Canberra Law Review

The *Canberra Law Review* is a peer-reviewed law journal published each year by the Canberra Law School at the University of Canberra.

It brings together academics, other scholars, legal practitioners, and students within and outside the University. It provides a peer-reviewed open access venue for innovative, cross-disciplinary and creative scholarly articles and commentaries on law and justice.

**Submissions**

The editors of the *Canberra Law Review* seek submissions on aspects 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.
- 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.

**Peer-Review**

Scholarly articles are blind peer-reviewed by two reviewers.

**Open Access**

Consistent with the Canberra Law School’s emphasis on inclusiveness, the *Review* is open access: an electronic version is available on the University of Canberra website and on the Australasian Legal Information Institute (AustLII) website.

**ISSN**

ISSN 1320-6702 (Print) and ISSN 1839-2660 (Online)
# TABLE OF CONTENTS

Professor Wendy Lacey FAAL  
Foreword  
1

The Editors  
Introduction to Issue 16(1)  
2

Linda Crebbin  
Looking forward, looking back: The wisdom of the Magic 8 Ball  
5

Matthew Rimmer  
Australia’s Stop Online Piracy Act: Copyright Law, Site-Blocking, and Search Filters in an Age Of Internet Censorship  
10

Bede Harris  
The Case for Codifying the Powers of the Office Of Governor-General  
65

Bruce Baer Arnold  
On a screen darkly: Outback Noir, Erasure and Toxic Masculinity  
79

Drew Gough  
Op Ed: When it comes to cybersecurity, lawyers don’t need to embrace Dr Strangelove  
99

Tom Round  
‘Recountbacks’ and Section 44 of the Constitution  
109

**Student Section**

Clarissa Shortland  
Face to Face with the Law: *Moutia Elzahed v Commonwealth*  
132

Renee Mastrolembo  
Imminence and States’ Right to Anticipatory Self-Defence  
143

Josh Mills  
‘Job Security and the Theoretical Basis of the Employment Relationship’  
175
2019 is a special anniversary for Canberra Law School, the 25th anniversary of Law teaching at the University of Canberra.

The School aspires to be a key part of the Canberra legal community and justice system. It seeks to produce work-ready graduates who are capable, curious and committed to excellence. Those attributes are of particular value in an environment where change is a constant, social ‘givens’ about social or personal values are eroded through practices such as fake news and marketisation, and graduates can seize opportunities to both serve clients and foster justice by being creative.

The School also aspires to contribute to a broader community of understanding that encompasses specialists and non-specialists alike, locally and across Australia. In 2019, as in the past, stakeholders expect established and emerging scholars to engage in public discourse. The responsibility of academics extends beyond the lecture theatre and online teaching spaces.

I am accordingly pleased to note the scope and relevance of this issue of the Canberra Law Review, a peer-reviewed journal that brings together academics from the Law School, distinguished outside contributors and – most welcome – some of our students. The contribution of those students is a reminder that legal scholarship is an adventure that does not stop when the last assessment item has been submitted and the student appears on stage to receive her/his testamur.

As an anniversary issue the Review features the thoughtful address given by distinguished practitioner Linda Crebbin AM at the event last month marking the School’s 25th. She has been a valued contributor to teaching at the University in addition to exemplary work within the justice system.

The Review includes incisive articles on technology and constitutional law by Professor Matthew Rimmer (QUT) and Senior Lecturer Bede Harris (CSU). Drew Gough critiques debate about cybersecurity. Canberra Law School’s Bruce Baer Arnold writes about Australian film’s understanding of sexual assault and power. Three student pieces draw on recent Honours dissertations.

The articles engage with questions about innovation, justice, public administration, commerce and law as a language sometimes misunderstood or contested by the underprivileged and privileged alike. In the coming year I look forward to special issues of the Review that engage with questions about #MeToo, about Open Science and about artificial intelligence.

Professor Wendy Lacey FAAL
Executive Dean
Faculty of Business, Government & Law
Introduction

This issue of *Canberra Law Review* marks the 25th Anniversary of Canberra Law School, situated within the Faculty of Business, Government & Law at the University of Canberra.

The articles in this issue look forward and backward, engaging with social, political, cultural and economic issues that have faced Australia in the past and will be salient in future as the nation – and legal practitioners, students and academics – grapple with questions about cybersecurity, the long shadow of colonialism, identity and how non-specialists understand the law. The latter aspect is especially relevant for law teaching amid controversy about democratic deficit and disengagement from mainstream politics or legal mechanisms in favour of poujadist fringe parties and assertions of sovereign citizenship, and perceptions that legal study is a matter of maximising revenue rather than justice.

As an Anniversary issue the Editors have taken an inclusive approach, featuring work by academics, an adjunct and – for the first time – current students at Canberra Law School. That inclusiveness means the Review features work that is longer and shorter than usual, with a mordant ‘Op Ed’ by information technology analyst Drew Gough and an exhaustive piece by Matthew Rimmer.

The issue kicks off with the speech by Linda Crebbin AM at the 25th Anniversary event on 12 September, which brought together current/past law students and academics with stakeholders from government, business and civil society. Ms Crebbin’s characteristically incisive, entertaining and humane view of law past and future reflects her contribution to the School and justice over many years. That is especially notable because excellent people are always in demand and ‘giving’ to the community comes at a personal cost.

Matthew Rimmer’s ‘Australia’s Stop Online Piracy Act: Copyright Law, Site-Blocking, and Search Filters in an Age Of Internet Censorship’ offers an incisive critique of law around a recurrent controversy: access to online content. The article argues that Australia’s copyright regime for site-blocking and search-filtering poses a threat to consumer rights, competition policy, and Internet Freedom. Professor Rimmer first reviews the model of the *Copyright Amendment (Online Infringement) Act 2015* (Cth) introduced by the then Minister for Communications & the Arts the Hon. Malcolm Turnbull. Secondly, the article explores the flurry of cases brought by the film, television, and music industries in respect of the legislative regime. Thirdly, the article evaluates the expansion of the regime with the *Copyright Amendment (Online Infringement) Act 2018* (Cth). In light of such developments, Rimmer calls for a new approach for Internet regulation by the Australian Parliament. His conclusion highlights the need for a bill of rights in
Australia for a digital age: a Magna Carta to protect an open and accessible Internet.

Dr Bede Harris inspired a generation of graduate and undergraduate students at Canberra Law School, many of whom still use ‘what would Bede say’ as part of their mental map. His ‘The Case for Codifying the Powers of the Office Of Governor-General’ suggests that debate on the question of whether Australia should become a republic has masked a far more important underlying issue, namely whether the conventions of the office of Governor-General should be codified. The issues are linked in that opinion polls have consistently shown that if Australia was to become a republic, voters would prefer a model which included direct election of a President, yet the risk that an elected President might breach the conventions of the office has proved to be an obstacle to its adoption. Codification of the powers of the office would address this problem. It would also provide an opportunity to clarify areas of uncertainty that became evident during the constitutional crisis of 1975 and to bring the text of the Constitution into alignment with how responsible government actually operates. Codification would therefore be beneficial irrespective of whether Australia became a republic. The constitutions of many other countries – both those that have retained the link to the Crown and those that have become republics – provide examples of how this might be done. The article ends with a model codification of the conventions.

‘On a screen darkly: Outback Noir, Erasure and Toxic Masculinity’ takes a walk on the wild side of law and culture, with Dr Bruce Arnold taking momentary leave from his research on genomic privacy and regulatory incapacity in the health sector to interrogate depictions of hegemonic manhood in four iconic Australian films: Wake in Fright, The Chant of Jimmie Blacksmith, Mad Max and Ghosts ... of the Civil Dead. The homosociality depicted in those films fosters sexual assault as an expression of power, an expression embraced by bystanders and authorities. The article’s engagement with toxic masculinity complements contemporary debate about #MeToo and questions the understanding of law on screen, alongside an acerbic view of Australia’s foundational myth of ‘mateship’.

Drew Gough’s Op Ed ‘When it comes to cybersecurity, lawyers don’t need to embrace Dr Strangelove’ explores questions about the Internet of Things, regulation, user/manufacturer responsibility and the notion that ‘Cybersecurity Is Not Very Important’. His piece serves as a starting point for the Canberra Law School’s 2020 symposium on artificial intelligence and law.

The ‘Recountbacks’ article by Tom Round considers the High Court’s approach to disqualification of MPs under s 44 of the Australian Constitution. The article engages with questions of principle and practice in discussing whether a ‘recountback’ can be allowed to unseat an already-elected not-disqualified Senator.

In a departure from usual practice this issue of the Review inaugurates a discrete Student section, featuring notes and articles by later-year undergrad and graduate Law students at Canberra Law School. Inclusion recognises their work in the Honours and other research units.
Clarissa Shortland’s ‘Moutia Elzahed v Commonwealth and NSW’ considers jurisprudence and protocols regarding testimony and veiling in the context of human rights and the Australian anti-terrorism regime.

‘Imminence And States’ Right To Anticipatory Self-Defence: Responding To Contemporary Security Threats And Divergence In Legal Diplomacy’ by Renee Mastrolembo explores core themes surrounding states’ inherent right to anticipatory self-defence and the notion of imminent threats in an attempt to identify deficiencies in the current international law position. Mastrolembo argues that changing nature of security threats and divergent diplomacy of states regarding anticipatory self-defence warrants a re-examination of the international law position. The article proposes a refined position and considers how it could be implemented.

‘Does the Common Law and Equity Provide an Adequate Framework for Digital Assets in Australia?’ by Joshua Mills explores digital assets through a common law approach, in particular juxtaposition of Blackstonian and Hohfeldian concepts of property. It suggests new legal avenues for digital asset owners through application of traditional legal principles, causes of action and remedies regarding personal property, for example a tort of privacy and information fiduciaries.
Looking forward looking back:
The wisdom of the Magic 8 Ball

Linda Crebbin AM

This speech was delivered by Linda Crebbin AM at the ceremony on 12 September 2019 to mark the 25th Anniversary of the Canberra Law School. Among other achievements Ms Crebbin was the first President of the Australian Capital Territory Civil and Administrative Tribunal (ACAT). She has tirelessly made a major contribution to the life of the Law School and to justice in the Territory over many years. Participants at the event were delighted to hear her thoughts about the past and future of legal practice, delivered with a characteristic verve and engaging humour. The Editors appreciate her generosity in providing a copy of her speech for this issue of the Review.

