situation if such legislation could be considered under Article 32 of the *Vienna Convention* but not court judgements, which interpret that legislation’. Panel Report, *EC - Chicken Cuts*, WTO Doc WT/DS269/R, WT/DS286/R, [7.391], footnote 681.
124 Ibid [7.391].
consideration that judgments of domestic courts are not, in principle, excluded from consideration as "circumstances of the conclusion" of a treaty if they would be of assistance in ascertaining the common intentions of the parties for purposes of interpretation under Article 32'.

Nevertheless, the Appellate Body clarified that court judgments which basically deal with a specific dispute, by their nature, are less relevant than legislation, which is of general application.

Observably, in both CCFT v US and EC - Chicken Cuts, the NAFTA and WTO tribunals have recognised the possibility for judicial decisions to be used as supplementary means of interpretation under Article 32. The difference between them is that while the Tribunal in CCFT v US viewed judicial decisions as falling into the non-defined notion of supplementary means, the panel and the Appellate Body in EC - Chicken Cuts perceived judicial decisions as an element of 'circumstances of conclusion'. However, this difference might not indicate a disagreement as to the interpretative relevance of judicial decisions, but seems to reinforce a widely accepted point that there is some flexibility intrinsic in Article 32. The ILC, for example, stated to this effect in its 1966 Report that 'recourse to [supplementary means] is discretionary rather than obligatory and the interpretation of documents is to some extent an art, not an exact science'. Similarly, Gardiner observed that 'a literal approach to treaty interpretation has not been applied to this element [that is, Article 32] of the Vienna rules'. This might imply that what kinds of, and to what extent, instruments and documents are relevant as supplementary means under Article 32 will be 'a matter of judgment and finesse', and depend on the issue and the circumstances, rather than being subjected to a mechanical and formalistic prescription. Therefore, the divergence between the NAFTA Tribunal and the WTO tribunals in justifying the employment of judicial decisions seems to fall within the permissible scope of the flexibility inherent in Article 32. The more significant issue is that they all agreed that judicial decisions may be used as supplementary means of interpretation under Article 32.

The tribunals in CCFT v US and EC - Chicken Cuts thus can be seen as pioneering a new trend in international law in which judicial decisions may be utilised in the interpretative process, not as a tacit technique, but based on a clear theoretical framework of Article 32 VCLT. If Article 32 indeed

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128 Ibid.
129 Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 233.
130 'Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session' [1966] II Yearbook of International Law Commission 165, 218[4]. See also Panos Merkouris, 'Introduction: Interpretation is a Science, is an Art, is a Science' in Malgosia Fitzmaurice, Phoebe Okowa, and Panos Merkouris (eds), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on (Martinus Nijhoff, 2010) 1, 1-16.
131 Richard Gardiner, above n 90, 303.
132 Henrik Horn and Robert L. Howse, above n 131, 32.
133 Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 233. This trend has been increasingly supported in doctrine. See Malgosia Fitzmaurice and Panaos Merkouris,
‘represented the crystallization of an emerging rule’,134 the rulings in CCFT v US and EC - Chicken Cuts seem to make a meaningful clarification as to a possible application of that emerging rule.

While the preceding analysis suggests that the utilisation of judicial decisions in international adjudication has already been an existing practice, there seems to be, as explained below, significant added benefit in qualifying that practice under Art.32.

First, this approach provides a channel, i.e. Article 32, by which the relevance of judicial decisions could be reinforced in the interpretative process. Even though the consideration of judicial decisions is at the interpreters’ discretion,135 the qualification of judicial decisions as supplementary means suggests that it remains possible for judicial decisions to be taken into account in the interpretative process. This approach effectively responds to the longstanding and difficult question in international law as to whether judicial decisions may be relevant to subsequent tribunals. In essence, even though judicial decisions are not binding, they can be considered by subsequent tribunals to the extent that ‘they throw useful light on’ the case at hand.136

Second, grounding the use of judicial decisions on Article 32 VCLT would create a more principled approach.137 Indeed, instead of being employed pragmatically, the use of judicial decisions under the current approach is institutionally framed within the scope of Article 32. Although Article 32 may contain some built-in leeway, constraints may not entirely be absent.138 For examples, it has been widely accepted that supplementary means only provide a complement,139 not an alternative, to the means provided in Article 31;140 and moreover, Article 32 may not be used to displace an interpretation based on the primary means specified in Article 31.141 Clearly, the use of judicial decisions on the basis of Article 32 is more disciplined than that under the de facto stare decisis doctrine.

Third, framing the use of judicial decisions on Article 32 is also a way to ensure a proper use of judicial decisions. It is widely accepted that judicial decisions should not replace or undermine the role of formal sources of international law. This problem would not arise if judicial decisions are utilised as supplementary means under Article 32. This is because, as

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135 ‘Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session’ [1966] II Yearbook of International Law Commission 165, 218 [4].
136 CCFT v US, above n 72, [51].
137 Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 233.
138 For a discussion on possible constraints in this regard, Richard Gardiner, above n 90, 320-1; Mark Eugen Villiger, above n 90, 447; Isabelle Van Damme, above n 90, 306.
139 Mark Eugen Villiger, above n 90, 447.
140 Isabelle Van Damme, above n 90, 306.
141 Henrik Horn and Robert L. Howse, above n 131, 32.
complementary means to complete the interpretation reached through Article 31, judicial decisions do not have the capacity to claim exclusive authority on a matter. They, at best, can serve as a useful interpretative aid, rather than challenge the governing role of formal sources of international law.

Fourth, the application of Article 32 is discretionary; and thus it is a particularly attractive legal framework. The consideration of judicial decisions would depend on their relevance, and the circumstances, which are subject to a discretionary determination by the interpreters. Article 32 does not impose on the interpreters an inescapable obligation to take judicial decisions into account.

Fifth, the utilisation of judicial decisions under Article 32 VCLT appears to have a solid basis in the DSU, the WTO jurisprudence and international law. Indeed, as to the methods of interpretation, Article 3.2 of the DSU states that WTO law will be clarified in accordance to the ‘customary rules of interpretation of public international law’. Articles 31 and 32 VCLT have traditionally been considered as customary international law; and this has been forcefully confirmed by the Appellate Body. Indeed, in US - Gasoline, the Appellate Body stated that Article 31 VCLT ‘has attained the status of a rule of customary or general international law’. In Japan - Alcoholic Beverages II, the Appellate Body went further and firmly confirmed that ‘[t]here can be no doubt that Article 32 of the [VCLT] has also attained the same status’. Thus, if the use of judicial decisions is grounded on the framework of Article 32 VCLT, it can certainly benefit from the legitimacy and credibility provided by Article 32 VCLT which has gained a status of a customary international rule.

In general, judicial decisions can be used in the interpretative process, ‘not tacitly, but within a clearly-defined theoretical framework’. This shift from the de facto stare decisis to Article 32 may not alter the weight of judicial decisions. However, it can certainly increase the discipline, legitimacy, and appropriateness in the use of judicial decisions in international law.

142 DSU, article 3.2.
146 Malgosia Fitzmaurice and Panaos Merkouris, above n 85, 233.
Obviously, judicial decisions be considered by international tribunals, and that should be done on a clear theoretical framework provided by Article 32 VCLT rather than as a tacit technique under the de facto system of precedent. The remaining question is how this could be done, especially in the WTO and RTA context. To answer this question, this section discusses how, in multiple proceedings, WTO and RTA tribunals could use judicial decisions of the other forum as supplementary means of interpretation under Article 32 VCLT. Article 32 VCLT itself provides useful starting points. It specifies that supplementary means could serve to confirm the interpretation reached by Article 31 or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous, obscure; or leads to a result which is manifestly absurd or unreasonable. The following sections will further elaborate these techniques in the context of WTO and RTA dispute settlement.

A Judicial Decisions as Means to Confirm the Interpretation Reached by Article 31 VCLT

From the language of Article 32 VCLT, one of the possible roles for judicial decisions is to confirm the meaning resulting from the application of Article 31. Specifically, if the obligatory and authentic means in Article 31 have generated an outcome, its validity may be established by resorting to supplementary means in Article 32, including judicial decisions. Functioning in this particular manner, judicial decisions seem to play a truly ‘secondary and supportive’, rather than primary, role in treaty interpretation because they do not independently decide the meaning of the rules under interpretation, but only establish the truth or correctness of the meaning produced by the means in Article 31. It may be legitimate to question why, if the meaning was already clear from the application of the general rule of interpretation, was it really necessary to resort to supplementary means, including judicial decisions? The answer seems to lie in the nature of the confirmatory process which may be more meaningful than merely repeating the obvious. As seen from the dictionary definition, ‘confirm’ means to ‘establish the truth or correctness of (something previously believed or suspected to be the case)’. Gardiner succinctly captures the solidity added by the confirmatory process in the following useful analogy:

[i]n a transitive mood, I may contact someone to confirm a provisional booking which I have made. I am actually going a little further than I had when originally booking because I am making firm something which previously was not. In an interrogative mode, I may telephone an airline or hotel asking them to confirm that they have received my internet booking and payments, and are keeping my reservation. I expect an affirmative response, but lurking is the fear that something may have gone wrong, in which case I have to think again. Both situations show the

147 Mark Eugen Villiger, above n 90, 447.
148 Richard Gardiner, above n 90, 308.
149 Ibid 323.
150 Oxford Dictionaries
comparable potential in the Vienna Convention’s usage of ‘confirm’.\footnote{Richard Gardiner, above n 90, 321.}

Confirmation is thus not an insignificant interpretative process. If a tribunal finds that the interpretation reached independently on the basis of Article 31 is also supported by prior judicial decisions, the tribunal can be more confident that it has produced a valid interpretation. Moreover, as observed by Sbolci, a judgment by an international tribunal in which the reasons for interpreting a treaty rule in a particular way are not only established by the means provided under Article 31 but also confirmed by other supplementary means will be ‘more convincing’ for the parties in dispute, and thus likely induce them to respect the ruling.\footnote{Luigi Sbolci, above n 139, 162.} Importantly, confirmation also implies the possibility of not confirming.\footnote{Richard Gardiner, above n 90, 309.} Even though a result arrived at by the primary means in Article 31 may prevail over the meaning suggested by the supplementary means,\footnote{Mark Eugen Villiger, above n 90, 447; Henrik Horn and Robert L. Howse, above n 131, 32.} it appears reasonable to believe that a non-confirmation might lead the interpreters to ‘reconsider[ing] the application of the general rule to find a permissible interpretation which is then confirmed’.\footnote{Richard Gardiner, above n 90, 309. See also Stephen M. Schwebel, ‘May Preparatory Work be Used to Correct rather than Confirm the “Clear” Meaning of a Treaty Provision’ in Stephen M. Schwebel (ed), Justice in International Law: Further Selected Writings (Cambridge University Press, 2011) 289, 289-96.} Furthermore, the confirmatory process may reveal the unperceived ambiguity (or obscurity of meaning, manifest absurdity or unreasonableness of result), and thus transfers the process from a potential confirming role to one of determining the meaning.\footnote{Richard Gardiner, above n 90, 309.} Clearly, the usefulness of confirmation ‘should not be overlooked’.\footnote{Luigi Sbolci, above n 139, 162.}

The suggestion that judicial decisions might play a confirmatory role is not entirely novel. In practice, international courts and tribunals often apply the ‘cross-checking’ technique to reinforce a position on an issue that they have independently established. For example, in Mangouras, after performing an autonomous interpretation of what constitutes a reasonable bond,\footnote{Mangouras v Spain (2012) 54 EHRR 25, 928.} the ECHR made a reference to the jurisprudence of the ITLOS Tribunal.\footnote{Ibid 929.} The ECHR was aware of the fact that the Tribunal’s jurisdiction differs from its own; it, nevertheless, found that the Tribunal ‘applies similar criteria’ in assessing the amount of security.\footnote{Ibid (emphasis added).} It is apparent that the ECHR referred to the jurisprudence of the ITLOS Tribunal to confirm the correctness of its own interpretation on the constituting elements of a reasonable bond. Similarly, in Gas Natural, the tribunal emphasised that:

it has rendered its decision independently, without considering itself bound by any other judgments or arbitral awards. Having reached its conclusions, however, the Tribunal thought it useful to compare its conclusion with the conclusions reached in other recent arbitrations conducted pursuant to the ICSID Arbitration Rules and arising out of
claims under contemporary bilateral investment treaties. We summarize a few of these decisions here, and confirm that we have not found or been referred to any decisions or awards reaching a contrary conclusion.\textsuperscript{161}

Notably, WTO case law has also been referred to by international tribunals to support a position that they have independently reached. For example, in determining the conditions for a discrimination claim under the national treatment clause contained in the Mongolia-Russia BIT, the tribunal in \textit{Paushok} \textsuperscript{162} ‘is of the view’ that ‘the sectors covered should relate to competitive and substitutable products’.\textsuperscript{163} The tribunal pointed out that this is ‘an expression regularly used in WTO/GATT cases’.\textsuperscript{164} Even though the tribunal was ‘aware of the differences between the Treaty and the one governing the WTO’, it considered that ‘such a requirement is a reasonable one to apply when considering allegations of discrimination’.\textsuperscript{165} Evidently, the tribunal referred to WTO decisions to reinforce the rationality of its view on the conditions for a discrimination claim. The convincing reasoning of WTO cases on this issue seems to be the reason why the tribunal chose to refer to them.