I acknowledge the traditional custodians of this land and pay my respect to their elders, past and present. I pay my respect to all elders, and all first nation people including the young people that I see doing remarkable things each day.

It is a surprise to find myself speaking to you in this context. First, I’m not a UC alumnus; though I have had a bit to do with students and graduates undertaking placements at Legal Aid ACT and the ACT Civil and Administrative Tribunal. I’ve been a guest lecturer from time to time. I’ve employed UC graduates.

Secondly, I am not by any stretch of anyone’s imagination, an academic; though like most lawyers I’m full of curiosity, love learning, and am happy to share that learning with any audience I can capture. You are my victims, oh ... I mean captives, of course, tonight.

So, I come at my task tonight as something of an imposter, or perhaps, an innocent abroad.

Ben suggested that I could talk to you about changes I have observed in the legal profession. When I think of changes I think about them at a superficial (that is, self-centred) level.

As an articled clerk, the firm I worked for had a telex machine; secretaries typed documents on manual typewriters using carbon paper for copies – two copies of everything – one for the file and one to go into the folder circulated to each partner to read and pass on at the end of each day. Typing required a high degree of accuracy - correcting errors meant re-typing the whole document and that was just too time consuming. Each letter I drafted was meticulously and agonizingly checked by partners with an inexhaustible supply of red pens. I gave clients the benefit of my amateurish wisdom, never expecting them to challenge or ask questions – and indeed, they did not. Such was the authority and mystic of the lawyer.
As an articled clerk I perfected the art of pounding the pavements of Melbourne to deliver letters, and clambering up the ladder in the magnificent Supreme Court library to check exactly what the Lord Chancellor, Lord Cairns, said in *Rylands v Fletcher* in 1868.

We were gobsmacked when the fax machine arrived. We gathered around as someone explained its magical operation. I still don’t quite understand - put paper in one end, press a button, the words float through the air and pop up on a piece of paper somewhere else.

About 18 years later, in 1999, one of my favourite jurists, then NSW Chief Justice James Spigelman, spoke about the opportunities technology gave women to change the paradigm of ‘normal conduct’ in the practice of the law by agitating for flexible work arrangements. When addressing the NSW Women Lawyers Association about the paradigm of conduct he said:

> That paradigm requires immediate and continuous availability in the form of physical propinquity...Modern technology makes physical presence or propinquity optional in many circumstances.

> Over recent decades there have been numerous predictions of the imminent arrival of the paperless office or of telecommuting by modems, faxes and telephones. Whilst all of these phenomena have progressed to some extent – more limited than many predictions – the idea of what is ‘normal’ has not changed. However, it may.

> The principal idea I wish to propound this afternoon is that women have an interest in changing the paradigm of ‘normal’ conduct of workplace relations in a direction which creates an alternative paradigm that does not require physical propinquity. All of the technologies that I have mentioned will assist in that regard.

Funny now, 20 years later, to reflect on those words. Email was in use in 1999 but not recognised as an appropriate mode of communication in a formal or professional context. Faxes? Who uses those anymore? His honour went on to talk about the usefulness of video conferences. OMG. I’ve been known to tear my hair out in frustration during video conferences. If you’ve not seen it I encourage you to watch the video ‘A conference call in real life’ by comedians Tripp and Tyler. It sums up every tortuous video or phone conference in which I have participated.

Work arrangements certainly did become more flexible after 1999 but not, I think, in the way the then Chief Justice envisaged. As an articled clerk I worked in the office more or less from 8am to 6pm Monday to Friday, and on the last Sunday of each month to get bills issued. Sometime in the 2000’s that changed to something much more flexible – work was anytime between 8am to 8am, in the office, at home, in the car, in the bath, wherever; up to a maximum of seven days a week.

No need for articled clerks to wear out shoe leather delivering letters, or to climb ladders and battle silverfish in the search for ancient wisdom. Indeed, no need for articled clerks.
While my workplaces were not academies, I have kept some contact with the world of legal education through students and as a result, know something of the significant changes to the mechanisms used for delivering legal education in our universities. But I have not thought more deeply about the purpose, nature or structure of legal education until now.

Professor Richard Susskind, the IT Adviser to the Lord Chief Justice of England and Wales, recently declared the 2020’s to be the decade when many of the radical tech-led programs being designed now – namely, AI and on-line courts – will really come to life. He said that these programs will replace our old ways of working and that lawyers will focus less on advising clients and more on building systems to advise clients. And he has questioned whether we are adequately preparing trainees for the coming decade of transformation.

That is a damned good question. It is perhaps easier to identify the need to ask the question rather than to answer it.

Like all reasonably trained lawyers I decided to immerse myself in a bit of research so as to come to my appearance before you prepared to have a go at some answers. I read the published papers from the 2017 Australian Academy of Law conference on the future of legal education. They’re easy to find on-line and I urge any of you with an interest in the topic to look for them.

Wow. What great thinkers. More of my favourites; Martha Nussbaum, Dennis Pearce, Sandford Clark, John Basten, Simon Rice – and others whose names I don’t know but whose writings and thinking challenge and provoke thought. I have to admit to being alarmed by the title of Associate Professor Cathy Sherry’s paper listed under the category ‘Experiential Learning’ – ‘Fertile Octogenarians in Cyberspace’. I felt an overwhelming need to call my gynaecologist to seek reassurance that the experience of diving into these papers in cyberspace was not likely to result in an embarrassing (for my children) late-age pregnancy.

I read about the need for academies to adjust teachings to take account of technological possibilities, and to take account of the demystification of science, to adjust to globalisation; to focus on learning new methods of solving legal problems, on developing analytical skills, and on understanding words and their interpretation. Separately from the papers, I read a lengthy article in Forbes magazine exhorting the need for universities to address a skills gap in what the article described as ‘the business of law’.

At the heart of most contemporary writing about legal education is a debate about whether the role of a law school is to train lawyers for professional practice or to educate in Jurisprudence, the philosophy and discipline of law – presented at times as aims that can only be pursued separately.

It is clear, on reading Martha Nussbaum’s excellent paper titled ‘Why Lawyers Need a Broad Social Education’, that this is not a new debate for law schools. She writes about Ernst Freund’s approach to the design of a new law school for the University of Chicago in the late 1800’s. I encourage you to seek out the paper and read it.
If this is such an old debate, do we need to keep having it? Of course. We should always check that lawyers are being trained to do their work, whatever that may be, in whatever context, properly. We should always challenge our thinking with such debates and check our progress – changing and adapting when needed.

One conference paper, Professor Sandford Clark’s ‘Regulating Admission – Are we there yet?’, struck a chord because it reflected my own recent experience as a practitioner. He noted that changes in the way people seek access to the law and obtain legal services are profound and challenge prevailing models of what lawyers do and how they organise their work. Dr John Boersig PSM, the CEO of Legal Aid ACT, talks far more eloquently and knowledgably about this than I do.

A rise in scepticism about experts, increased access to information about the law, increasing costs, the rise of DIY culture encouraged by YouTube and helpful staff at Bunnings, disillusionment with, and mistrust of authority and governance structures including courts and lawyers, and even acceptance by the legal system itself that the system should re-organise so as to facilitate self-representation and adopt a more inquisitorial than adversarial approach to decision-making evidenced in the growth of multi-jurisdiction tribunals such as ACAT (which has the broadest jurisdiction of any such tribunal in Australia) – as a result of these things lawyers are required to be not only representatives, advocates and advisers but also coaches, facilitators, drafters of documents and assistants to individuals and organisations seeking to advocate for, or represent themselves.

This occurs every day at Legal Aid ACT where people seek advice and assistance to draft correspondence, navigate legal problems and advocate for, or represent, themselves. You see it also in multi-jurisdiction tribunals which are established with direct or indirect barriers to participation by lawyers – many require that lawyers obtain leave to appear, others such as ACAT, have legislative restrictions on costs orders, which have the indirect result of discouraging use of lawyers in proceedings. In these scenarios lawyers sit in the background, explaining the law and its systems and processes, coaching clients, guiding them through processes, teaching them and directing them to relevant resources.

Are the knowledge of the law and the skills needed to practise law in these new ways any different than they were 40 years ago when I left law school? I think so. How do we adjust legal education to ensure both knowledge and skills are relevant? Do we abandon the teaching of practical knowledge and practice skills at law schools and focus only on educating in the discipline of law? Do we train lawyers to be teachers and facilitators, do we train lawyers to set up DIY systems that will do the teaching and advising? I do not know.

Here I return to Professor Sandford Clark’s paper. He identifies a need to re-conceive legal education as a continuum, and allocate responsibility for sequential components to other elements of the
profession, after law schools and PLT providers have made their initial threshold contributions.

When I read this I looked back to my own education - at university there was a mix of jurisprudence and practice skills, then passed to the profession for 12 months of articles. This served me reasonably well.

So what is the answer? Are we adequately training people for the coming decade of transformation? Are we adequately training people for current purposes? After all this reading I am more informed but as an innocent abroad, I have no idea where the information leads. I thought I should consult the Magic 8 Ball.¹ I have been known to have recourse to it in the past. Its non-committal answers to the questions - cannot predict now, concentrate and ask again, I can’t say – were somehow comforting. If the Magic 8 Ball isn’t certain what hope have I? Fortunately, it is not up to me to work it out.

But I will watch the Canberra Law School’s review and re-focussing of its work with interest from a more informed position, and encourage you to do so as well – watch, support and join in where there is an opportunity to do so. Because what I do know, what I am convinced of, is the importance of the role of lawyers in our society, of producing lawyers who are curious people, who like to learn, to think deeply, critically and boldly, and who can apply their knowledge and their skills to the important task of furthering social and economic justice for every person, in all spheres of life.

I congratulate Canberra Law School for its initiative and wish it well on its journey.

***

¹ A toy developed in the 1950’s and manufactured by Mattel, used for fortune telling or seeking advice: ask it a yes/no question and turn it over to reveal an answer.
Australia’s Stop Online Piracy Act: Copyright Law, Site-Blocking, And Search Filters In An Age Of Internet Censorship

Matthew Rimmer*

Relying upon the work of Cory Doctorow, this article argues that Australia’s copyright regime for site-blocking and search-filtering poses a threat to consumer rights, competition policy, and Internet Freedom. This article first reviews the model of the Copyright Amendment (Online Infringement) Act 2015 (Cth) introduced by the then Minister for Communications and the Arts the Hon. Malcolm Turnbull. Secondly, it explores the flurry of cases brought by the film, television, and music industries in respect of this legislative regime. Third, this article evaluates the expansion of this regime with the Copyright Amendment (Online Infringement) Act 2018 (Cth). In light of such developments, the conclusion calls for a new approach for Internet regulation by the Australian Parliament. It highlights the need for a bill of rights in Australia for a digital age. As Sir Tim Berners-Lee says, we need a Magna Carta to protect an open and accessible Internet.

Introduction

In 2011, the United States Congress considered the highly controversial Stop Online Piracy Act 2011 (US) – nicknamed SOPA. Amongst other things, the bill included provisions on court orders requiring Internet Service Providers to block access to websites.

Edward Black, the CEO and President of the Computer and Communications Industry Association, warned about the dangers of the bill.² He observed of the regime:

H.R. 3261, the Stop Online Piracy Act, has elements of pre-emptively stopping crime reminiscent of the plot of Minority Report, in which the government arrested people it suspected would commit crimes. This legislation would ‘disappear’ domains suspected of containing infringing copyright content.³

---

* Dr Matthew Rimmer (BA/LLB ANU, PhD UNSW) is a Professor in Intellectual Property and Innovation Law at the Faculty of Law in the Queensland University of Technology (QUT). He is a leader of the QUT Intellectual Property and Innovation Law research program, and a member of the QUT Digital Media Research Centre (QUT DMRC) the QUT Australian Centre for Health Law Research (QUT ACHLR), and the QUT International Law and Global Governance Research Program (QUT IL GG). Dr Rimmer is the chief investigator in the ARC Discovery Project, ‘Inventing the Future: Intellectual Property and 3D Printing’ (2017-2020) (DP 170100758). This article expands and builds upon past submissions to the 2015 and 2018 parliamentary inquiries into copyright site-blocking in Australia.


³ Ibid.
Black noted that ‘SOPA claims to aim at domains that deliberately offer primarily copyright infringing content’. He observed that the legislation would impinge upon the freedom of speech protected by the First Amendment in the United States: ‘Many could support the purported goal, but the bill deploys the power of a nuclear weapon with little of the target-accuracy.’

Black was concerned: ‘The collateral damage would undermine the security and functionality of the Internet.’ He warned: ‘By ordering tech and telecom companies to ‘disappear’ domains suspected of infringing content, many legitimate domains and virtually all domains that allow user-generated content like Facebook, Twitter, and YouTube, would be snared in the dragnet.’ Black observed: ‘This would dramatically change the speed, utility, and freedom of the Internet as we’ve come to know it.’ He stressed: ‘Ironically, [SOPA] would do little to stop actual pirate websites, which could simply reappear hours later under a different name, if their numeric web addresses aren’t public even sooner’. Black observed: ‘Anyone who knows or has that web address would still be able to reach the offending website.’

Mike Masnick observed that the bill engaged in copyright censorship, and raised larger constitutional issues about freedom of speech. He commented:

The bill would have allowed the Justice Department to take down an entire website, effectively creating a blacklist, akin to just about every Internet censoring regime operated by the likes of China or those Axis-of-Evil-style foreign states our politicians are prone to shaming and using as evidence of American civil libertarian exceptionalism.

Masnick noted that ‘Case law around the First Amendment is clear that you cannot block a much wider variety of speech just because you are trying to stop some specific narrow speech’. He observed: ‘Because of the respect we have for the First Amendment in the U.S., the law has been pretty clear that anything preventing illegal speech must narrowly target just that kind of speech.’ The regime raised obvious problems in respect of prior restraint.

David Segal of Demand Progress highlighted the opposition to the various Internet Blacklist Bills – including COICA, PIPA, and SOPA. He said that the legislation ‘would’ve created a list of ‘rogue’ websites that the government

---

4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
8 Ibid.
9 Ibid.
10 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.
could block access to with minimal due process'. In response, there was a huge public outcry over SOPA – with opposition from both progressives and libertarians, civil society and the new economy. In the end, the overwhelming community opposition to the legislative proposals led to them being dropped.

Notwithstanding this major setback in the United States, copyright industries have lobbied other jurisdictions to introduce copyright site-blocking laws. The United Kingdom has establishing a procedure under section 97A of the Copyright, Designs, and Patents Act 1988 (UK) for copyright rights holders to seek court orders to require internet services provers to block copyright-infringing sites. The European Union enthusiastically passed copyright site-blocking legislation in a range of national jurisdictions. A recent 2015 dissertation by Pekka Savola is highly critical of the copyright law and practice on blocking websites in the European Union. Savola comments:

Enforcement proceedings are problematic because typically only the copyright holder and possibly the provider are represented in court. Nobody is responsible for arguing for the users or website operators. The court should take their interests into account on its own motion. Unfortunately, many courts have not yet recognised this responsibility. Even this dual role as both the defender of unrepresented parties and judge is less than ideal and improvement is called for.

This analysis suggests that there have been ongoing problems in respect of the site-blocking regime implemented in the European Union. Nonetheless, site-blocking has become much more mainstream in copyright jurisprudence. In early 2019, it was reported that over 4,000 sites are blocked by internet service providers around the world for copyright reasons.
In Australia, copyright owners lobbied to pass site-blocking legislation in 2015, and further search-filtering legislation in 2018. Such measures were hastily debated and discussed in the Australian Parliament. To put this into context, the Australian Parliament spent a few years developing a moral rights regime from 1997-2000. Equally, the Digital Agenda Act in 2000 was the product of several years of inquiry. After the Australia-United States Free Trade Agreement 2004, it took a further couple of years before the changes to technological protection measures took place in the Copyright Amendment Act 2006 (Cth). It took an extensive period of time before the right of resale (droit de suite) was passed in the Australian Parliament. The IT Pricing Inquiry has still not been acted on by the Australian Parliament.21 Likewise, key recommendations of the Harper Review have not implemented.22 The Australian Law Reform Commission’s recommendations on copyright law have been neglected.23 The Productivity Commission’s report on IP Arrangements has been discussed and implemented in part.24 There have been more than two decades of discussion and deliberation over the protection of Indigenous intellectual property (without there necessarily being a resolution to such matters). In light of this history of copyright law reform, the rush to push the Copyright Amendment (Online Infringement) Act 2018 (Cth) through Parliament does seem like some reckless haste. The bill passed through the Parliament was poorly drafted and ill-designed and will no doubt have negative consequences and impact.

Given that SOPA was a poorly constructed legislative model, it seems extraordinary that the Australian Government should want to resurrect a site-blocking copyright regime like SOPA. Crude site-blocking copyright laws were profoundly discredited during the debates in the United States Congress. While no doubt copyright owners are enthusiastic about gaining such incredible powers, there remain deep concerns about how site-blocking regimes impact upon Internet freedom, innovation, and competition. Drawing upon the work of Cory Doctorow,25 this article argues that Australia’s copyright regime for site-blocking and search-filtering will have larger impacts upon the regulation of the internet. This article analyses the political debate around the legislation – as well as early judicial responses to claims under the regime. This article has three main parts. Part 1 reviews the passage of the Copyright Amendment (Online Infringement) Act 2015 (Cth). Part 2 considers the key test cases in respect of this legislative regime. Part 3 examines the efforts to expand this regime even further, with the Copyright Amendment (Online Infringement) Act 2018 (Cth). The conclusion calls for a new approach for Internet regulation by the Australian Parliament. It highlights the need for a bill of rights in Australia – particularly in an age of

---

25 Cory Doctorow, Information Doesn’t Want to Be Free: Laws for the Internet Age (McSweeney’s, 2014).
the Internet, search engines, social media, and cloud computing. As Sir Tim Berners-Lee says, we need a Magna Carta to protect an open and accessible Internet—rather than a government web of censorship and surveillance.

I Copyright Amendment (Online Infringement) Act 2015 (Cth)

The proposal to give copyright owners the power to block websites and online locations is highly controversial. The Australian Government devised a local version of the Stop Online Piracy Act—nicknamed #SOPA. There was a concern that such a power will interfere with civil liberties, traditional freedoms, and Internet rights. There was also an anxiety that copyright trolls will abuse such a scheme. The Australian Government has not crafted adequate and sufficient safeguards and protections for consumer in respect of the bill.

As Communications Minister, Malcolm Turnbull was sensitive to criticisms of the copyright regime. He was incensed by questions from the Fairfax journalist Ben Grubb about whether the legislation was an internet filter:

There’s no internet filter here at all... What we’re, look, what we are simply doing is proposing to amend the ... we’re going to amend the Copyright Act to make it more straightforward for rights owners to do what they can do now, which is to seek an order that access be prevented’ to a site that is ... infringing content.

Critics of the regime have been unconvinced by such sophistry, and have been of the view that blocking websites amounted to an internet filter.

Professor Dan Hunter from Swinburne University has commented that blocking websites is bad for Australia’s digital economy. He observed that ‘a poorly drafted law will inevitably be used to threaten Australia’s nascent cloud computing industry, because cloud storage is where a large number of infringing files are found these days.’

A. The Goals and Objectives of Copyright Law

In his second reading speech, the Minister for Communications, the Hon. Malcolm Turnbull introduced the bill, with these prefatory remarks: ‘The Copyright Amendment (Online Infringement) Bill 2015 amends the Copyright Act 1968 to provide an effective new tool that rights holders use can then use to respond to commercial scale widespread copyright infringement

29 Ibid.
on websites operated outside Australia.’ Obviously, there is much controversy over whether such a measure will be an ‘effective new tool’. There is also much debate over whether the measure is particularly well-adapted or specific to addressing commercial scale copyright infringement on websites operated outside Australia.