None of the tribunals in \textit{Mangouras}, \textit{Gas Natural}, or \textit{Paushok} stated the legal basis for their reference to the case law of other tribunals. Nevertheless, it is arguable that the cross-checking technique utilised by these tribunals might fall squarely within the confirmatory role under Article 32. Indeed, the tribunal in \textit{CCFT v US} justified its reliance on the jurisprudence of other tribunals exactly in this direction and stated its reasoning as follows:

\begin{quote}
after a review of the relevant decisions in other cases as supplementary means of interpretation (Article 32 VCLT) it can thus be concluded that some of these decisions provide support to the interpretation the present Tribunal has chosen in earlier sections above of this Award, and that none of these decisions has been found to contradict this Tribunal’s interpretation.\textsuperscript{166}
\end{quote}

These analyses suggest that when an RTA tribunal interprets the incorporative RTA rules, it might refer to WTO jurisprudence on the equivalent norms to confirm the correctness of its interpretation. If the RTA tribunal finds support from WTO jurisprudence, it essentially follows the interpretation of WTO tribunals. Conversely, if the interpretation by the RTA tribunal is inconsistent with WTO jurisprudence, there is no rule of international law that requires the RTA tribunal to follow the interpretation made by WTO tribunals. Nevertheless, it might be reasonable and logical for the RTA tribunal to reconsider its position arrived at through the application of the general rule of interpretation. In doing so, the RTA tribunal might need to set out factors that

\begin{itemize}
\item[]\textsuperscript{161} \textit{Gas Natural SDG (S.A. v Argentina) (Jurisdiction)} (ICSID Arbitral Tribunal, Case No ARB/03/10, 17 June 2005) [36] (emphasis added).
\item[]\textsuperscript{162} Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v Mongolia (Award on Jurisdiction and Liability) (UNCITRAL Tribunal, 28 April 2011) (\textit{Paushok}) [313]-[315].
\item[]\textsuperscript{163} Ibid [315].
\item[]\textsuperscript{164} Ibid. The tribunal referred to WTO/GATT case law generally without citing specific decisions. See further Gabrielle Marceau et al, above n 61, 519.
\item[]\textsuperscript{165} \textit{Paushok}, above n 143, [315].
\item[]\textsuperscript{166} \textit{CCFT v US}, above n 72, [223] (emphasis added).
\end{itemize}
ensure a different interpretative outcome. This is perhaps the manner in which decisions of WTO tribunals may impose, not a formal legalistic obligation, but an argumentative burden on subsequent RTA tribunals. The constraints may be soft, but appear sufficient to minimise unreasonably inconsistent interpretation produced by RTA tribunals on equivalent norms.

B Judicial Decisions as Means to Determine the Meaning

The other possible role for supplementary means envisioned in Article 32 is to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous, obscure; or leads to a result which is manifestly absurd or unreasonable. The dictionary definition indicates that ‘ambiguous’ could be understood as ‘open to more than one interpretation; not having one obvious meaning’.167 This is perhaps the most common situation envisaged by Article 32 because a treaty term may not have a single ordinary meaning, but point in different directions.168 However, ambiguity under Article 32 may have a narrower scope than that in the dictionary sense since Article 32 refers to ambiguity that still remains after the application of the general rule of interpretation provided in Article 31. Various primary means such as the context, subsequent agreements, object and purpose, etc. may help to eliminate any dictionary ambiguity without the need to resort to supplementary means. The other qualifying condition is ‘obscure’, which may be defined as ‘not discovered or known about; uncertain’.169 Obscurity appears to be a less common situation than ambiguity; and in practice, international tribunals often perceive the existence of obscure meaning by contrasting provisions that are ‘clear’ with those ones that are ‘uncertain’.170 For example, in Prosecutor v Dusko Tadic, the tribunal stated that ‘[a]s the wording of article 5 is clear and does not give rise to uncertainty ... there is no need to rely upon those statements’.171 As to the last condition, it is hard to find a particular instance in which the application of the general rule of interpretation produces a ‘manifestly absurd or unreasonable’ result.172 Nevertheless, this condition is sometimes used as an aid to exclude certain meanings in determining the ordinary meaning of a term.173

Clearly, ambiguity, and to a lesser extent, obscurity that remain after the application of the general rule of interpretation leave a ‘generous scope’ for resort to supplementary means, including judicial decisions.174 Indeed, if the above qualifying conditions are satisfied, Article 32 seems to provide what is in effect a ‘replacement’ of the inadequate outcome achieved by the general

167 Oxford Dictionaries
168 Richard Gardiner, above n 90, 328.
169 Oxford Dictionaries
170 Richard Gardiner, above n 90, 329.
172 Richard Gardiner, above n 90, 329.
173 Ibid. For example, the Tribunal in Champion Trading Company held that ‘[t]he Tribunal does not rule out that situation might arise where the exclusion of dual nationals could lead to a result which was manifestly absurd or unreasonable (Vienna Convention, article 32(b)’. See Champion Trading Company Ameritrade International, Inc. & Others v Arab Republic of Egypt (Jurisdiction) (2004) 19 ICSID Review-Foreign Investment Law Journal 275, 288.
174 Richard Gardiner, above n 90, 328.
rule with an interpretation suggested by supplementary means.\textsuperscript{175} Although both confirmation and determination are incorporated under the same heading ‘supplementary means’, to determine the meaning is essentially to perform a primary interpretative function, whereas confirmation only plays a secondary and supportive role in the interpretative process.\textsuperscript{176} Thus, Villiger appears to be correct in suggesting that Article 32 allows the utilisation of supplementary means to determine the meaning ‘in most situations and does not restrict the manner in which they may be employed’.\textsuperscript{177} In other words, it is hard to ‘imagine’ a situation in which supplementary cannot be used to assist the determination of the meaning.\textsuperscript{178} The following sections will further examine the common ways in which international tribunals have utilised judicial decisions to determine the meaning, and ascertain their potential relevance in the context of the WTO and RTAs.

1 Clarify

Similar to the confirmatory role, the use of judicial decisions to determine the meaning is not an unknown technique in international dispute settlement. One of the most common practices is the employment of judicial decisions of other tribunals that interpreted similar or identical provisions in order to clarify the ambiguous or uncertain legal questions under interpretation.\textsuperscript{179} In this technique, the equivalent features between norms play a crucial role because they provide a useful interface for cross-reference and make the decisions of other tribunals more relevant to the interpretation of the rules at hand. The tribunal in \textit{Eureko v Poland},\textsuperscript{180} for example, had effectively employed this interpretative method.\textsuperscript{181} In this case, the tribunal had recourse to prior arbitral decisions concerning the interpretation of umbrella clauses under the Switzerland - Pakistan and the Switzerland - Philippines BITs in order to make clear the function and meaning of a comparable clause in the Netherlands - Poland BIT.\textsuperscript{182} The tribunal appeared to perform a comprehensive and credible interpretation. Particularly, the majority of the tribunal not only relied on the ordinary meaning of the clause under interpretation and the principle of effective interpretation, but also made recourse to other investment awards,\textsuperscript{183} noting that it ‘finds the foregoing analyses of the Tribunal in \textit{SGS v The Republic of the Philippines} ... cogent and ‘convincing’.\textsuperscript{184} Even though the tribunal paid intensive consideration to

\begin{itemize}
\item \textsuperscript{175} Ibid.
\item \textsuperscript{176} Ibid.
\item \textsuperscript{177} Mark Eugen Villiger, above n 90, 447.
\item \textsuperscript{178} Ibid.
\item \textsuperscript{179} Jacob, above n 36, 1012; Stephan W. Schill, ‘System-building in Investment Treaty Arbitration’, above n 45, 1097-8.
\item \textsuperscript{180} \textit{In the Matter of an Ad Hoc Arbitration under the Agreement between the Kingdom of the Netherlands and the Republic of Poland on Encouragement and Reciprocal Protection of Investment (Eureko B.V. v Republic of Poland) (Partial Award) (UNCITRAL Arbitral Tribunal, 19 August 2005).}
\item \textsuperscript{181} For a detail discussion, see Stephan W. Schill, ‘System-building in Investment Treaty Arbitration’, above n 45, 1097-8.
\item \textsuperscript{182} Ibid 1098.
\item \textsuperscript{183} Ibid.
\item \textsuperscript{184} \textit{Eureko B.V v Republic of Poland (Partial Award) (UNCITRAL Arbitral Tribunal, 19 August 2005) [257].}
\end{itemize}
the interpretation of the umbrella clause by the tribunal in *SGS v The Republic of the Philippines*, it did not adopt that interpretation as a binding precedent, but performed an independent interpretation of the Dutch - Polish BIT.\(^{185}\) Apparently, the tribunal did not use prior arbitral awards as a primary interpretative tool, but only as an additional means that provides interpretative aid to the determination of the meaning of the umbrella clause. The use of judicial decisions in this particular manner seems to fall squarely into the scope of the determining role of judicial decisions under Article 32.

Similarly, in *Pope & Talbot*,\(^{186}\) the NAFTA tribunal had also employed GATT jurisprudence to clarify an uncertain legal question under interpretation. In this case, Canada argued that a national treatment violation under NAFTA Article 1102 ‘can be found only if the measure in question disproportionately disadvantages the foreign owned investments or investors’.\(^{187}\) Canada acknowledged that this disproportionate disadvantage test does not appear in the NAFTA text, and asserted that it originates in WTO/GATT precedents.\(^{188}\) The tribunal first reviewed WTO/GATT cases cited by Canada, and rejected Canada’s assertion that these cases support its position on disproportionate disadvantage.\(^{189}\) However, what is striking is that the tribunal then examined GATT decisions in *United States - Section 337 of the Tariff Act of 1930*,\(^{190}\) and *United States - Measures Affecting Alcoholic and Malt Beverages*\(^{191}\) to prove that cases indeed exist for ‘the contrary position’.\(^{192}\) Specifically, as noted by the NAFTA panel, GATT panels in these decisions already stated that national treatment is to be accorded to each individual product,\(^{193}\) and forcefully rejected the notion to balance treatment between different sets of products since that interpretation ‘would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III’.\(^{194}\) In light of these GATT rulings, the tribunal in *Pope

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\(^{185}\) Ibid [67].

\(^{186}\) *Pope & Talbot v Canada (Award on the Merits of Phase 2)* (NAFTA Chapter 11 Arbitral Tribunal, 10 April 2001) (*Pope & Talbot*).

\(^{187}\) Ibid [43]. Specifically, as asserted by Canada, a violation of NAFTA Article 1102 only exists if the size of the group of Canadian owned investments that are accorded the same treatment as the Investor is smaller than the size of the group of Canadian owned investments receiving more favourable treatment than the Investment. Ibid [44].

\(^{188}\) Ibid [45].

\(^{189}\) Ibid [46]-[67].


\(^{192}\) *Pope & Talbot*, above n 167, [68].

\(^{193}\) Ibid, citing GATT Panel Report, *United States - Section 337 of the Tariff Act of 1930*, GATT Doc L/6439 - 36S/345, [5.13]-[5.14] (the panel stated that ‘the “no less favorable” treatment requirement of Article III.4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products’); and GATT Panel Report, *United States - Measures Affecting Alcoholic and Malt Beverages*, GATT Doc DS23/R - 39S/206, [5.6] (the panel stated that ‘the fact that only approximately 1.5 per cent of domestic beer in the United States is eligible for the lower tax rate does not immunize this United States measure from the national treatment obligations of [GATT] Article III’).

& Talbot then rejected the disproportionate disadvantage test since it would ‘hamstring foreign owned investments seeking to vindicate their Article 1102 rights’, and thus be inconsistent with the objective of NAFTA.\textsuperscript{195}

Obviously, the tribunal in Pope & Talbot had effectively utilised GATT decisions to clarify the uncertain legal question as to whether the disproportionate disadvantage test is consistent with NAFTA Article 1102. Like the tribunal in Eureko v Poland, the NAFTA tribunal also did not state the legal basis of its reference to GATT cases. However, in light of the previous analysis, such a utilisation of judicial decisions might be justified under the framework of Article 32 VCLT.

B Analogising with Prior Decisions

Analogising with prior decisions is another common way in which international tribunals have utilised judicial decisions.\textsuperscript{196} The tribunal in AES Corporation v Argentina, for example, followed this approach and stated clearly that even though prior decisions are not binding upon it, they could be considered as a source of ‘comparison and ... of inspiration’.\textsuperscript{197} Specifically, the tribunal characterised that:

\begin{quote}
[0]ne may even find situations in which, although seized on the basis of another BIT, ... a tribunal has set a point of law which, in essence, is or will be met in other cases whatever the specificities of each dispute may be. Such precedents may also be rightly considered, at least as a matter of comparison and, if so considered by the Tribunal, of inspiration.\textsuperscript{198}
\end{quote}

The essence of this technique is that if a term was credibly interpreted by a previous tribunal in a particular way, the interpretation of that tribunal could serve as an illumination for the subsequent tribunal to ascertain the meaning of a comparable term. In this way, even though the subsequent tribunal does not treat the previous ruling as a formal legal obligation, it in effect integrates the reasoning of the earlier decision into its own decision,\textsuperscript{199} and performs an interpretation in a normatively consistent manner with the earlier decision.\textsuperscript{200} It is obvious that when used as a source for analogy, judicial decisions could assist the determination of the meaning by suggesting how the subsequent tribunal should interpret a comparable treaty term.

The decision of the NAFTA Panel in Broom Corn Brooms\textsuperscript{201} can succinctly

\textsuperscript{195} Pope & Talbot, above n 167, [72].
\textsuperscript{197} AES Corporation v The Argentine Republic (Jurisdiction) (ICSID Arbitral Tribunal, Case No ARB/02/17, 26 April 2005) [31].
\textsuperscript{198} Ibid.
\textsuperscript{200} N’Gunu N. Tiny, ‘Judicial Accommodation: NAFTA, the EU and the WTO’ (Working Paper No 04/05, New York University School of Law, 2005) 23.
\textsuperscript{201} In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico (Final Report) (Panel Established under Chapter Twenty of the NAFTA, Secretariat File No USA-97-2008-01, 30 January 1998) (Broom Corn Brooms). For a detail analysis of this ruling, see, e.g., N’Gunu N. Tiny, above n 205, 17-20, 22-8; David A. Gantz, ‘Regional Trade Agreements’ in Daniel Bethlehem et al, The Oxford Handbook of International Trade Law (Oxford University Press, 2009) 238, 262-3.
illustrate these points, particularly in the context of the WTO and RTAs. In this case, in order to elucidate the concept ‘like product’, the NAFTA Panel had followed closely WTO jurisprudence, specifically, the definitions of ‘like product’ in GATT/WTO decisions.\(^{202}\) The Panel openly acknowledged at the outset of its reasoning that:

\[
\text{[i]n attempting to perform this analysis, the Panel carefully examined the way in which the “like product” concept had been defined in prior GATT/WTO decisions, and noted, in particular the degree of discretion accorded to governments and panels in applying those definitions.}^{203}\]

In particular, the Panel noted that in \textit{Japan - Alcoholic Beverages II},\(^{204}\) a factor test has been used to define ‘like product’,\(^{205}\) which emphasises that ‘the term “like product” should be interpreted on a case by case basis’, and that different criteria could be used ‘in order to establish likeness, such as the product’s properties, nature and quality, and its end-uses; consumers’ tastes and habits, which change from country to country; and the product’s classification in nomenclatures’.\(^{206}\) The Panel also noted that the WTO Appellate Body in the same case explained that the application of the factor test is not mechanical, but ‘will always involve an unavoidable element of discretionary judgment’.\(^{207}\) Lastly, the Panel found that in the view of the WTO Appellate Body, the definition of likeness can vary from WTO provision to WTO provision according to the legal context in which it is being used.\(^{208}\) On the basis of these observations, the Panel then reached its own finding that:

\[
\text{whether the analysis offered by the ITC in support of its ultimate conclusion would have been erroneous in one or more respects if it had been offered in support of the legal conclusion that plastic brooms were “not like” broom corn brooms - would depend on whether the ITC’s appraisal and weighting of the various factors was within the range of discretion permitted by the case-by-case approach and the multi-factor definitions employed in the GATT/WTO definitions of “like product.”}^{209}\]

Evidently, the NAFTA Panel had intensively utilised the GATT/WTO definitions of ‘like product’ to make ‘clear’, to use exactly the word of the Panel,\(^{210}\) the meaning of the same term under NAFTA law. Even though the Panel still performed an independent analysis, the WTO reasoning had become the cornerstone on the way the Panel reaching its own conclusion. It is observable that when the WTO reasoning is modelled by an RTA tribunal, it may not only have the capacity to work as an interpretation aid, but may also


\(^{203}\) Panel Report, \textit{Broom Corn Brooms}, above n 189, [66].


\(^{205}\) Panel Report, \textit{Broom Corn Brooms}, above n 189, [66].


\(^{208}\) Ibid.

\(^{209}\) Panel Report, \textit{Broom Corn Brooms}, above n 189, [66].

\(^{210}\) Ibid [67].
enhance the consistency between the interpretations made by WTO and RTA tribunals. In this case, for example, the NAFTA Tribunal in fact read the term ‘like product’ in conformity with WTO jurisprudence on this issue.\textsuperscript{211}

Another case at the WTO and RTA nexus in which WTO decisions were utilised as ‘guidance by analogy’\textsuperscript{212} is the \textit{Decision of the Binational Panel in Accordance with Article 1904 of the North American Free Trade Agreement}.\textsuperscript{213} In this case the US Investigating Authority (IA) argued that it could use ‘facts available’ in its dumping investigation because of the failure to cooperate by the producers during the course of its investigation.\textsuperscript{214} The claim of non-cooperation was grounded on the fact that certain producers did not ‘come forward with information’.\textsuperscript{215} This argument was rejected by the panel. Remarkably, in doing so the NAFTA panel had effectively integrated WTO panel interpretations of Article 6.8 of the Anti-Dumping Agreement into its analysis. Specifically, the panel noted that in \textit{US - Hot-Rolled Steel},\textsuperscript{216} and \textit{Argentina - Ceramic Tiles}\textsuperscript{217} the WTO panels already stated that the ‘facts available’ under Article 6.8 of the Anti-Dumping Agreement can only be resorted to if there has been a clear request for such information and the necessary information is not provided within a reasonable period.\textsuperscript{218} The NAFTA panel agreed with this analysis of WTO panels and used it as guidance to conclude that:

\begin{quote}
the IA may not resort to “available information” when the particular information necessary to calculate a dumping margin for the non-certified meat was never requested by the IA from the participants.\textsuperscript{219}
\end{quote}

This reasoning by analogy in effect, as acknowledged by the panel, led the panel to interpreting the law applicable before it ‘harmoniously’ with the relevant WTO panel interpretations.\textsuperscript{220}

\section{3 Abbreviation of Reasoning}

Beside the cautious use of judicial decisions as an interpretative aid for

\textsuperscript{211} N’Gunu N. Tiny, above n 205, 23.

\textsuperscript{212} \textit{Mondev International Ltd. v United States of America (Award)} (ICSID Arbitral Tribunal, Case No ARB(AF)/99/2, 11 October 2002) [144].

\textsuperscript{213} \textit{Decision of the Binational Panel in Accordance with Article 1904 of the North American Free Trade Agreement (Mexico v US)} (NAFTA Case No MEX-USA-00-1904-02, 15 March 2004).

\textsuperscript{214} Ibid [11.40]-[11.44].

\textsuperscript{215} Ibid [11.50]. See also Gabrielle Marceau et al, above n 61, 526.


\textsuperscript{217} Panel Report, \textit{Argentina - Definitive Antidumping Measures on Imports of Ceramic Floor Tile from Italy}, WTO Doc WT/DS189/R (28 September 2001) \textit{(Argentina - Ceramic Tiles)}.


\textsuperscript{220} Ibid.
clarification of the meaning, or as a source for analogy with earlier decisions, a more liberal technique can also be detected. International tribunals sometimes invoke prior decisions to abbreviate reasoning.\textsuperscript{221} The tribunal in \textit{Enron v Argentina},\textsuperscript{222} for example, relied on a number of prior decisions adopted by other ICSID tribunals as a ‘shorthand argument’ to turn down the objections to jurisdiction by Argentina in the case before it.\textsuperscript{223} Specifically, in rejecting Argentina’s arguments on jurisdiction, the tribunal found that ‘shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company’.\textsuperscript{224} However, instead of performing its own analysis, the tribunal stated that the reasons supporting this finding ‘have been amply considered in recent decisions’ and thus do not need to be re-examined.\textsuperscript{225} It does not mean that the tribunal entirely abandoned explaining its approach. In fact, it stated clearly that even though prior decisions are not ‘a primary source of rules’, references to them could still be made because the tribunal ‘believe[d] that in essence the conclusions and reasons of those decisions are correct’.\textsuperscript{226} Evidently, if judicial decisions are used as an abbreviation of reasoning, they can create an imminent impact on the decision-making of the subsequent tribunal. Thus, where this technique is applied, it leaves almost no gap for inconsistent interpretations of similar terms by different tribunals to arise.