In his second reading speech, Malcolm Turnbull discusses the significance of the creative industries and copyright challenges. While asserting that the bill engages in ‘balancing’, the content of the bill is very much tilted towards enhancing the rights and remedies of copyright owners: ‘Copyright protection provides an essential mechanism for ensuring the viability and success of creative industries by providing an incentive for and a reward to creators’. There is also a significant slippage in the discussion of the objectives of copyright owners between the interests of creators, and the interests of major distributors, such as publishers, film studios, television networks, and newspaper empires. Notably, the remedy contemplated by the bill would be largely only accessible to copyright owners, with significant legal and financial resources. If this bill was concerned about the interests of creators, it would do more to enhance the rights and remedies of creators against distributors. The bill does little to enhance the quite distinct interests of copyright users, consumers, and citizens, or the much corporate interests of copyright intermediaries and disseminators. Overall, the Minister Malcolm Turnbull succumbs to the fallacy of the ‘balancing’ metaphor – a conceptual problem which has been highlighted in Abraham Drassinower’s recent Harvard University Press book, What’s Wrong with Copying? The ‘balancing’ metaphor is often used for political purposes to justify the continued expansion of copyright owner rights and remedies.

The Minister comments that ‘Australia possesses a proud and valuable creative sector.’ He observes: ‘Our creative industries make a significant contribution to our national economy.’ The Minister maintains: ‘According to a 2012 report, Australia’s creative industries employ 900,000 people and generate economic value of more than $90 billion, including $7 billion in exports.’ The 2012 report, though, was commissioned by a Copyright Owner organisation, and, as such, should not be considered to be a reliable source of

---

33 Ibid.
34 Abraham Drassinower, What’s Wrong with Copying? (Harvard University Press, 2015).
36 Ibid.
37 Ibid.
evidence about jobs, economic value, and exports.\textsuperscript{38} Indeed, it should be worth remembering that Australia is a net importer of copyright works. In terms of the balance of trade, higher copyright standards will benefit the United States, with its heavy concentration of large copyright industries.

In his second reading speech, Malcolm Turnbull repeatedly makes the basic error of confusing copying with ‘theft’.\textsuperscript{39} He asserts: ‘What they do, in unlawfully accessing and then profiting from the intellectual and artistic endeavours of others, is a form of theft.’\textsuperscript{40} He also refers more generally to ‘intellectual property theft’.\textsuperscript{41} It is surprising that Malcolm Turnbull would make such mistakes, given his interest in the topic. Such an approach confuses and conflates property law and intellectual property law. There is also perhaps an underlying slippage here between civil matters under copyright law (which is what this bill is about), and criminal offences under copyright law (which the bill is not about).

The bill was quite over-reaching in its scope and its application. A copyright owner will be able to block a website – even if the infringement occurring is not in Australia. Will a judge have to assess foreign copyright laws to make such a determination? There is a great variation between copyright laws around the world. There is a lack of uniformity in respect of copyright subsistence, the nature of rights (both economic and moral rights), the test for copyright infringement, and the operation of copyright exceptions. Conduct which may be infringing copyright in one jurisdiction may be perfectly legal in another. This will lead to dizzying array of complications.

RMIT’s Mark Gregory notes: ‘The idea that the Federal Court of Australia is to take into account copyright law for a country other than Australia when making a determination is novel, and possibly ground breaking’.\textsuperscript{42} He wondered: ‘Who would have thought the government would attempt to use the Federal Court of Australia to prevent Australians from accessing online content that does not infringe copyright in Australia?’\textsuperscript{43}

Procedurally, the bill sets up a bizarre process. The danger, of course, is that the owners of foreign sites will be unrepresented in this process. There does not seem much in the way of representation for other interests affected by the injunctions.

The work of Cory Doctorow has highlighted that copyright law also plays an important role in promoting access to knowledge, innovation, and


\textsuperscript{39} The Hon. Malcolm Turnbull, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2015 (Cth)’, Hansard, the House of Representatives, Parliament of Australia (26 March 2015) 28.

\textsuperscript{40} Ibid.

\textsuperscript{41} Ibid.


\textsuperscript{43} Ibid.
Such values were not clearly embodied in the 2015 legislative regime in Australia.

B. The ‘Primary Purpose’ Test

The bill says that an injunction can be granted where ‘the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).’ This seems to be an incredibly crude provision. This drafting raises a whole host of jurisdictional questions and problems.

Malcolm Turnbull maintains: ‘Critically, the provisions in this bill have been carefully drafted to ensure that the new injunction power will not affect the legitimate websites and services that legally provide access to copyright material.’ He elaborates upon this issue:

First, the power is only as broad as it needs to be to achieve its objectives. The provision will only capture online locations where it can be established that the primary purpose of the location is to infringe or facilitate the infringement of copyright. That is a significant threshold test which will ensure that the provision cannot be used to target online locations that are mainly devoted to a legitimate purpose.

Turnbull maintains that the bill does apply to virtual private networks: ‘Where someone is using a VPN to access Netflix in the United States to get content in respect of which Netflix does not have an Australian licence, this bill would not deal with that because you could not say that Netflix in the United States has, as its primary purpose, the infringement or facilitation of the infringement of copyright.’ It is not clear that the text of the bill actually says this. The draft legislation says that one can take into account both Australian and overseas copyright infringement. There have been arguments made by Foxtel, amongst others, that Netflix has facilitated copyright infringement. Notably, Sony Pictures has complained to Netflix over its unwillingness to stop Australians from using virtual private networks.

Considering the bill, Ben Grubb noted that there had been debates within the Government about whether the website-blocking power might affect virtual private networks (VPNs). He noted that there had been concerns about unintended consequences in the bill:

---

46 Ibid.
47 Ibid.
49 Tim Biggs and Ben Grubb, ‘Sony lobbied Netflix to stop Aussie VPN users, leak shows’, Sydney Morning Herald (Sydney, 17 April 2015).
One of those unintended consequences, according to sources familiar with the drafting of the legislation, could have resulted in the websites of virtual private networks (VPNs) also being caught up in the blocking regime if they were deemed by a judge as facilitating copyright infringement. VPNs are often used to circumvent website filtering in countries by allowing users to ‘tunnel’ their internet traffic through another country where there is no filtering.\(^5\)

It is not necessarily clear how this issue has been addressed by the legislative drafting. If the Government wanted to exclude Virtual Private Networks from the bill, why has not it done so, expressly?

Unfortunately, it does seem to be the case that the bill has been badly drafted. The bill does not provide an adequate test of what is a ‘primary purpose’. It is notable that online sites can serve an amazing profusion of purposes. Search engines, such as Google and Yahoo!, have a multitude of purposes. Microblogging sites like Twitter serve many different functions. Cloud computing can be used in respect of hosting both authorised copyright content, and unauthorised copyright content. The bill does not provide adequate protection for legitimate websites and services that legally provide access to copyright material. The bill is particularly poor at dealing with websites and services, with multiples functions and purposes.

Consumer groups such as ACCAN have been concerned about the impact of the new bill on virtual private networks. ACCAN observed: ‘ACCAN believes consumers should have the freedom to choose where they purchase content’.\(^5\) ACCAN stressed: ‘Improved choice will also address some of the problems around access, delayed release dates and affordability which fuel piracy.’\(^5\)

Similarly, consumer advocacy group CHOICE has been concerned the new copyright laws could allow industry groups to block or hinder the use of VPNs.\(^5\) Erin Turner commented: ‘We know that at least 684,000 Australian households already save money and get better deals by accessing overseas content using tools like a VPN.’\(^5\) She said: ‘Currently, [the proposed bill] is far from clear when it comes to whether using a VPN to access a legitimate service like US-based Hulu is legal or not’.\(^5\)

Such concerns are certainly pertinent, given recent copyright threats against global roaming services in New Zealand.\(^5\)

---


\(^5\) Hannah Francis, ‘Fears VPNs Could Be Blocked in Piracy Crackdown’, *The Sydney Morning Herald* (Sydney, 20 April 2015)

\(^5\) Ibid.

\(^5\) Ibid.

\(^5\) Tim Biggs and Ben Grubb, ‘Sony lobbied Netflix to stop Aussie VPN users, leak shows’, *Sydney Morning Herald* (Sydney, 17 April 2015).

\(^5\) Ibid.

\(^5\) Ibid.

C. The Matrix of Factors

Section 115A (5) of the bill has a laundry list of matters to be taken into account by a court in determining whether or not to grant an injunction:

In determining whether to grant the injunction, the Court is to take the following matters into account:

(a) the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement, as referred to in paragraph (1)(c);

(b) whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright;

(c) whether the owner or operator of the online location demonstrates a disregard for copyright generally;

(d) whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement;

(e) whether disabling access to the online location is a proportionate response in the circumstances;

(f) the impact on any person, or class of persons, likely to be affected by the grant of the injunction;

(g) whether it is in the public interest to disable access to the online location;

(h) whether the owner of the copyright complied with subsection (4);

(i) any other remedies available under this Act;

(j) any other matter prescribed by the regulations;

(k) any other relevant matter.

In his second reading speech, the Minister maintained that this multi-factorial test will help the court consider ‘a broad range of factors that reflect competing public and private interests.’ He commented:

The court must consider the flagrancy of the infringement. This provision particularly contemplates online locations that deliberately and conspicuously flout copyright laws. The court must also consider whether blocking access to the online location is a proportionate response in the circumstances. For example, the court may consider the percentage of infringing content on the online location compared to the legitimate content or the frequency with which the infringing material is accessed by subscribers in Australia.

Another consideration for the court is the overall public interest. The internet has revolutionised our ability to disseminate information and knowledge. The court must weigh the public interest in access to information against the public interest in protecting our creative industries. These competing public interests must themselves be considered in the wider context of the private interest which it is the

principal purpose of the bill to protect—that is, the right of content creators to the protection of their intellectual property.58

However, the factors are pretty clearly tilted towards the interests of copyright owners. There are significant drafting problems as well in respect of the factors. The motley collection of factors seem vague, ambiguous, ill-defined, and over-inclusive.