Again, this technique was effectively utilised by the NAFTA tribunal in \textit{Broom Corn Brooms}.\textsuperscript{227} In this case, the Panel found that the US Government definition and subsequent application of ‘like product’ was neither legally correct nor incorrect because the legal explanation put forward by that authority ‘was simply inadequate to permit review on this issue’.\textsuperscript{228} In determining the legal consequence of this inadequacy, the Panel found an answer that did not flow from its own analysis, but directly and immediately from WTO reasoning.\textsuperscript{229} Particularly, the Panel first pointed out that:

\begin{quote}
[a] GATT panel confronted a similar situation in the \textit{Polyacetal Resins} case, where it was asked to review an antidumping determination by the Korean Trade Commission (KTC) that failed to make clear the grounds on which the KTC had determined “material injury.” ... The \textit{Polyacetal Resins} panel concluded that KTC’s failure to make clear the basis of its decision violated the provisions of Article 8.5 of the 1979 Antidumping Code.\textsuperscript{230}
\end{quote}

\begin{flushright}
\textsuperscript{221} Stephan W. Schill, ‘System-building in Investment Treaty Arbitration’, above n 45, 1098-9; Gideon Boas, above n 43, 113-4.
\textsuperscript{222} \textit{Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic (Jurisdiction)} (ICSID Arbitral Tribunal, Case No Arb/01/3, 14 January 2004).
\textsuperscript{224} \textit{Enron Corporation and Ponderosa Assets, L.P. v The Argentine Republic (Jurisdiction)} (ICSID Arbitral Tribunal, Case No Arb/01/3, 14 January 2004) [39].
\textsuperscript{225} Ibid [38]-[39].
\textsuperscript{226} Ibid [40].
\textsuperscript{227} Panel Report, \textit{Broom Corn Brooms}, above n 189. For a discussion on the application of this technique in this case, see N’Gunu N. Tiny, above n 205, 17-20, 23-6.
\textsuperscript{228} Panel Report, \textit{Broom Corn Brooms}, above n 189, [68].
\textsuperscript{229} N’Gunu N. Tiny, above n 205, 24.
\textsuperscript{230} Panel Report, \textit{Broom Corn Brooms}, above n 189, [69]-[70]. For the cited case, see GATT Panel Report, \textit{Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, GATT Doc ADP/92 (2 April 1993)} [217].
\end{flushright}
The Panel then felt ‘compelled to reach the same conclusion’ in the case before it. In particular, since the US safeguard measures were not explained in a sufficiently clear manner, they ‘must be held’ to be inconsistent with NAFTA rules, specifically, Annex 803.3(12), which requires that safeguard determinations provide ‘reasoned conclusions on all pertinent issues of law and fact’.\textsuperscript{231} It is almost impossible to fail to observe that the NAFTA Panel grounded its finding \textit{directly} on the WTO reasoning. The same technique was also exercised when the Panel decided to rule on the inadequacy of the US legal explanation regardless of the fact that Mexico did not raise this issue. To justify this position, the Panel adopted the reasoning reached in \textit{Polyacetel Resins}, in which the WTO panel found the Korean measures were inconsistent with WTO law even though the complaining party did not make such a claim.\textsuperscript{232} Similar to the \textit{Enron v Argentina} case discussed above, the compelling WTO reasoning is the justification for the Panel in \textit{Broom Corn Brooms} to follow the WTO approach.

\textbf{4 Limitations to the Use of Judicial Decisions to Determine the Meaning}

Apparently, judicial decisions have been proven to be helpful in assisting international courts and tribunals to determine the meaning of the rules under interpretation, as either an interpretative aid to clarify the meaning, a source for analogising, or an abbreviation of reasoning. Thus, these practices might suggest useful ways in which judicial decisions could be utilised as supplementary means of interpretation within the determining role under Article 32. Accordingly, in multiple proceedings before the WTO and RTAs involving equivalent norms, tribunals might use judicial decisions from the other forum as supplementary means within the meaning of Article 32 to determine the meaning of the norms under interpretation. In doing so, tribunals could employ judicial decisions as either an interpretative aid to clarify the meaning, a source for analogising, or an abbreviation of reasoning.

However, in accordance with the complementary nature of supplementary means provided in Article 32, the utilisation of judicial decisions might need to be subject to certain limitations. Perhaps, the most important restriction is that, as supplementary means, judicial decisions cannot be invoked as an ‘alternative’ to the means of Article 31,\textsuperscript{233} or at the outset of the interpretation.\textsuperscript{234} This seems to be a reasonable restriction, given ‘the pitfalls inherent in the use of supplementary materials which lack the authentic element present in the means of Article 31’.\textsuperscript{235} Accordingly, a proper utilisation of judicial decisions as supplementary means to determine the meaning of the rules under interpretation might require tribunals to first reasonably exhaust the means provided in Article 31. Only when it could be established that these means leave the meaning ambiguous, obscure, or lead to a result which is manifestly absurd or unreasonable, recourse may then be made to supplementary means, including judicial decisions to determine the

\textsuperscript{231} Panel Report, \textit{Broom Corn Brooms}, above n 189, [71].
\textsuperscript{232} Ibid [70]-[71].
\textsuperscript{233} Isabelle Van Damme, above n 90, 306.
\textsuperscript{234} Mark Eugen Villiger, above n 90, 447.
\textsuperscript{235} Ibid.
meaning of the rules under interpretation.

The tribunal in *Eureko v Poland* discussed above seemed to faithfully follow this logic, and only made recourse to prior judicial decisions to clarify the meaning of the umbrella clause after an independent interpretation in accordance with Article 31. Thus, even though the tribunal in *Eureko v Poland* did not spell out the theoretical foundation for its approach, the case might still be seen as a good example where judicial decisions are appropriately utilised as supplementary means of interpretation under Article 32. In light of these analyses, it might be said that had the NAFTA Panel in *Broom Corn Brooms* decided to justify its use of GATT/WTO decisions on the basis of Article 32, the Panel would, first of all, need to establish that the primary means of interpretation could not resolve, for example, the ambiguity or obscurity, in the meaning of the rules under interpretation, before it could utilised GATT/WTO decisions as either a source for analogy, or an abbreviation of reasoning. The rationale of this restriction is to ensure that judicial decisions will not be appealed to as the sole element, but only part of a wider interpretative process involving other primary and supplementary means ‘that in fact may point in different directions’. As a product of complementary means, an interpretation suggested by judicial decisions may only be useful and credible to the extent that there is no other primary means pointing to a different interpretation. If there is such an obligatory means indicating a different reading, the best supplementary means can do is to suggest the tribunal revisit its application of the general rule of interpretation, rather than to directly modify the interpretation arrived at by the obligatory interpretative techniques.

The utilisation of judicial decisions as part of the wider interpretative process does not mean that judicial decisions will lose their constraining force. Actually, when a tribunal employs judicial decisions to confirm the meaning resulting from the application of Article 31, it is in fact performing an interpretation that is in conformity with the interpretation of the prior tribunal. Similarly, where a tribunal utilises judicial decisions as supplementary means to determine the meaning, it also accords a substantial weight to prior decisions, and in effect follows the interpretation made by earlier tribunals. The constraining force of judicial decisions, as analysed previously, does not stem from formal legalistic obligations, but from argumentative burdens that judicial decisions may generate on subsequent tribunals. Indeed, as far as equivalent norms are concerned, if a tribunal is interpreting the equivalent rules that were already interpreted by a previous tribunal, it may take that interpretation into consideration to either confirm or determine the meaning of the equivalent rules. In doing so, the subsequent tribunal may make a different interpretation of the equivalent rules, but, to be reasonable, it may need to pronounce clearly factors that cause it to reach a

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236 *Eureko B.V v Republic of Poland (Partial Award)* (UNCITRAL Arbitral Tribunal, 19 August 2005).

different interpretative outcome. It is clear that even when invoked under the framework of supplementary means of interpretation, rather than a *de facto* stare decisis doctrine, judicial decisions may still retain their argumentative power on subsequent tribunals where Article 31 has not provided a clear answer, and thus contribute to an enhancement of consistency between interpretations made by different tribunals on equivalent rules.

Nevertheless, the requirement to be used as part of the wider interpretive process also means that judicial decisions could not ensure a completely homogeneous interpretation by different tribunals on similar or identical norms. Certainly, even though international courts and tribunals could refer to the jurisprudence of one another, each of them still remains as ‘an independent body, based on a different instrument binding its parties, which do not necessarily coincide with those of other courts and tribunals’.238 Thus, differences in the constituting instruments and applicable law may explain why a completely unified interpretation cannot be achieved across regimes even on similar or identical rules. Moreover, as mentioned above, various primary means of interpretation provided in Article 31, such as the context, object and purpose, or subsequent agreements may suggest a different reading of the rules under interpretation, over which judicial decisions, as supplementary means could not prevail. Therefore, the ICTY seems to be correct to spell out in *Zejnil Delalic* that although other decisions of international courts should be taken into account to promote consistency, stability, and predictability between international judicial bodies, the tribunal may, ‘*after careful consideration*, come to a different conclusion’.239 However, to the extent that incompatible judicial pronouncements are backed by defensible reasons, they may still be within the scope of reasonable differences, and thus may not be contrary to the principle of reasonableness in law.240 In this light, even though judicial decisions cannot eliminate all sorts of inconsistencies, their use as supplementary means of interpretation may still be meaningful since they can help to minimise unreasonably inconsistent interpretations, that is, inconsistent interpretations that are not supported by any concrete reason.

In theory, the integration of WTO and RTA decisions should be a two way process. However, the use of RTA decisions to clarify or determine the meaning of WTO rules may be more limited than the reverse way. Indeed, even though RTA decisions may certainly be useful to WTO tribunals, they are generally not a source to articulate drafting intention of a WTO rule. This is because, as analysed previously, the equivalence between WTO and RTA rules

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238 Tullio Treves, above n 55, 1795.
is not a coincidence but generally results from the fact that RTAs intentionally incorporate WTO rules into their texts. Moreover, while the WTO has a rich jurisprudence, from which RTA tribunals could generally find valuable interpretative aids, RTA decided cases, with a relative exception for Mercosur and NAFTA, are still very rare. In the future when RTAs are able to develop a comparably rich and credible jurisprudence, there would be more pressure to reconstruct a balanced interaction between the two fora. Given the greater advantage in many respects of the WTO procedure which may lead to the flowing of most disputes between WTO Members into the WTO forum, that day does not seem to come in the near future. At this stage, the far richer and well-established jurisprudence of the WTO means that the integration of WTO and RTA decisions on equivalent norms may in fact amount to the interpretation of the incorporative RTA rules in relative conformity to WTO jurisprudence. This seems desirable because it signifies that the WTO still in fact retains some control over RTAs, ensuring a necessary level of security and predictability for the world trading system as a whole.

IV CONCLUSION

Currently, there seem to be no international legal rules that can satisfactorily eliminate the risks of multiple proceedings over essentially the same disputes before the WTO and RTA fora. In this context, Articles 32 VCLT might provide useful alternatives. This is not magic tool, but it can to some extent minimise the risks of inconsistent interpretations and rulings over similar or identical rules.

Indeed, instead of being invoked as a pragmatic technique, judicial decisions might be employed on a more clearly-defined theoretical foundation, that is, as supplementary means of interpretation under Article 32 VCLT. Accordingly, in interpreting the incorporative RTA rules, RTA tribunals might utilise WTO decisions interpreting the equivalent WTO rules as supplementary means of interpretation to either confirm or determine the meaning of the incorporative RTA rules on the basis of Article 32 VCLT. Where judicial decisions are employed to determine the meaning, they might be utilised as either an interpretative aid to clarify the meaning, a source for analogising, or an abbreviation of reasoning. This approach can meaningfully assist the integration of WTO and RTA decisions on equivalent norms into each other because by using WTO decisions in such a manner, RTA tribunals in effect interpret the incorporative RTA rules in conformity with WTO jurisprudence. However, this does not mean that a completely homogeneous interpretation of equivalent norms by WTO and RTA tribunals could be.

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241 Compared to 457 WTO complaints, 149 panel reports, and 90 Appellate Body reports as of April, 2013, there have been only 25 known decisions under RTAs relating 16 disputes. See Amelia Porges, above n 3, 492; David Morgan, above n 3, 244; World Trade Organization, World Trade Report 2011. The WTO and Preferential Trade Agreements: From Co-Existence to Coherence (Geneva, WTO, 2011) 175-8.

ensured. As supplementary means, judicial decisions are only part of a wider interpretative process involving other primary means ‘that in fact may point in different directions’. If there is such an obligatory means indicating a different reading, judicial decisions, as supplementary means, cannot modify the interpretation arrived at by the obligatory interpretative techniques. Thus, incompatible judicial findings on equivalent norms may at times be both reasonable and unavoidable.