It is both odd and peculiar that the first factor is the ‘the flagrancy of the infringement, or the flagrancy of the facilitation of the infringement’. As previously discussed, this will be an incredibly difficult task, given that the court is meant to consider the question of infringement, not only in Australia, but elsewhere around the world. The second factor says it is relevant ‘whether the online location makes available or contains directories, indexes or categories of the means to infringe, or facilitate an infringement of, copyright.’ This phrasing would make me concerned whether search engines and index sites could be swept up in the scope of this bill. The third factor is ‘whether the owner or operator of the online location demonstrates a disregard for copyright generally.’ This seems an incredibly vague factor. How is a court supposed to determine a general ‘disregard for copyright’? That hardly seems like a precise or specific factor test. The fourth factor is ‘whether access to the online location has been disabled by orders from any court of another country or territory on the ground of or related to copyright infringement.’ Given the territorial nature of copyright law, this is quite a strange way to approach this question. Moreover, it should be remembered that many authoritarian governments engage in website-blocking for political purposes. It seems to me an absurd situation for an Australian court to have to consider whether China or Iran or North Korea is blocking access to websites or online locations, on the grounds of intellectual property or otherwise.

The fifth factor is whether ‘disabling access to the online location is a proportionate response in the circumstances.’ If proportionality is an important factor, it should be spelt out properly. The sixth factor is vague and open-ended – ‘the impact on any person, or class of persons, likely to be affected by the grant of the injunction.’ The seventh factor is ‘whether it is in the public interest to disable access to the online location.’ Again, this is a highly vague statement. This factor fails to address whether or not questions about human rights should be taken into account by the court in an assessment of the grant of an injunction. The eighth factor is whether ‘the owner of the copyright complied with subsection (4).’ It is notable that there is a failure to address circumstances of copyright trolls in respect to this factor.

The ninth factor notes ‘any other remedies available under this Act.’ However, the Act really fails to properly explain the relationship between the blocking power and other existing remedies. Is the blocking power an exceptional remedy? Or will it be an everyday, commonplace occurrence? The tenth factor is ‘any other matter prescribed by the regulations.’ There has been a real problem with the Attorney-General drafting broad regulation-making powers in internet bills – like this one, and the Data Retention legislative regime.

58 Ibid.
There is a real danger of political interference, with the Attorney-General of the day being able to manipulate the relevant factors for a court to consider by means of regulation. The eleventh factor is ‘any other relevant matter.’

Notably, the bill does not provide proper guidance as to how a court should weigh this long list of factors. The Federal Court of Australia – and perhaps the High Court of Australia – will have to make sense of this array of factors.

D. Injunction

In his second reading speech, the Minister Malcolm Turnbull also argued that the court would play a role in respect of using its discretion in respect of the injunctions. 59

Mark Gregory, a Senior Lecturer in the School of Electrical and Computer Engineering at RMIT University, was concerned about the technical operation of the bill. 60 He said: ‘Section 9 of the Bill is likely to become known as the iiNet clause or the ‘shut up and do as your told’ clause because it states that ‘the carriage service provider is not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings.’ 61 Gregory was concerned that regulations would have to illuminate the infrastructure for the bill: ‘If an injunction is granted the ISPs will need to know the process that should be taken to block the online location and provide notification to their customers of the website block.’ 62 He worried: ‘Given that the online location may reappear with a different IP address very shortly after an injunction has been enforced, ISPs are likely to be inundated with injunctions at regular intervals and will therefore require additional staff and resources to handle the expected load.’ 63

Turnbull insisted that the bill ensured ‘copyright holders have access to an effective remedy without unduly burdening carriage service providers or unnecessarily regulating the behaviour of consumers.’ 64 Unfortunately, the legislation will place heavy burden upon internet service providers. Moreover, the regime will heavily regulate the behaviour of consumers. The bill is not an example of light-touch regulation.

The legislation devised by the Coalition Government in many ways reflects the position of political donors, such as Village Roadshow Limited, who

---


61 Ibid.

62 Ibid.

63 Ibid.

64 The Hon. Malcolm Turnbull, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2015 (Cth)’, Hansard, the House of Representatives, Parliament of Australia (26 March 2015) 28.
demanded a new regime for site-blocking, claiming that current copyright laws were inadequate and insufficient.65

E. The Internal Debate within the Australian Labor Party

Initially, the Australian Labor Party was critical of the Coalition Government’s approach to the regulation of copyright law. In a powerful critique in 2014, Jason Clare MP maintained that the Abbott Government does not understand the Internet:

The Abbott Government has made it clear it doesn’t understand the internet or its users. Senator Brandis demonstrated this with his complete inability to explain metadata earlier this year. Malcolm Turnbull is about to buy an ageing copper network because he thinks that by 2023 the median household in Australia will only require 15 Mbps.66

Jason Clare argued: ‘It is clear that action is needed both to deter piracy, and to encourage access to legitimate content.’67 He also wondered whether the proposals of the government would be effective: ‘Site-blocking is unlikely to be an effective strategy for dealing with online piracy’.68 Jason Clare maintained that ‘the Government has passed the buck back to industry, asking rights holders and ISPs to reach an agreement among themselves’.69 He contended: ‘Any crackdown on the infringement of copyright needs to be accompanied by changes to make copyright law fairer, clearer, and more in keeping with public expectations’.70 In his view, ‘The Government should look after the interests of consumers.’71

However, in the end, after receiving generous donations from the film industry, the Australian Labor Party switched its position and supported the Copyright Amendment (Online Infringement) Act 2015 (Cth).72 The Shadow Attorney-General Mark Dreyfus seemed to be the key figure behind this move.73 In his second reading speech, he employed the discourse of ‘piracy’ to justify the need for giving copyright owners the ability to engage in site-blocking:

67Ibid.
68Ibid.
69Ibid.
70Ibid.
71Ibid.
Given how central copyright protections are to supporting creative activity of all kinds, we should be deeply concerned about the current level of online piracy. We should not mince words about this: Australia has a very serious problem with piracy. Available figures indicate that it is one of the worst in the developed world. A lot of the public debate about this topic is focused on popular foreign content, like _Game of Thrones_.

Dreyfus maintained: ‘The current level of online piracy clearly necessitates government action.’ He was supportive of further measures to modernise copyright law: ‘If we allow our copyright law to become outdated, obsolete, we cannot expect to thrive in the new digital economy.’

The Shadow Minister for Communications Hon. Michelle Rowland MP also supported the bill. She tried to employ semantics to maintain that the legislation was not in fact an internet filter:

This bill does not provide for a sort of internet filter. It provides a judicial remedy on a case-by-case basis for conduct that flouts existing Australian law. The requirements of the bill are strict, and we can expect Federal Court judges to exercise the site-blocking power cautiously and with restraint.

Much like her colleague Dreyfus, she sought to justify the legislation in terms of the need to address ‘piracy’: ‘We believe action is needed to reduce current levels of online piracy and that the enforcement of copyright law is vital to our creative industries.’

Although he has professed his opposition to censorship, the Hon. Graham Perrett was a keen supporting of the site-blocking legislation. He stressed that ‘piracy damages a vulnerable industry and impacts on precious Australian jobs.’

Changing his tune from 2014, Jason Clare MP supported the site-blocking copyright legislation. Yet, he warned that ‘we need to be careful not to overestimate how effective this legislation might be.’ Clare commented, though, that there needed to be affordable access to copyright work: ‘Content also has to be cheap, quick and easy to get. And that is a job for business not for this parliament.’ Mindful of a recent parliamentary inquiry, Clare

---

74 Ibid.
75 Ibid.
76 Ibid.
78 Ibid.
79 Ibid.
82 Ibid.
83 Ibid.
emphasized that there was a need to take action to ensure that Australians received a fair deal in respect of IT pricing.\textsuperscript{84}

The Hon. Terri Butler also expressed reservations about the ability of Australian consumers to obtain timely and affordable access to copyright content.\textsuperscript{85} She expressed the view:

It is fair to say that Australian consumers of digital products want fair and timely access to content. It has been described as being more of an issue about service than about price—in other words, the view is that if consumers had more convenient and timely access to digital content then the fact that they would also have to pay for it would not dissuade them from using that lawful way of obtaining content. That is not just my view. That concern has been around for some time in relation to how people can get access to digital content in this country in a fair and timely way.\textsuperscript{86}

Nonetheless, she supported the site-blocking legislation, arguing that it was a ‘moderate’ intervention: ‘We, as I say, will always take a critical and moderate approach to supporting any interventions in this area, because it is quite a nuanced and facetted question, but this, we believe, is a moderate and appropriate approach to the issue of combating online piracy.’\textsuperscript{87}

However, there was some dissent from Ed Husic MP about how the Australian Labor Party had supported the copyright site-blocking regime.\textsuperscript{88} He argued that the legislation reflected ‘an ethos that tries to limit the liberalising force of the internet to the extent that it tries to skew benefits to producers, rights holders, and entrenched interests at the expense of others’.\textsuperscript{89} He warned: ‘We cannot remain insular, imposing a quasi-form of protectionism to prop up profits at the expense of consumers.’\textsuperscript{90} Husic contended: In the wider context it demonstrates an absence of commitment by this government to having a coherent approach to dealing with piracy ... it is tough on piracy but not on the causes of piracy.’\textsuperscript{91} He argued that there was a need to change the way in which Australian consumers were treated:

For years consumers of content have been forced to accept content later than overseas consumers at higher prices. It's a business model that helped prop up profits of rights holders, and consumers have been cynically forced to accept a business model that simply fleece them.\textsuperscript{92}

\textsuperscript{84} The House of Representatives Standing Committee on Infrastructure and Communications, \textit{At What Cost? IT Pricing and the Australia Tax} (Parliament of Australia, 2013).

\textsuperscript{85} The Hon. Terri Butler, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2015 (Cth)’, Hansard, House of Representatives, Parliament of Australia (16 June 2015) 6413.

\textsuperscript{86} Ibid.

\textsuperscript{87} Ibid.


\textsuperscript{89} Ibid.

\textsuperscript{90} Ibid.

\textsuperscript{91} Ibid.

\textsuperscript{92} Ibid.
Husic commented: ‘What this bill does is get government to help business to keep fleecing consumers or to support that type of ethos.’ He also expressed concerns as to whether VPNs would be affected by the Coalition Government’s approach to copyright in the future. Husic was concerned that the recommendations of the inquiry into IT Pricing had been ignored.

In his book, *Information Doesn’t Want to Be Free: Laws for the Internet Age*, Cory Doctorow has some sage advice for copyright owners: ‘Things that don’t make money: Complaining about piracy; Calling your customers thieves; Treating your customers like thieves.’ He maintained that there was a need for copyright owners to develop appropriate business models, which provided for accessible and affordable access to copyright content.