The diminished availability of contradictory outcomes in international trade adjudication has the potential to render parallel or subsequent claims in different fora less attractive. By becoming a deterrent for submitting the same claims in different fora, an interpretative tool like Articles 32 VCLT could, implicitly, provide a solution to jurisdictional conflicts and international forum shopping.

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243 Andre Nollkaemper, above n 242, 237-8. See also Benedikt Pirker, above n 242, 114; Christoph Schreuer, above n 45, 139, 143; Andrea K Bjorklund, above n 45, 278.
Job Security and the Theoretical Basis of the Employment Relationship

ELIZABETH SHI* AND FREEMAN ZHONG**

ABSTRACT

Despite extensive statutory regulation in the form of the Fair Work Act 2009 (Cth), the employment relationship in Australia is still founded on the contract of employment. It thus privileges the terms of the contract and the ‘bargain’ struck by employer and employee. It is argued, based on insights from the law and legal theory of contract, property, equity and other areas of private law, that this approach is inadequate. The normative authority of contract derives from the assumption that contractual obligations are voluntarily incurred, but this assumption cannot be maintained in light of the vast differences in bargaining power between employer and employee in most cases. It is argued that, to provide a general law basis for job security, the general law should develop principles based on a recognition of the vulnerability of employees. Such principles would be broadly analogous to property rights and, in particular, Joseph Singer’s theory of the ‘reliance interest’ in property.

I INTRODUCTION

Under the traditional free market view of the employment relationship, the rights and obligations of employers and employees should be defined primarily by contract. In a contractual framework, it is argued that if the employees wish to bargain for greater rights, they are free to do so within their contract. Contract law’s characterisation of the employment relationship, which leads to the obligations of the employer being primarily governed by contractual obligations, does not give full recognition to the inequality that exists between the bargaining parties to the employment relationship, or the vulnerability or dependence of the employee. The framework of contract law is inadequate for protecting the vital interest of job security. The framework of property law provides a more promising approach.

In most developed nations, employers do not have the absolute or unfettered power to manage their enterprises. In Australia, for example, the Fair Work Act 2009 (Cth) (‘Fair Work Act’) imposes various constraints on managerial prerogatives, including minimum notice periods in s 117, consultation requirements for redundancy under s 139(1)(j) and unfair dismissal protection in pt 3-2. However, statutory rules are overlaid on the common law basis of the employment relationship — the contract of employment. Statute modifies and alters that common law basis, but it does not displace it. It thus remains a relevant question whether the general law principles that govern the employment relationship are up to the task.

Although this article discusses the right to work and potential means of providing that right a doctrinal basis in the Anglo-Australian common law system, it is not strictly concerned with questions surrounding the philosophical foundations of the right to work, or whether the right to work is a human right. Such questions will

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need to be bracketed for the purposes of this article, which will instead focus on justifying the position that employees ought to have non-contractual workplace rights at all, and on discussing and critiquing the general reluctance of the common law to recognize such rights.

II STATUTE AND THE COMMON LAW EMPLOYMENT RELATIONSHIP

Much of this article focuses on the common law contract of employment. Much of this article’s critique of the existing legal state of affairs is based on the common law’s failure to recognize particular features of the employment relationship, such as the tendency for such relationships to be characterized by bargaining power imbalances. Given the extensive statutory regime for regulating the employment relationship — the *Fair Work Act* and various state industrial relations statutes — the law surrounding the contract of employment may seem to have a diminished significance. The *Fair Work Act* contains statutory protections for workers, such as the National Employment Standards (provided for by pt 2-2 of the *Fair Work Act*), which cannot be displaced. It might be thought that most employment disputes take place within the framework of, and are resolved by reference to, this statutory scheme, and so the common law contract of employment is no longer an important object of study.

Such a view would be misconceived. First, the statutory law of employment is overlaid on the employment contract, and many aspects of the employment relationship are not regulated by statute. Those aspects are subject to the employment contract. Employers and employees retain substantial latitude in negotiating the terms of their employment contracts. For the most part, the statutory scheme leaves it to the parties to establish the terms of their relationship, intervening only in limited areas such as the conditions provided for by the National Employment Standards and modern awards, and at the state level in occupational health and safety. For example, a contract can provide for situations in which the employer may terminate the employee, as long as it is not inconsistent with the unfair dismissal or adverse action general protections in pts 3-1 and 3-2 of the *Fair Work Act*.

Second, many workers fall outside the various statutory protections. Not all workers are protected from unfair dismissal under s 382 of the *Fair Work Act*, as they may not meet the minimum employment period (one year for small business employers and six months for other employers) (s 382(a)), they may not be covered by a modern award or enterprise agreement (s 382(b)(i)–(ii)), and their earnings might be over the high income threshold (s 382(b)(iii)). Such employees would be more dependent on common law rights.

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2 *Industrial Relations Act 1996* (NSW); *Industrial Relations Act 1999* (Qld); *Fair Work Act 1994* (SA); *Industrial Relations Act 1979* (WA); *Industrial Relations Act 1984* (Tas).

3 *Fair Work Act* s 61. See also the modern awards system established by pt 2-3.


5 The authors are grateful to one of the referees for suggesting this point.
Third, as will be discussed in greater detail in Part V.B of this article, the common law governing the employment relationship is worthy of study because common law is more amenable to developing into a genuinely coherent body of principle than legislation. Legislation tends to be the product of political compromise between competing goals and interest groups; as such, it often cannot result in the development of a coherent body of principle, especially in the context of a politically charged area of law such as labour law. On the other hand, adjudicative institutions such as courts proceed on a case-by-case basis and are ‘accountable to principles which are intrinsic in the prior adjudicative practice’. Unlike the political accountability of legislatures, this kind of accountability is more likely to produce a coherent body of principle. It is for this reason that much of this article focuses on identifying inconsistencies between the operation of common law doctrines and concepts in the context of employment compared to other contexts.

For this reason, it is also insufficient to point to statute as a ‘countervailing force’ to the common law’s failure to recognize bargaining power imbalances inherent in the employment relationship, to use Kahn-Freund’s famous phrase. There is no reason why common law principles are necessarily unable to counterbalance the fact that many employees are at an inherent bargaining power disadvantage to employers, and due to the shortcomings of legislation, it is not entirely satisfactory to leave it to Parliament alone to redress bargaining power imbalances.

Nor is it sufficient to point out, as Howe does, that the objective of labour law in Australia has shifted from securing collective industrial peace to individualised industrial justice. Even assuming a general political consensus that workplace rights ought to be protected, the conception of industrial justice embodied by labour law legislation will necessarily be the result of political compromise in the manner described above. Further, legislation aimed at industrial justice will necessarily require adjudicative bodies to apply discretionary legislative criteria (such as the ‘harsh, unjust or unreasonable’ criteria in Fair Work Act s 385). Such criteria, though discretionary, must still be guided by principle. If the common law is unable to develop a set of principles more sophisticated than the priority of freedom of contract and the managerial prerogative above all, then adjudicative bodies will have fewer legitimate resources to draw on in exercising their discretion, given that modern labour law legislation clearly does not favour freedom of contract and the managerial prerogative to the same extent as the common law of contract.

For these reasons, it would be unfortunate if courts and other adjudicative bodies were to completely abandon the common law as a means for securing industrial justice. Common law principles applicable to the employment relationship should not be left behind in the societal shift towards the recognition of industrial justice and workplace rights. Nor should it be thought impossible for the common law to change tack after so many years of a contract-centric view of the employment relationship: after all, the contract-centric view of the employment relationship was

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7 Grantham and Jensen, above n 6, 369.
10 Norbis v Norbis (1986) 161 CLR 513, 519 (Mason and Deane JJ).
itself a relatively modern development that replaced the earlier ‘master-servant’ view of the employment relationship.\textsuperscript{11}

\section*{III \quad THE FREE MARKET VIEW OF THE EMPLOYMENT RELATIONSHIP}

\subsection*{A \quad The free market}

The traditional contractual approach is associated with the view that people should be ‘free to enter the marketplace and structure their own activities free from governmental control and private coercion’.\textsuperscript{12} As Singer points out, there is an argument against legal intervention in the area of job security with critics being of the view that it will have a negative impact, not only on the employers, but on the employees it’s intended to protect.\textsuperscript{13} Critics argue that ‘regulation necessarily winds up hurting its intended beneficiaries by depriving them of choices and forcing them to accept arrangements they would not have voluntarily accepted’.\textsuperscript{14} Further, by enforcing job security such interference would prevent the free market from ‘reallocating resources in an efficient manner’.\textsuperscript{15}

Hayek, one of the most eminent advocates for the free market, argued that:

\begin{quote}
To seek any ‘balance’ between interest groups is ‘demonstrably irrational and inefficient and unjust in the extreme.’ The optimum condition men and women can seek, given the division of labour in industrial society and the nature of human knowledge, is in the nature of things the competitive market.\textsuperscript{16}
\end{quote}

Further, he argued that:

\begin{quote}
The employee’s freedom depends on choice between ‘a great number and variety of employers,’ and that can be achieved only in a competitive market. The pressure of organised groups such as trade unions on that market creates distortions and must therefore be ended.\textsuperscript{17}
\end{quote}

This view of the free market leads naturally to a view of private law that leaves little room for obligations that are not voluntarily incurred. As Deakin puts it, Hayek’s view is that:

\begin{quote}
Private law and the market are mutually supportive elements of a ‘spontaneous order’ that is both the foundation of a society’s well-being and also the necessary condition for the freedom of its individual members. Social legislation, by contrast, interferes with the abstract rules of just conduct in a way that undermines personal autonomy and the well-being of society.\textsuperscript{18}
\end{quote}

This is the neo-liberal view of the employment relationship, that any limitation on the parties’ rights to contract is a ‘distortion’ of the market. ‘The new wisdom is that

\begin{footnotes}
\item[14] Ibid 477–8.
\item[15] Ibid 491.
\item[17] Wedderburn, above n 16, 9
\end{footnotes}
the relationship between employer and employees is better regulated at enterprise level, by consensual bargain'. This view entails that the obligations arising out of the employment relationship should be contractual obligations only. The scope for protecting job security under this model is highly limited.

The Hayekian view appears to rest on a false assumption. It is wrong to assume that a law of private relations governed by contract alone manages to avoid seeking a ‘balance between interest groups’. Contract law does strike a balance between interest groups in at least two unavoidable ways, both imposed by the state: first, in determining what remedies are available for breach of contract (when may a party terminate the contract? Should punitive or restitutionary damages be available, or just compensatory? Should an injunction or specific performance be available?); and second, in determining the rules of evidence and procedure applicable to a breach of contract claim (which, in placing the burden of proof on the plaintiff, favour the defendant).

**B The normativity of contract**

The contractual framework has a natural affinity with the free market view described above. Contractual obligations, so the theory goes, are incurred voluntarily and therefore freely. Bargains and contractual obligations, unlike government regulation, are a natural product of the operation of the free market.

Free market theorists argue that ‘contract law has an internal logic and that the logic is normatively attractive’. On this view, the managerial prerogative of the employer takes priority over job security. At the outset, however, it should be observed that it is somewhat anachronistic to view the employment relationship as ‘traditionally’ governed by the framework of contract law. As French CJ, Bell and Keane JJ pointed out, the employment relationship is significantly older than modern contract law, and it ‘attracted incidental obligations’ long before the law of contract developed into its modern form: it was only in the 19th and early 20th century that the employment relationship began to be seen as one properly governed primarily by contract law.

This privileging of contractual obligations over all else fits naturally with the English common law’s traditional reluctance to interfere with the terms of a contractual bargain in other commercial contexts. In 1875, Sir George Jessel MR held that

> if there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.

As recently as 2010, it was held by the England and Wales High Court that ‘[i]n a commercial context ... a degree of self-seeking and ruthless behaviour is expected and accepted to a degree’.