### F. The Critique of the Australian Greens

The Australian Greens have also been highly critical of the copyright proposals of the Coalition Government. Senator Scott Ludlam of the Australian Greens has commented:

> The Greens will not support amendments to the Copyright Act to allow rights holders to apply for a court order requiring ISPs to block access to a website. Such a move would be a defacto Internet filter and would allow rights holders to unilaterally require websites to be blocked. This kind of Internet filter would not be effective at all, due to the widespread availability of basic VPN software to evade it.

In his second reading speech, Senator Scott Ludlam elaborated upon his concerns about the legislation. He complained that the Australian Government ‘has cherry picked an element that was not even canvassed in the [Australian Law Reform Commission] report and brought that forward because it gives it the impression of having done something and it directly answers to its cashed-up donors and lobbyists, which, we are well aware, is how this government works.’ He observed: ‘So it is lazy from a policy point of view and it is also lazy politics.’ Ludlam warned: ‘It is dangerous because it does create the architecture of a second internet filter in this country.’ Ludlam observed that Turnbull had previously opposed an Internet filter. He observed: ‘During the inquiry into the bill, major companies, including Amcom, iiNet and Google—and even some of the bill’s supporters—

---

93 Ibid.
95 Cory Doctorow, *Information Doesn’t Want to Be Free: Laws for the Internet Age* (McSweeney’s, 2014).
98 Ibid.
99 Ibid.
100 Ibid.
101 Ibid.
emphasised that blocking websites will not stop people from accessing content.'\textsuperscript{102} He commented that the regime could be circumvented: ‘There are dozens of ways of getting around a website being blocked, ranging from using a virtual private network—or a VPN—to using one of many streaming apps or websites, or just getting hold of the files on a USB stick and running them from there.’\textsuperscript{103}

Ludlam was concerned whether legitimate services would be affected by the site-blocking regime:

Both the Minister for Communications and the shadow Attorney-General have stated that the bill is not intended to catch legitimate services like virtual private network providers, but the bill does not make it clear. Again, I am hoping that this is a relatively uncontroversial amendment. VPNs have a very wide variety of legitimate uses, and I think it is extremely concerning that this bill has left vague the fact that it may be possible for a court to decide that the primary purpose of VPN services is to facilitate or to infringe copyright.\textsuperscript{104}

Ludlam was concerned that there would be inadequate representation of the public interest: ‘The structure of the bill makes it very clear that, at least after the first several actions, it is very unlikely that these blocking injunctions, that will come, most likely, from foreign rights holders, will be blocked either by the affected website owners—who may be based overseas and who are not necessarily going to want the expense of defending an Australian legal case—or the ISPs.’\textsuperscript{105} He maintained: ‘The experience in the UK, where a similar regime prevails, shows that ISPs are likely to only contest the first few injunctions before waving through most of what comes afterwards’.\textsuperscript{106} Ludlam observed: ‘And that—again, to foreshadow—goes to why we have proposed, in another of our committee stage amendments, that much wider standing should apply, so that the courts can hear from affected third parties or others who might want to put a public interest point of view or who have a private interest even though they are not the ISP or somebody more immediately affected.’\textsuperscript{107}

Citing the inquiry into IT Pricing, Ludlam argued that there is a need for a change in market behaviour: ‘The only effective way to deal with copyright infringement on the kind of scale that the government is concerned about is to just make it available: conveniently, affordably and in a timely way’.\textsuperscript{108}

David Leyonhjelm of the Liberal Democrats also complained that ‘website blocking is a drastic remedy and a blunt tool.’\textsuperscript{109}

\begin{thebibliography}{9}
\bibitem{102} Ibid.
\bibitem{103} Ibid.
\bibitem{104} Ibid.
\bibitem{105} Ibid.
\bibitem{106} Ibid.
\bibitem{107} Ibid.
\bibitem{108} Ibid.
\end{thebibliography}
**G. Stakeholder Perspectives**

There were a range of stakeholder perspectives about the legislation.  

Foxtel chief executive Richard Freudenstein asserted that there was evidence from Europe that web-blocking measures have had a significant impact upon rates of copyright infringement. Freudenstein also asserted: "This about blocking access to sites run by criminals and gangs: these are not crusaders for freedom, they are out to make money by stealing other people's intellectual property." This statement shows a poor understanding and appreciation of copyright history. Even since the inception of copyright law, there have been concerns about governments. There is a long history of governments, corporations, associations, and individuals bringing copyright action in order to censor free speech or at the very least chill free speech.

CHOICE Australia—the leading consumer rights’ group in Australia—was also disappointed by the copyright proposals. Alan Kirkland was wary of ‘an industry-run internet filter to block ‘offending’ websites’. He commented:

> We know that internet filters don’t work. This approach has been called ineffective and disproportionate by courts overseas, and it risks raising internet costs for everyone.

Kirkland said that there was a need to fix the availability, and the high prices in respect of copyright works.

The Communications Alliance has been cautious about the Coalition Government’s copyright plans. The Communications Alliance, whose members include iiNet and Optus, have commented that the bill is vague and ambiguous and fails to specify what type of blocking should be undertaken. John Stanton commented on the proposed bill:

> The bill is very generic on this. And yet there are different costs and risks associated with different types of blocking methodology. We have cautioned that website blocking is a relatively blunt tool, with risks of ‘collateral damage’ if not applied with precision. There is uncertainty as

---

112 Ibid.
114 Ibid.
115 Ibid.
to how courts will interact with and interpret the requirements of the legislation when making orders.\textsuperscript{118}

Stanton was concerned that the phrases ‘online location’ and ‘website’ were not precisely defined under the bill. Such ambiguity left open the danger of the bill being used for copyright censorship – whether that be purposely or accidentally. Moreover, the Communications Alliance was concerned about the lack of information over the costs of such prescriptive regulation. Stanton said: ‘The government originally said rights holders would be responsible for meeting implementation costs and that seems to have disappeared since the government first proposed it.’\textsuperscript{119} He observed: ‘It is reasonable for us to understand what the expectations and costs are rather than agreeing to a high level bill.’\textsuperscript{120}

Pirate Party Australia has denounced the new copyright regime.\textsuperscript{121} President of the Pirate Party, Brendan Molloy, has commented:

This proposal is effectively the beginning of an Australian version of the failed US Stop Online Piracy Act. Notification schemes, graduated response schemes and website blocking do not work. They are costly, ineffective and disproportionate, as evidenced by academia and decisions of foreign courts. Fighting the Internet itself as opposed to solving the lack of convenient and affordable access does not work, nor does propping up business models that rely upon the control of content consumption in the digital environment.\textsuperscript{122}

Deputy President, Simon Frew, added: ‘Website blocking is censorship, plain and simple.’\textsuperscript{123} He commented: ‘By ignoring the IT Pricing Inquiry and numerous submissions to different reviews that Australians are regularly paying more and waiting longer for content, the Coalition is looking to enact a legislative dinosaur that will be easily bypassed by savvy Internet users in seconds.’\textsuperscript{124}

The Institute of Public Affairs has also expressed reservations about the proposed copyright regime.\textsuperscript{125} Chris Berg commented:

The government’s proposal to block websites that infringe copyright is an internet filter and a threat to free speech. This is nothing more than an internet filter, of the sort which the Coalition proudly opposed when it was proposed by the Rudd and Gillard governments. There is no

\textsuperscript{118} Ibid.
\textsuperscript{119} Ibid.
\textsuperscript{120} Ibid.
\textsuperscript{122} Ibid.
\textsuperscript{123} Ibid.
\textsuperscript{124} Ibid.
reason to believe that this will reduce copyright infringement in any
material way.\textsuperscript{126}

Such criticism is notable—given that the Institute of Public Affairs is
frequently an ally and a friend of the Coalition Government, across a range of
policy fields.

II Copyright Litigation over Site-Blocking and Search-Filtering

The Australian courts considered the operation of the scheme for site-blocking
copyright-infringing sites in a number of precedents. Thus far, copyright
owners have been largely successful in a number of instances in satisfying
judges of the Federal Court of Australia of the need for site-blocking orders.
There has been only the odd case which has not proceeded.

The copyright litigation in respect of the Copyright Amendment (Online
Infringement) Act 2015 (Cth) has also highlighted some of the problems with
the approach of site-blocking. There has largely been a failure by sites to
defend themselves in court proceedings – with only the rare opposition. So
many of the arguments in the cases have been uncontested. In some respects,
the Australian courts have contemplated straightforward cases thus far, where
there is clear evidence of facilitation of copyright infringement. There have not
yet been more ambiguous cases – in which there have been mixed purposes in
respect of sites. There has not been a full consideration of the myriad of
factors that judges should take into account.

In 2017, David Lindsay was hopeful that there would be a ‘demanding and
ambitious’ proportionality analysis.\textsuperscript{127} He argued that ‘the introduction of
some form of proportionality has the potential to improve, first, the nature
and transparency of judicial decision-making in awarding a blocking
injunction and, secondly, impose principled limits on the jurisdiction’.\textsuperscript{128}
Unfortunately, in practice, proportionality has not necessarily received much
in the way of judicial contemplation. There has yet really been an elaboration
of the rules in respect of site-blocking and proportionality.

A. Roadshow Films Pty Ltd v Telstra Corporation Ltd [2016]
FCA 1503

In the 2016 case of Roadshow Films Pty Ltd v Telstra Corporation
Ltd and Foxtel Management Pty Ltd v TPG Internet Pty Ltd, Nicholas J
considered applications by Roadshow to block access to online locations
known as ‘SolarMovie’, ‘The Pirate Bay’, ‘Torrentz’, ‘TorrentHound’ and
‘ISOHunt’.\textsuperscript{129}

\textsuperscript{126} Ibid.
\textsuperscript{127} David Lindsay, ‘Website Blocking Injunctions to Prevent Copyright Infringements:
Proportionality and Effectiveness’ (2017) 40 (4) University of New South Wales Journal
1507-1538.
\textsuperscript{128} Ibid., 1538.
\textsuperscript{129} Roadshow Films Pty Ltd v Telstra Corporation Ltd [2016] FCA 1503.
In his judgment, Nicholas J provided some technical background on the internet, internet protocol address, uniform resource locator, domain names, the domain name system server, DNS blocking, URL blocking, IP address blocking, proxy servers and BitTorrent.