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21 Ibid 52.
24 Vercoe v Rutland Fund Management Ltd [2010] EWHC 424 (Ch) (5 March 2010), [343].
The rationale for this view, which reflects 19th century liberal theory, is primarily that contractual obligations are imposed by the will of the parties, and respect for individual autonomy and choice therefore requires that those obligations be given effect by a court and not disturbed.25 The emphasis on individual autonomy and choice grew out of a concern with the legitimacy of state intervention — in Morris Cohen’s terms, there was a view that ‘all restraint is evil and that the government is best which governs least’.26

Also used to support the contract view of employment relationships is the argument that adhering to it increases certainty, while imposing obligations external to the agreement of the parties decreases certainty. As Njoya explains, it is generally thought that ‘any form of “right” in work that was not granted and defined by the terms of the employment “contract” would impose a vague and unenforceable duty on the employer’.27

Both of these considerations — the value placed on voluntary consent to the creation of legal obligations, and the value placed on certainty in commercial dealings — together produced a traditional reluctance on the part of judges to disturb or depart from the bargain arrived at by the parties. Despite the fact that they are considerations which were shaped primarily by reference to commercial contracts between business entities of roughly equal bargaining power, the common law made little exception for the contract of employment.

C Managerial prerogative

Additional to the arguments in favour of freedom of contract is the concept of the managerial prerogative, or right to manage, that allows the employer to do whatever they deem necessary for the efficient and economical operation of the enterprise. It is claimed that this ‘right to manage derives from the property rights of the owners or stockholders’ of the enterprise.28 Alternatively, Cyril O’Donnell considers the idea that this authority is derived from property rights to be a ‘bland assumption’ and argues instead that managerial rights are not developed from property rights, but rest ‘ultimately in the nature of man’.29 His reasoning for this argument is that:

(1) man as man has natural rights derived from the law of mankind and from the natural law; (2) somehow, man has developed a moral sense; (3) man has always behaved in an organised way and thus submits to laws and the power to enforce them; (4) the tool created for the purpose of developing statute law and confirming natural law is that state; (5) part of the legal system is the law of contract which establishes the right of a manager to command and the duty of the managed to obey; (6) the managed have the power to disobey but the broad penalties of the law generally prove sufficient, along with the natural behavior of man, to achieve obedience; and (7) at the extreme, universal disobedience results in revolution which is succeeded by another legal system embodying status or contract law which is approved by the collective will of the people.30

30 Ibid 588.
Thus, on O’Donnell’s view, the managerial prerogative is closely tied to the contract view of the employment relationship; that is, the managerial prerogative is established by the contract. On this view, the managerial prerogative would seem to derive its legitimacy at least partly from the employee’s voluntary acceptance of the prerogative.

As part of this prerogative, ‘management needs absolute power to fire or lay off workers as a necessary incentive for the owner’s capital to be put to productive use’,\textsuperscript{31} the idea being that, ‘since [workers] are risk averse, they will produce even more than the minimum necessary to hold onto their jobs’.\textsuperscript{32}

In Australia, managerial prerogatives have been the subject of much discussion and judicial consideration, particularly in relation to the ‘industrial relations’ power of the Federal government. Section 51(xxxv) of the Commonwealth Constitution reads:

> 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:

> (xxxv) conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State ...

One issue relating to this power was whether it granted the federal government the power to impose restrictions on the managerial prerogative. It was considered that managerial prerogatives ‘posits a class of subjects so central to the efficient organisation, operation and commercial viability of business that the right and power to make decisions about them rests (or ought to rest) exclusively with management’ and that as such ‘this means that such matters fall outside of the ambit of the federal arbitration power’.\textsuperscript{33}

An ardent defender of employers’ rights to control their enterprises was Barwick CJ, who held in \textit{R v Flight Crew Officers} that:

> Whilst it may be no objection to an award or order settling an industrial dispute or question that the award or order may impinge upon management or the exercise of managerial discretion, management or managerial policy as such is not ... a proper subject for an award or order.\textsuperscript{34}

\section*{IV ISSUES WITH THE CONTRACT VIEW}

\subsection*{A Voluntariness and bargaining power}

As noted above, the normative authority of contractual obligations, and the reluctance of courts to disturb the bargain, derives primarily from the view that those obligations are voluntarily accepted by parties to the contract. Some of the issues of this view are well known. For example, it relies on the assumption that the bargaining power between the parties will be equal. A party’s bargaining power is its ability, arising from the costs to the respective parties of failing to reach an


\textsuperscript{34} \textit{R v Flight Crew Officers Industrial Tribunal, Ex parte Australian Federation of Air Pilots} (1971) 127 CLR 11, 20.
agreement, to influence the other party in a negotiation. In *A Schroeder Music Publishing Co Ltd v Macaulay* (*Macaulay*), Lord Diplock said: ‘To be in a position to adopt [a take it or leave it] attitude towards a party desirous of entering into a contract to obtain goods or services provides a classic instance of superior bargaining power.’ Thus it is necessary to consider the consequences, for the employer and the employee, of the employment relationship ending, and whether the employee is in a position to refuse to accept contractual obligations which the employer wishes to impose. As Levine explains:

> The bargaining power of the parties was believed to be approximately equal. It was assumed that employees could easily find new jobs, while the employer would have no difficulty replacing them. Under these circumstances legal intervention was considered undesirable.

Singer further explains that the free market argument assumes that the original distribution of both investment and human capital is sufficiently equal and just to conclude that market participants are able to get what they are willing to pay for. If the existing distribution of economic benefits is not just, then the results of private contracting may reflect, not the voluntary arrangement that maximises the joint interests of both parties, but the imposition of exploitative terms by the more powerful party on the more vulnerable party.

In the context of employment contracts, it is no longer true (and it is unclear if it ever was true) that the parties have equal bargaining power. First and foremost, most people obviously rely on employment to meet their basic physical needs. Increasingly, it is being recognised that employment is also essential to meeting people’s psychological needs. As Bromberg J said:

> There is now a greater recognition than ever that employment is important to an employee not simply because it provides economic sustenance. Workplaces are a hub of important human exchanges which are vital to the wellbeing of individual workers. Work provides employees with purpose, dignity, pride, enjoyment, social acceptance and many social connections. As well, the performance of work allows for skill enhancement and advances career opportunities. These non pecuniary attributes of work are important and their denial can be devastating to the legitimate interests of any worker, either skilled or unskilled.

The denial of employment to a person can have serious effects upon their interests. Such effects will generally exceed the effects on an employer of losing an employee, especially when the employer is a larger business and less reliant on any particular individual worker. Industrial development in the late nineteenth century, as Levine explains, meant that ‘businesses had grown to such an enormous size that the relative bargaining powers of employee and employer had become grossly unequal’. In the modern world, Lord Steyn has noted ‘the progressive deregulation of the labour market, the privatisation of public services, and the globalisation of product and financial markets’ as necessitating greater protections for employees.

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37 Singer, above n 12, 491.
38 *Quinn v Overland* [2010] FCA 799, [101].
39 Levine, above n 36, 1084.
40 *Johnson v Unisys Ltd* [2003] 1 AC 518, 532 [19].
This situation is further exacerbated in times of economic hardship where unemployment rates are high. Whilst in boon times employees may find it easy to find other work, when times are not so good losing one’s job may mean a lengthy period of unemployment. The inequality of power is not only a result of the size and number of potential employers but also of the possible damage that termination can have on a person’s reputation. As Blades points out, ‘future employment is far more difficult to obtain once the stigma of having been fired is attached’.41 By contrast, with the exception of negative publicity associated with the unlikely scenario of a mass exodus of employees, the employer does not face the same risk as the employees.

Not only is the assumption of the equality of bargaining power false, but the common law has recognised that some obligations, when imposed on parties with inferior bargaining power, should be set aside as contrary to public policy. This has most famously occurred in the context of restraint of trade clauses and penalties. In Lord Diplock’s words:

in refusing to enforce provisions of a contract whereby one party agrees for the benefit of the other party to exploit or to refrain from exploiting his own earning power, the public policy which the court is implementing is not some 19th-century economic theory about the benefit to the general public of freedom of trade, but the protection of those whose bargaining power is weak against being forced by those whose bargaining power is stronger to enter into bargains that are unconscionable.42

As Chief Justice Allsop observed, writing extra-curially, this passage recognises that ‘the common law has the capacity to develop and mould principles and doctrine that operate upon an assessment of the legitimacy of the exercise of power, the protection of the weak and the restraint of conduct that is unconscionable’.43

Collins argues that arguments against freedom of contract that are based on bargaining power are ‘overstated’.44 Different types of employees will face a different level of disadvantage in the employment relationship. For example, he argues that highly skilled, senior, or in-demand employees may face a very low level of disadvantage, and employees may generally have an advantage where there is a labour shortage.45 Further, the employer and employee are vulnerable to each other in different respects. An employer is vulnerable to an employee for the reasons that have traditionally given rise to fiduciary obligations of fidelity and confidence on the part of the employee;46 the employer typically reposes its legal and practical interests of the employee, often including confidential information. It is not intended to suggest that employees are always, and in all respects, vulnerable or at a disadvantage to their employers. However, a fact of contemporary society is that the majority of employees are, in most respects, in such a position of disadvantage for the reasons listed above.

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41 Ibid.
46 See below n 19.
Imbalances of bargaining power, and the common law doctrines that recognise it, heavily undermine the traditional liberal argument for freedom of contract. The normative basis of enforcing contractual obligations is the voluntary agreement, or consent, of the parties. The quality of that consent is highly questionable in circumstances where the worker does not have a real choice in the imposition of an intolerably onerous contractual term.

Deane J saw a distinction between cases in which the quality of a weaker party’s consent was under question, and cases in which the stronger party took unconscientious advantage of a bargain entered into where the weaker party was under a ‘special disability’ (a concept very similar to imbalances of bargaining power). The former, he said, was the domain of undue influence and duress; the latter the source of equity’s jurisdiction to set aside a contract for unconscionable dealing. The distinction is not always strict. In the context of an employment contract, they seem to overlap. The disadvantage in an employee’s bargaining position is such as to mean that the employee has no real choice but to accept the employer’s terms in entering into a contract of employment, which allows the employer to impose terms which drastically favour the employer. The situation is reminiscent of McHugh JA’s description of duress: ‘A person who is the subject of duress usually knows only too well what he is doing. But he chooses to submit to the demand or pressure rather than take an alternative course of action.’ In those circumstances, the weaker party’s consent is normatively insignificant notwithstanding the fact that they were fully informed and made their own choice to enter into the contract. Of course, the law of duress requires the stronger party to exert illegitimate pressure, and the potential refusal of employment is not widely recognized as an illegitimate pressure.

Collins further argues that coercion based on economic necessity is not completely analogous to physical coercion, so it is inaccurate to say that employees lack freedom when entering into an employment contract. That is undoubtedly true. However, the argument of this Part does not rest on an analogy with physical coercion or slavery. Rather, it rests on the common law’s treatment of other situations in which the quality of a person’s consent may be doubtful. Consider, for example, McHugh JA’s description of economic duress above. If the common law is willing to intervene in contracts entered into under such conditions, there is an apparent inconsistency in the refusal of the common law to intervene or alter the contractual bargain struck by employer and employee in conditions very similar to those that attract the common law doctrines of duress or unconscionable dealing. This is not to say that employees are necessarily under duress, or that they should always be deemed to be under duress. The point of this observation is simply to note the common law’s inconsistent treatment of employment contracts compared to other contracts.

B Objectivity in the construction of contracts

The previous section argued that the consent of an employee to onerous contractual obligations may be suspect due to the bargaining power imbalance between the parties. However, the law of contract itself runs counter to the traditional view that

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48 Ibid 475.
49 Crescendo Management Pty Ltd v Westpac Banking Corp (1988) 19 NSWLR 40, 45 (emphasis added).
50 Ibid 46.
51 Collins, Justice in Dismissal, above n 45, 193.
contractual obligations are founded entirely on voluntary consent. As Atiyah argues, contractual liability has an objective element because contracts are not interpreted based on the subjective intentions of the parties; rather, they are interpreted according to the ‘objective theory’ of contract interpretation. The law looks to a reasonable understanding of the terms of the contract. Thus, where a party reasonably relies on a term of a contract, a court will decide in that party’s favour even if the other party did not subjectively intend the term to have the meaning determined by the court to be reasonable.

The effect of the objective theory of contract is demonstrated by courts’ willingness to imply terms into contracts, whether ad hoc in the particular circumstances of the contract, or at law for a certain class of contracts. Such terms are implied on the basis that they are ‘reasonable and equitable’ and necessary to give the contract ‘business efficacy’. Some courts have recognised a term implied into all contracts requiring that parties act in good faith in exercising their powers and discharging their obligations under contracts.

Lest it be thought that the objective theory of contract and the doctrine of implied terms are sufficient to remedy all of the difficulties faced by employees, it is important to recall the limitations of those doctrines. In Lord Hoffmann’s words, ‘it is not enough for a court to consider that the implied term expresses what it would have been reasonable for the parties to agree to. It must be satisfied that it is what the contract actually means’. Thus the High Court of Australia held that Australian employers do not owe a duty, arising from an implied term of employment contracts, to maintain trust and confidence in the employment relationship. This illustrates the limits of the objective theory of contract. Even though contracts are interpreted objectively, it is still the actual text of a contract that is to be interpreted, and an employer in a superior bargaining position will often be able to ensure that the text does not give rise to implied obligations that afford too much protection to the employee, or that undermine the managerial prerogative to too great an extent. Terms implied at common law can, after all, be excluded by the express terms of the contract, confirming that the theoretical basis of contractual obligations remains some conception of voluntary agreement.

C The flawed foundations of the managerial prerogative

From the foregoing discussion of the normativity of contractual obligations, some of the issues with the concept of the managerial prerogative should be clear. If the prerogative comes from the law of contract, it must come from the voluntary agreement of both the employer and employee. As the previous section argued, however, the description of an employee’s agreement to onerous terms in an employment contract as ‘voluntary’ is suspect. Even aside from that argument, ‘many rights which management perceives to be part of its inherent prerogatives have little foundation in law’ and simply exist due to the fact that employers and managers have mistaken what they have been able to do as a result of superior economic power as a

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53 BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 180 CLR 266, 283.
54 Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234.
57 See, eg ibid 186 [21].
legal right. Singer challenges the assumed right to managerial prerogative, arguing that:

Prevalent baselines make managerial power seem natural and inevitable while job security appears to be a meddlesome interference in the free market; rather than a correctable social problem, workers’ insecurity is seen as a necessary cost of progress and freedom.

According to Singer, in looking at the employment relationship courts use assumptions that are not necessarily true. One such assumption is that ‘management needs absolute power to fire employees as a necessary incentive for owners of capital to put it to good use’. This assumption resembles the justification of implied terms in contract — that the terms are necessary to give the arrangement business efficacy. In response to this, Singer argues that whilst owners of capital desire complete managerial control, ‘it may also be true that workers need security to develop their labor’. Put another way, the basis for ‘implying’ the managerial prerogative into the employment contract privileges the interests of the employer over the employee. Contract law cannot, by itself, justify elevating the interests of the employer over the employee.

‘The greater the insecurity of tenure, the harder the employee will work to maintain his or her job’. Those who oppose the concept of job security rely on the restrictive effect it may have on employers and the financial burden it imposes. However, this is an empirical premise and cannot simply be asserted without empirical evidence. The opposite may in fact be true. Singer points out that it is ‘increasingly apparent that one reason US businesses are not doing as well in international competition as they could is that they fail to utilize their workforce effectively’. He argues that the ‘refusal to workers of job security deprives them of incentives to increase productivity’. In other words, ‘[w]orkers whose jobs are secure might work harder because they feel more positive about their jobs’. Wallis echoes this idea by stating that ‘if an employee believes that he or she will not lose his or her job unjustly, then there is more of an incentive to work well’.

In the Australian context, the primacy once given by some theorists to the managerial prerogative has attracted criticism from judges. Murphy J, in Federated Clerks, stated that:

It appears to assume the existence of an unchanging class of matters which are inherently managerial in character and which, by their very nature, are or ought to be beyond the regulatory powers of government or the ‘industrial’ claims of employees. In so far as it does this the doctrine if both unconvincing and unhistorical. It is unhistorical because it is so obviously at odds with what has taken place even since federation.

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58 Young, above n 28.
59 Beermann and Singer, above n 32, 919
60 Ibid 925.
61 Ibid.
62 Ibid 927.
63 Wallis, above n 31, 645.
64 Singer, above n 12, 509.
65 Beermann and Singer, above n 32, 927.
66 Wallis, above n 31, 647.
Further, in *Re Cram; Ex parte NSW Colliery Proprietors' Association Ltd* it was stated in relation to managerial prerogatives that '[t]here is no basis for making such an implication. It is an implication which is so imprecise as to be incapable of yielding any satisfactory criterion of jurisdiction'.

Thus the idea of a managerial prerogative plays no real role in the constitutional concept of arbitral power. It cannot be relied upon to deny legislative protections to workers under legislation based on the conciliation and arbitration power, such as the *Fair Work Act*.

While these statements were made in the context of cases on the extent of the conciliation and arbitration power, the criticism of the managerial prerogative doctrine as ‘imprecise’ has broader implications. It demonstrates that there is no principled reason for singling out the class of matters which are typically considered part of the managerial prerogative, or for giving the employer absolute discretion with respect to those matters. The traditional justifications for the managerial prerogative fail to distinguish between legitimate and illegitimate forms of pressure or ownership. They simply assume that the power to hire and fire, as part of the managerial prerogative, is a legitimate form of power which employers should be able to exercise over employees, without giving any cogent argument in support of that proposition. The force of the managerial prerogative argument is illusory in that it sidesteps this issue of legitimacy.

Some forms of ownership or motivation are plainly legitimate: for example, positive reinforcement and feedback. It is uncontested, however, that certain types of pressures or incentives which employers could theoretically use to motivate employees and increase productivity are illegitimate. Employers are not allowed to physically threaten their employees, or require employees to surrender personal documentation such as passports. Similarly, it is uncontested that an employer's ownership has limits. An employer is not allowed to enslave an employee; that is not a legitimate form of property right. Strictly speaking, it is not even accurate to say that shareholders of a company ‘own’ the company: they own shares in the total capital stock of the company, but they do not own the legal entity that is the company.

There is no legitimate property right that allows one to ‘own’ a company in the technical legal sense, so it is misleading to speak of ‘owners’ of companies or enterprises.

The power to fire employees for a particular reason or reasons, while less extreme than the unlawful acts just mentioned, is just another form of pressure directed at motivating employees (according to the managerial prerogative). Certain of those reasons may be legitimate and certain of them may not be. However, classifying the power to fire employees generally as a ‘managerial prerogative’ is unhelpful because it distracts from the ultimate question of whether it is legitimate for an employer to hold that power. In the following Part, it will be argued that an unrestricted, unconditional power to fire an employee is not legitimate, and that employees have a

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69 The separation between a company and its shares is clear when one considers the requirements of transferring or assigning shares. A transfer of a share has been described as a ‘a three sided novation rather than a two sided assignment’ because ‘[t]he company is involved in the change of ownership’: *Elders Forestry Ltd v Bosi Security Services Ltd* [2010] SASC 223 (21 July 2010), [115], quoting Robert P Austin & Ian M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 14th ed, 2010), [17.210]. That is, the company is involved in the transfer not because it is a property right in the company that is being transferred, but because the company’s *approval* of the transfer (in the form of registration) is required for it to be successful.
corresponding right to job security — that is, a right against being dismissed in a way that is arbitrary, capricious, unfair, etc.

Further, a striking feature of the managerial prerogative is its asymmetry. As Collins argues, considerations of an employee’s civil liberties, such as freedom of speech, ‘seem to be easily swamped by considerations reflecting respect for the breadth of managerial prerogative’. Traditional justifications for the managerial prerogative fail to explain why the employer’s right to manage their business always outweighs any relevant rights of the employee. Collins gives the examples of employees dismissed due to their public statements about the employer’s activities in exporting nuclear material, and due to their homosexuality. The core of the problem with the managerial prerogative is that it arbitrarily prioritises the employer’s rights over the employee’s.

It might be thought that a counterpart of the managerial prerogative, which tempers the harshness of an employer’s broad discretion over its employees and business, is the common law relating to duties owed by the employer to employee. Employers owe common law duties to only terminate employment lawfully in accordance with the contract of employment, provide sufficient work to the employee to earn reasonable remuneration where the employee’s remuneration is dependent on the amount of work done, take reasonable care of employees’ health and safety (including a non-delegable duty to take reasonable care) and indemnify employees for losses sustained and expenses incurred in carrying out the employer’s instructions.

At the outset, it should be observed that common law and equity traditionally imposed significantly more onerous duties on employees. For example, employees generally owe fiduciary duties towards their employers, but not vice versa. It has been held that in Australia, employers do not owe a duty not to destroy the trust and confidence in the employment relationship, and thus there is no counterpart duty to employees’ duties of fidelity to the employer (derived from employees’ fiduciary status). Further, the common law duties of employees are all either implied contractual terms or duties arising from tort law. They are, as a result, restricted by the limitations of both doctrines — contractual terms cannot be implied except in the circumstances set out in BP Refinery (Westernport) Pty Ltd v Hastings Shire Council, and tortious duties primarily relate to the physical and mental health and safety of the employee, without much regard for their economic welfare.

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70 Collins, *Justice in Dismissal*, above n 45, 185.
71 Ibid ibid.
73 *Turner v Goldsmith* [1891] 1 QB 544.
74 As an implied contractual term, see *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18; as a non-delegable tortious duty, see *Wilson v Clyde Coal Co Ltd v English* [1938] AC 57; *Kondis v State Transport Authority* (1984) 154 CLR 672.
75 *Cleworth v Pickford* (1840) 7 M & W 314; *Burrows v Rhodes* [1899] 1 QB 816.
78 See *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66, 81–2 (Dixon and McTiernan JJ).
79 (1977) 180 CLR 266, 283
V RECOGNISING THE VALUE OF JOB SECURITY

A The importance of work and job security

In modern society, one’s job is often central to one’s identity, dignity and self-esteem. A job is important to recognition by others, including by the government and providers of services. Whether applying for a credit card, a home loan or a rental property in which to live, people must provide details of their employment and references from their employers in order to establish their reliability and capacity to pay. Employment status and history have become an essential indicator of not just a person’s financial capacity, but also reliability and trustworthiness. It is now more important than ever to protect people from having their employment taken away arbitrarily.

As Reich points out:

Today more and more of our wealth takes the form of rights or status rather than tangible goods. An individual’s profession or occupation is a prime example. To many others, a job with a particular employer is the principle form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure.81

Or in other words, as Tannenbaum put it: ‘For our generation, the substance of life is in another man’s hands’.82 Yet, as Collins points out, despite this importance, workers ‘enjoy neither secure possession nor absolute control over its alienation’.83

The financial as well as emotional costs suffered by an employee as a result of a termination from employment can be high. Of significance are ‘the insecurity and fear of redundancy and unemployment’ as well as the ‘psychic and familial costs’ of termination.84 Singer states that the management argument underestimates the impact of insecurity and termination on employees.85 When the level of unemployment increases, the possible impact of unemployment also rises due to the decreased prospects of finding further employment. Advances in technology further narrow alternative employment options by overtaking jobs once done by hand or requiring increased specialization.86

Whilst in certain economic climates employees may have been able to more easily move from one job to another, increasingly this is not the case. The management argument that the ending of an employment relationship has little impact on the employee is based an outdated assumption that ‘there are no barriers to the free flow of workers from one job to another’.87

Collins also notes that employees generally have non-pecuniary interests in their work. Work may be a source of ‘social status and self-esteem’, of ‘friendships and

83 Collins, above n 45, 10.
84 Wallis, above n 31, 647.
85 Beermann and Singer, above n 32, 930.
87 Beermann and Singer, above n 32, 930.
social engagements’, and of ‘fulfilling intellectual, artistic, or physical challenges’. The importance of these non-pecuniary interests, and the effect of their denial, would generally outweigh the non-pecuniary detrimental effects to an employer of losing an employee.