Nicholas J observed that Roadshow has objected to ‘SolarMovie’ engaging in copyright infringement in respect of a number of films and television programs, including *The Lego Movie*, *Tron Legacy*, *Cindarella*, *Spy*, *Kingsman: The Secret Service*, *Transformers: Age of Extinction*, *The Gambler*, *Spider-Man 2*, *Jurassic World*, *This is the End*, *Straight Outta Compton*, *The Big Bang Theory* and *Shameless*. Nicholas J found that ‘SolarMovie’ was being used to infringe or facilitate the infringement of copyright in respect of Roadshow films: ‘I am satisfied that the SolarMovie website was designed and operated to facilitate easy and free access to cinematograph films made available online, something which, I would infer, has almost certainly occurred without the permission of the owners of the copyright in such films’.132

The judge also noted that ‘it is apparent that the SolarMovie website positively encouraged the infringement of copyright on what I am satisfied is likely to be a widespread scale.’133 The judge held: ‘These activities involved a flagrant disregard for the Roadshow copyright owners’ rights, the rights of other copyright owners whose films were made available online at the SolarMovie website, and copyright generally’.134 The judge ruled: ‘Blocking orders have already been made in relation to many of the SolarMovie sites in other jurisdictions.’135

The accompanying proceeding involved an action by Foxtel against The Pirate Bay, Torrentz, TorrentHound and IsoHunt in respect of copyright infringement of television programs, such as *Wentworth*, *Open Slather*, *A Place to Call Home*, and *Real Housewives of Melbourne*. In respect of The Pirate Bay, the judge found: ‘Each site, which I am satisfied is located outside Australia, facilitates the infringement of copyright, including Foxtel’s copyright in the Foxtel programs, which can be downloaded using magnet links found there’.136


133 Ibid.

134 Ibid.

135 Ibid.

136 Ibid.
The judge held: ‘I am also satisfied that the primary purpose of each of the active TPB sites is to facilitate the infringement of copyright.’

Reflecting upon the decision, Paula Dootson, Kylie Pappalardo and Nicolas Suzor doubted whether site-blocking would be sufficient to stop copyright infringement. They contended: ‘In the 17 years since Napster, one of the first file-sharing services, punitive legal responses are yet to be proven effective at reducing rates of infringement.’ Dootson, Pappalardo and Suzor argued: ‘This experience suggests that stricter copyright laws are not the most effective way to address copyright infringement’. They maintained: ‘Instead of investing resources into legal proceedings, we suggest that rights-holders should invest in innovative platforms that provide consumers with greater access to content in a timely manner at a fair price’.

B. Universal Music Australia Pty Limited v TPG Internet Pty Ltd [2017] FCA 435

In the 2017 case of Universal Music Australia Pty Limited v TPG Internet Pty Ltd, the Federal Court of Australia considered an application by various members of the music industry for the blocking of domain names, IP addresses and URLs that provided access to online locations known as ‘KickassTorrents’ or ‘KAT’. There was a concern that ‘Kickass Torrents’ had facilitated copyright infringement of such sound recordings as Major Lazer’s album, ‘Peace is the Mission’, The Kite String tangle’s album, ‘Vessel’, Guy Sebastian’s song ‘Like a Drum’, Indigenous singer Jessica Mauboy’s album ‘Beautiful’, Fall Out Boy’s album ‘American Beauty/ American Psycho’, Justin Bieber’s album ‘Purpose’, and Ellie Goulding’s work, ‘Delirium’. There was a complaint that ‘Kickass Torrents’ had enabled copyright infringement in respect of musical works, including such numbers as Sia’s ‘Chandelier’, ‘AC/DC’s Highway to Hell’, Taylor Swift’s ‘Shake It Off’, and One Direction’s ‘Steal My Girl’.

Considering the matter, Burley J held:

The KickassTorrents website (KAT website) is a website which can be accessed by users of the internet via a number of different domain names. Users of the website are encouraged to search for digital content on the website and download it. The primary, and probably the sole, function of the website is to enable the digital downloading of musical works, sound recordings, movies and books, free of charge and

---

137 Ibid.
139 Ibid.
140 Ibid.
141 Ibid.
142 Universal Music Australia Pty Limited v TPG Internet Pty Ltd [2017] FCA 435
143 Appendix A of Universal Music Australia Pty Limited v TPG Internet Pty Ltd [2017] FCA 435
144 Appendix B of Universal Music Australia Pty Limited v TPG Internet Pty Ltd [2017] FCA 435
without the licence or approval of the owners of copyright in those works. The evidence indicates that the website enables users to infringe copyright on an industrial scale.\footnote{Universal Music Australia Pty Limited v TPG Internet Pty Ltd [2017] FCA 435}

Burley J noted: ‘The KAT website has already been the subject of orders blocking access to it on the basis of copyright infringement in a ‘significant number of jurisdictions’, including the United Kingdom, Ireland, Denmark, Italy, Finland and Belgium.’\footnote{Ibid.} The judge held: ‘The scale of the infringement is such that it has a real and meaningful impact on the creation of new copyright content.’\footnote{Ibid.} Accordingly, the judge concluded: ‘I accept the applicants’ submission that the orders sought would be effective at preventing a meaningful proportion of Australian users from infringing copyright via the online location in the future, without giving rise to a danger of ‘overblocking’ legitimate websites.’\footnote{Ibid.} The judge also noted that ‘the evidence reveals that the applicants have taken steps to ensure that Australian customers have access to their licensed copyright content by other, legal means.’\footnote{Ibid.}

C. Roadshow Films Pty Ltd v Telstra Corporation Limited [2017] FCA 965

In the 2017 matter of Roadshow Films Pty Ltd v Telstra Corporation Limited, the Federal Court of Australia considered an application by Roadshow for the blocking of domain names, IP addresses and URLs that provided access to 49 online locations, including ‘Demonoid’, ‘LimeTorrents’, ‘EZTV’ and ‘CouchTuner’.\footnote{Roadshow Films Pty Ltd v Telstra Corporation Limited [2017] FCA 965.} Nicholas J was the presiding judge once again. The judge was satisfied that the sites had infringed the copyright of Roadshow Films – particularly in respect of Kingsman: The Secret Service:

I am satisfied, on the evidence of Mr Fraser, Mr Kraegen and Mr Stewart, that each Online Location has infringed or facilitated the infringement of copyright subsisting in one or more of the applicants’ Roadshow Films. In particular, I am satisfied that, by making the film ‘Kingsman: The Secret Service’ available to the public on the Streaming Online Location ‘Kinogo’ website, the copyright owner’s copyright has been infringed.\footnote{Ibid.}

The judge held: ‘The applicants’ evidence establishes that the primary purpose of each of the Online locations is to make available online and/or facilitate the making available online or reproduction of motion pictures and television programs without the licence of the copyright owner, including in respect of one or more of the Roadshow Films.’\footnote{Ibid.} The judge observed that the copyright infringement was flagrant: ‘By way of illustration, one of the Online Locations is accessible via the domain name ‘istole.it’ and it and many others include...
notices encouraging users to implement technology to frustrate any legal action that might be taken by copyright owners."\(^{153}\)

**D. Foxtel Management Pty Limited v TPG Internet Pty Ltd [2017] FCA 1041**

The case of *Foxtel Management Pty Limited v TPG Internet Pty Ltd* provided a consideration of the new site-blocking regime.\(^{154}\)

In this case, the applicant, Foxtel Management Pty Ltd, was the co-owner of the copyright in the television series, ‘Wentworth’. Foxtel sought orders against 49 internet service provider respondents, pursuant to s 115A of the *Copyright Act 1968* (Cth) (Act), disabling access in Australia to 127 internet locations which it alleged infringed or facilitated infringement of its copyright. Burley J granted orders.

Burley J provided some general findings, which were applicable to the relief sought against all of the online locations.

First, Burley J held that Foxtel was the copyright owner of the television series, ‘Wentworth’:

> The fact that Foxtel is a co-owner of copyright with another party does not preclude it from bringing the action in its own right. One co-owner can sue for infringement and obtain an injunction, as well as damages, without joining the other co-owner(s).\(^{155}\)

The judge held: ‘By reason of these matters, I find that Foxtel has established that it is the owner of copyright in Wentworth, as required by the chapeaux to s 115A(1) of the Act.’\(^{156}\)

Second, Burley J noted that Foxtel had pleaded that ‘each of the respondents is a carriage service provider within the meaning of that term as it is used in s 115A of the Act.’\(^{157}\) The judge observed: ‘Each of the respondents admit this fact in terms, and I find that it has been established for the purpose of these proceedings.’\(^{158}\)

Third, Burley J ruled that ‘Foxtel has established that each of the respondents is a carriage service provider that provides access to an online location within the requirements of s 115A(1)(a) of the Act.’\(^{159}\)

Fourth, Burley J held that ‘it is possible to make a general finding in relation to the question of the unauthorised use of the copyright material in respect of which copyright is claimed in these proceedings.’\(^{160}\) The judge observed:

---

\(^{153}\) Ibid.

\(^{154}\) *Foxtel Management Pty Limited v TPG Internet Pty Ltd [2017] FCA 1041*

\(^{155}\) Ibid.

\(^{156}\) Ibid.

\(^{157}\) Ibid.

\(^{158}\) Ibid.

\(^{159}\) Ibid.