At a more fundamental level, and related to Collins’ observations, philosophers and labour law theorists have recognized the importance of work to human life. According to Arendt, meaningful work — work done to produce lasting things (‘artefacts’), rather than merely to fulfil transient needs — distinguishes humanity from beasts. On an Aristotelian conception of the good life, a person cannot achieve flourishing (eudaimonia) unless he or she lives a life of activities involving the proper performance of his or her function as a human being. Wiggins interprets these activities as being ‘the work ... that is proper to a human person’ and says that ‘[t]o have no work to do ... is among the very worst things that can befall someone’. The centrality of work to human life means that the possibility of being unable to work should be taken seriously as a factor affecting the bargaining power balance between (prospective) employee and employer.

B  Doctrinal bases of the right to work and job security

The importance of work has led some to recognise it as a right. In the limited context of someone who is actually hired as an employee, Morritt LJ (with whom Robert Walker and Stuart Smith LJJ agreed) said:

But as social conditions have changed the courts have increasingly recognised the importance to the employee of the work, not just the pay ... Lord Denning MR considered that it was open to a welder to argue that: ‘a man has, by reason of an implication in the contract, a right to work. That is, he has a right to have the opportunity of doing his work when it is there to be done’.

This is not a recognition of a general right to work — it still operates within the contractual framework. It is a recognition of an implied term in contracts of employment requiring an employer to give work to the employee. This protection is therefore vulnerable to the issues previously identified with the contract approach to employment.

The limited common law recognition of employees’ rights has generally been founded on contractual concepts or concepts otherwise referable to free market ideology. In the UK decision of Naigle v Feilden it was stated that ‘the common law of England has for centuries recognised that a man has a right to work at a trade or profession without being unjustly excluded from it’. This proposition appears to be primarily directed at preventing ‘unjust’ restrictions on free trade. In Allen v Flood, Hawkins J held that workers have a ‘probable expectation’ of continued employment:

The daily labourer, whose tested character for steadiness, honesty, and industry has induced his master, as a matter of course, through a long series of years, week by week to renew or continue his employment finds in this the foundation for his ‘reasonable and probable expectation’ that he may rely on continual employment in the future.\textsuperscript{95}

The Allen v Flood idea of a reasonable expectation conferring rights on an employee is purportedly based on the objective theory of contract — the parties are bound by the terms of the contract as reasonably understood and construed. The case is interesting because it demonstrates judicial recognition of the kinds of interests employees have in their jobs, but in protecting that interest, Hawkins J was required to draw a connection to the contractual framework, a framework in which obligations arise from the voluntary agreement of the parties. Rather than recognising the interests a worker has in their work based on the importance of work to a person's dignity and financial security, Hawkins J instead used implied voluntary agreement as the normative basis for protecting the worker’s interests. The case is similar to other 19\textsuperscript{th} century cases in which courts used contract law to remedy civil wrongs,\textsuperscript{96} rather than recognising those wrongs as wrongs in themselves. It is reminiscent of the fiction of ‘quasi-contract’ on which restitutionary claims, such as the claim for money had and received and the claim for quantum meruit, were previously founded. This general approach represents an attempt to pigeonhole various wrongs into the framework of contract.

The inadequacies of this approach are clear. First, it is an obviously circuitous means of protecting interests which deserve protection in their own right. The High Court recognised in Pavey & Matheus Pty Ltd v Paul\textsuperscript{97} that the idea of a quasi-contract is indeed a fiction, and that the true basis of restitutionary claims is as a means of preventing unjust enrichment.

Second, and relatedly, the fact that an Allen v Flood-style protection is based on contract law means that employers can always exploit contractual principles to get around the protection, such as by providing that the worker has no expectation of continued work.

Third, it is simply an unconvincing and strained interpretation of the intentions of the parties. Businesses which regularly transact with each other at arms-length should, on the Allen v Flood approach, similarly create in each other a reasonable expectation that their business relationship will continue. Yet the law of contract recognises no implied term ‘protecting’ parties in an arms-length business relationship from the termination of that relationship in accordance with express provisions of the contract. The reason for this is clear: the relationship being arms-length, the parties are not vulnerable to one another and have no need of an Allen v Flood-type protection. However, on a contractual approach in which the notion of intention (objective or not) and voluntarily incurred obligations are decisive, the vulnerability of the parties should not make any difference. Vulnerability is certainly not explicitly invoked in Allen v Flood itself, but as these arguments should make clear, the vulnerability of employees and their dependence on their employment is

\textsuperscript{95} [1898] AC 1, 16.

\textsuperscript{96} See, eg Hugh Collins, The Law of Contract, (Cambridge University Press, 4\textsuperscript{th} ed, 2003) 4, citing the famous case of Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256. Collins argues that in this case, the court declined to recognise the misleading advertising as a civil wrong in itself, instead using the law of contract to give a remedy for misleading claims.

\textsuperscript{97} (1987) 162 CLR 221. See also United Australia Ltd v Barclays Bank Ltd [1941] AC 1.
the most plausible explanation for the rule in Allen v Flood. A superior basis for protecting the employee should recognise that the employee’s vulnerability and dependence, not some fiction of implicit contractual undertakings, are core to the protection.

If the contractual approach to the employment relationship is done away with or recognised as having serious limitations, what should take its place? One approach to this question is simply to abandon any attempt at fitting the employment relationship into an overarching private law framework like contract. While contract can govern some aspects of the employment relationship, the other rights and obligations arising from the relationship could simply be created by ad hoc, miscellaneous rules contained in statutes, such as the Fair Work Act, designed to balance the interests of employer and employee and arrived at by political compromise.

However, it is desirable for legal rules to be grounded in some overarching, coherent framework, rather than merely being the product of political compromise and ad hoc legislation. Contract law is one such framework. Its inadequacies do not negate the attractiveness of its ‘internal logic’. Those inadequacies mean that the internal logic cannot be rigorously applied to all aspects of human relationships for reasons already discussed, but the fact that it is based on a fundamental principle and value — the paramountcy of voluntarily incurred obligations — gives it some strength as an overarching principle or framework.

Commentators have recognised a need for the law to be coherent, rather than a ‘random assemblage of unrelated and inconsistent rules’. Coherence is closely linked to the rule of law: the principle that ‘like cases must be treated alike’ can only be adhered to, and the law can only ‘speak with one voice’, if legal rules are coherent. As Dworkin argues, legislators must make the law coherent and justifiable by a set of general values, whereas judges must act as if legal rules express coherent principles. Coherence is necessary to maintain what Dworkin calls the ‘integrity’ of the law and to avoid unprincipled outcomes. Weinrib argues that for a body of rules to be coherent, they must be expressions of a single unifying idea. That idea exists at a higher level of abstraction than directly applicable legal rules. If the contractual framework cannot supply that unifying idea, what can?

C Singer’s reliance interest

Singer argues that beyond contract there should be a ‘reliance interest’ in employment which must be protected. In the context of plant closures, he states that: the corporation should not be allowed to waste property which has been relied upon by members of the common enterprise; such property is held in trust for the benefit of the common enterprise and especially for the benefit of the more vulnerable parties to the relationship.

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98 Grantham and Jensen, above n 6, 363.  
100 Ibid 217.  
101 Ibid 183.  
103 Ibid.  
104 Singer, above n 12, 660.
Singer justifies this assertion of a ‘reliance interest’ by reference to a range of other circumstances in which the law ‘imposes mutual obligations on persons who enter relationships of mutual dependence’.

He provides examples from property law such as adverse possession, prescriptive easement and public rights of access to private property, linkage requirements examples among others, the common thread being that these relationships are protected not because of voluntarily incurred obligations, but ‘because the parties have relied on each other generally and on the continuation of their particular kind of relationship’. As such, the law steps in to protect the more vulnerable party.

Singer’s reliance interest is based on what he calls the ‘social relations view’ which emphasises the relationships involved as opposed to the free market view which regards people as autonomous and ‘property as either owned or not owned in a system of private property’.

He argues that:

the relation between power and vulnerability should be at the heart of our analysis of property rights. Rather than asking ‘who owns the factory?’ we should ask ‘what relationships should we nurture?’ We should encourage people to rely on relationships of mutual dependence by making it possible for everyone to form such relationships and by protecting those who are most vulnerable when those relationships end.

Singer’s reliance interest theory accords well with this article’s discussion of the vulnerability and dependence of employees. Rather than trying to create protections for job security out of a fiction based on voluntary undertakings or contractual obligations, he recognises that the true interest to be protected is employees’ reliance on and vulnerability to their employers. The reliance interest theory does not suffer from the same issues previously identified with the Allen v Flood approach or the now defunct fiction of quasi-contract.

It might seem strange to think of a job as property. Unlike other forms of property, an employee does not and should not have ‘sole and despotic dominion’ over their job; they do not and should not have the ability to ‘do anything they like with’ it, to ‘use it, use it up, neglect it, destroy it, give it away entirely or for a time, lend it, sell or lease it, pledge it, leave it by will, and so on’. However, as Singer argues, the traditional conception of property rights as totally unfettered is simply false: private property may well come with inherent limits and obligations, and the ‘tension’ between obligation and unfettered property rights is the ‘essence’ of property.

Nor should the fact that jobs are intangible rule out treating them as property. As Meyers has said, ‘a job, of course, is an abstraction, but like other abstractions such as “good will” and “expectancy of profit,” it may become the object of “ownership”’. In principle, there is no barrier to an abstraction, such as a job, being the subject of

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105 Ibid 664.
106 Ibid.
107 Singer, above n 12, 702.
108 Wallis, above n 31, 652.
109 Singer, above n 12, 751.
112 Ibid.
114 Frederic Meyers, Ownership of Jobs: A Comparative Study (Institute of Industrial Relations, University of California, 1964) 3.
property. As Munzer explains, ‘[t]he bundle of rights analysis views property as a package of rights among persons with respect to things’.115 A job can fit into this analysis as a ‘thing’ just as well as traditionally recognised forms of property, such as land, goods, and rights to payment.

On this view, protections for job security are really a form of vindicating property rights. Adopting the proprietary framework should mark a shift away from the language of ‘implied terms’, which have thus far been the primary means of protecting employees’ rights where statute is silent, and towards more direct recognition of the ‘reliance interest’ of employees. The contract of employment still has a place in this framework. The employment relationship, with its further reliance-based rights and obligations, is created in the first place by a contract, much like other forms of property (such as easements and estates in fee simple) can be created or transferred by contract. The point of the proprietary approach to employment is not to eradicate the idea of contract from the law of employment; it is to confine it to contexts where contractual principles, with their reliance on the normative authority of voluntary and consensual undertakings, can justly be applied — that is, when the relationship is created in the first place.

VI CONCLUSION

This article has analysed the foundations of the employment relationship. It has argued that the contractual framework used by the common law to allocate rights and obligations in the relationship is inadequate. It has defended the continuing relevance of the common law despite the extensive statutory regulation of the employment relationship — first by noting the desirability of a coherent body of principle as opposed to the result of political compromise, and second by identifying areas where certain statutory protections (such as unfair dismissal and the National Employment Standards) are unavailable.

The vulnerability and dependence of the employee undermine the normative theory behind contractual obligations, which emphasises the protection and enforcement of voluntary undertakings. Instead, the framework of property law and rights created not by consent but by objective features of the relationship (such as the vulnerability and dependence of the employee) provide a more promising basis for the employment relationship.

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