\(^{160}\) Ibid.
Copyright in relation to a cinematograph film includes the exclusive right to make a copy of the film and to communicate the film to the public; s 86 of the Act.\footnote{161}

The judge observed: ‘The relevant question arising under s 115A(1)(b) of the Act is whether the online location infringes, or facilitates an infringement of, the copyright.’\footnote{162} The judge held: ‘Ms Southey gives evidence that Foxtel has not licensed or authorised the operations of any of the online locations to make available, reproduce or provide access to Wentworth’.\footnote{163} The judge ruled: ‘In the case of online locations where she was redirected to other websites which then enabled her to stream or download torrent files and associate content for the episodes of Wentworth that she watched (being season 3, episode 11, or season 4, episode 1), Ms Southey confirms that Foxtel did not authorise any of those sites to make such reproductions.’\footnote{164}

The judge then considered the investigations into the online locations. In respect of yesMovies, the judge ruled: ‘More generally, having regard to the content available via the domain name yesmovies.to, I am satisfied that the online location facilitates the infringement of copyright and that the primary purpose of the online location is to infringe or facilitate the infringement of copyright.’\footnote{165} The judge held: ‘In particular, I am satisfied that the website was designed and operated to facilitate easy and free access to cinematographic films made available online on such a scale and extent that, I infer, has occurred without the permission of the owners of copyright in such films.’\footnote{166} The judge ruled: ‘The website appears to be intended to promote, encourage and enable users to download content having no regard to the rights of the owners of copyright in that content.’\footnote{167}

On Vumoo, the judge held: ‘In my view, the orders sought represent a proportionate response to the activities of the online location and, having regard to the content of the website, it is unlikely that persons having legitimate rights will be adversely affected.’\footnote{168} The judge often used as a similar stock set phrases in respect of some of the sites.

The judge noted that ‘online locations known by reference to the name ‘LosMovies’ have been blocked by order of courts in the United Kingdom’.\footnote{169} The judge observed: ‘Such blocked websites include; losmovies.ch, losmovies.club and losmovies.com.’\footnote{170} The judge commented: ‘No doubt this explains why some of the LosMovies domain names include within them the words ‘unblocked.lol’.’\footnote{171} The judge held: ‘Having regard to the discretionary matters referred to in s 115A(5), the activities facilitated on this online location

\footnote{161} Ibid.  
\footnote{162} Ibid.  
\footnote{163} Ibid.  
\footnote{164} Ibid.  
\footnote{165} Ibid.  
\footnote{166} FoxTEL Management Pty Limited v TPG Internet Pty Ltd [2017] FCA 1041  
\footnote{167} Ibid.  
\footnote{168} Ibid.  
\footnote{169} Ibid.  
\footnote{170} Ibid.  
\footnote{171} Ibid.
include the flagrant infringement of copyright in Wentworth and of copyright in the cinematograph works that it promotes more generally.\footnote{172}

In respect of cartoon HD, the judge noted that the domain names were associated with IP addresses located in the United States and Iceland. As well as ‘Wentworth’, the judge noted that Foxtel was able to ‘stream other contemporary movie content including the 2017 feature film ‘Wonder Woman’, and episode 3 of season 7 of Game of Thrones.’\footnote{173}

The judge blocked ‘putlocker’. The judge noted that ‘the evidence of Ms Singh indicates that online locations known by reference to the name ‘putlocker’ may have been blocked by order of courts in the United Kingdom and Italy.’\footnote{174} The judge also observed: ‘There is also a suggestion that blocking orders were made in Norway in respect of domain names putlocker.is and putlocker.bz.’\footnote{175}

Foxtel also sought to block the ‘Watch Series’ locations. The judge held: ‘The evidence concerning the Watch Series sites, whether considered individually having regard to each group listed in Schedule 2, or collectively, presents a compelling case for the grant of the injunctive relief sought.’\footnote{176}

E. \textit{Roadshow Films Pty Limited v Telstra Corporation Limited [2018] FCA 582}

In the 2018 case of \textit{Roadshow Films Pty Limited v Telstra Corporation Limited}. Nicholas J considered the blocking of domain names, IP addresses and URLs that provided access to the online location ‘HD Subs’, and other specific locations from which various files may be downloaded by certain applications that operate on the Android operating system and enable access to content by the use of certain set-top boxes.\footnote{177} The judge held:

\begin{quote}
In this case, the six online locations (KissCartoon, Couchtuner, MegaShare, Bitsnoop, Demonoid and Kinogo) which were unavailable in May 2017 were, at the time the proceeding was commenced in February 2017, accessible using the respondents’ carriage services. There is no evidence before me to suggest that those six locations may not infringe or facilitate the infringement of copyright in the future.\footnote{178}
\end{quote}

The judge held: ‘I am satisfied, on the evidence of Mr Fraser, Mr Kraegen and Mr Stewart, that each Online Location has infringed or facilitated the infringement of copyright subsisting in one or more of the applicants’ Roadshow Films.’\footnote{179} The judge observed: ‘In particular, I am satisfied that, by making the film ‘Kingsman: The Secret Service’ available to the public on the Streaming Online Location ‘Kinogo’ website, the copyright owner’s copyright

\footnotesize
\begin{flushright}
\begin{tabular}{l}
\footnote{172}{Ibid.} \\
\footnote{173}{Ibid.} \\
\footnote{174}{Ibid.} \\
\footnote{175}{Ibid.} \\
\footnote{176}{Ibid.} \\
\footnote{177}{Roadshow Films Pty Limited v Telstra Corporation Limited [2018] FCA 582.} \\
\footnote{178}{Roadshow Films Pty Limited v Telstra Corporation Limited [2018] FCA 582.} \\
\footnote{179}{Ibid.}
\end{tabular}
\end{flushright}
has been infringed.’180 The judge concluded: ‘In respect of all the Online Locations, the evidence establishes that each of those locations has facilitated infringement of copyright in one or more of the Roadshow Films.’181

F. **Foxtel Management Pty Ltd v TPG Internet Pty Ltd [2018] FCA 933**

In the 2018 case of **Foxtel Management Pty Ltd v TPG Internet Pty Ltd**, Nicholas J of the Federal Court of Australia considered the blocking of domain names, IP addresses and URLs that provided access to 15 online locations, including ‘HDO’, ‘123Hulu’, ‘Watch32’, ‘WatchFreeMovies’, ‘SeriesTop’, ‘ETTV’, ‘Torrent Download’ and ‘Torrents.me’.182 In a short judgment, Nicholas J held: ‘I am satisfied that each of the target online locations allows users to access audio-visual material consisting of cinematograph films using either torrent technology or streaming technology that enables users to access and view such material on devices connected to the internet’.183

The judge also noted: ‘Most of the target online locations provide internet users with a browsable and/or searchable index or directory of audio-visual content from which the user can make a selection, and categorises its index of audio-visual content by reference the title such as ‘Movies’ and ‘TV’.’184 The judge also observed: ‘One of the target online locations, torrents.me, allows users to search for and download torrent files and, in addition, provides users with an index of sites from which a user can access other torrent files’.185 The judge held: ‘The index of proxy sites found at torrents.me includes links to many proxies for other well-known sites that infringe or facilitate the infringement of copyright in audio-visual websites including the Pirate Bay.’186

G. **Television Broadcasts Limited v Telstra Corporation Limited [2018] FCA 1434.**

In the 2018 case of **Television Broadcasts Limited v Telstra Corporation Limited**. Nicholas J considered applications for copyright site-blocking by TVB – a free to air television broadcasters based in Hong Kong, China. TVB operated five TV channels in Hong Kong – including Jade, J2, TVB News, Pearl, and TVB Finance and Information.187 The application related to various online locations, which communicated with set top streaming boxes, which enabled a user to receive TVB’s television broadcasts in Australia, without having to pay a subscription fee. A1; BlueTV; EV Pad Pro; FunTV; hTV5; MoonBox C; and Unblock TV Gen 3.

---

180 Ibid.
181 Ibid.
182 Foxtel Management Pty Ltd v TPG Internet Pty Ltd [2018] FCA 933.
183 Ibid.
184 Ibid.
185 Ibid.
186 Ibid.
Nicholas J considered the primary purpose test. The judge commented: ‘The evidence shows that TVB, TVBO and the third party copyright owners or exclusive licensees I have referred to have not given any such permission to the operators of either the target online locations or the streaming devices from which the relevant content is streamed.’  

The judge observed: ‘I am also satisfied that the primary purpose of the target online locations is to facilitate the infringement of copyright by making such material available online in Australia in circumstances where this occurs without the consent of the relevant copyright owners.’  

Nicholas J also took into account a number of discretionary factors: ‘As to the various considerations relevant to the exercise of the discretion in this particular matter, I think the following matters should be given most weight in determining whether to make the blocking orders sought: flagrancy of the infringements; impact on persons likely to be affected; availability of other remedies; proportionality of response; and compliance with s 115A.’  

The judge held: ‘I regard as flagrant the copyright infringements of the persons who have made the TVB broadcasts available online, including those persons responsible for the establishment and maintenance of the target online locations that make it possible for users of the streaming devices to view the TVB broadcasts either in close to real time or at some later time using the VOD service.’  

The judge observed: ‘The unfairness inherent in this form of “free riding” extends not just to the copyright owners, but also to the Australian subscribers to the authorised TVB pay-tv service operated by TVBA.’  

The judge held: ‘As the evidence shows, the operators of the target online locations, who are almost certainly based overseas, are virtually impossible to track down.’  

In his view, ‘Obtaining any form of effective injunctive relief against them in Australia is not a realistic option.’ The judge held that site-blocking was a proportionate response: ‘I accept that access to some of content that was originally broadcast (ie. which was not pre-recorded) in which copyright does not subsist may also be blocked, but my strong impression from the evidence is that this is likely to constitute a relatively small proportion of the total content the subject of TVB’s television broadcasts in Hong Kong.’  

The judge also noted that the applicants had made reasonable efforts to ascertain the identity and address of the operators of the target online operators.

H. Music Rights Australia

In 2019, Music Rights Australia – and other music industry members – have sought site-blocking orders against Australian internet services providers to block their customers from accessing ‘stream-ripping’ services.  

188 Ibid.
189 Ibid.
190 Ibid.
191 Ibid.
192 Ibid.
193 Ibid.
194 Television Broadcasts Limited v Telstra Corporation Limited [2018] FCA 1434
ripping’ sites enable users to record and save audio streamed from a service such as YouTube or Spotify. A Music Rights Australia spokesperson was quoted by Computerworld: ‘We use this effective and efficient no fault remedy to block the illegal sites which undermine the many licensed online services which give music fans the music they love where, when and how they want to hear it’.196 Barrister Rob Clark appearing for the applicants said that the action is ‘somewhat different’ to past site-blocking cases ‘in so far as the online locations don’t themselves provide content or the means to get content [such as] BitTorrent or streaming sites’.197

The music industry was successful in their efforts to obtain court orders.198 Perram J issued orders instructing Telstra, Foxtel, Optus, TPG and Vodafone to take reasonable steps to stop their customers from accessing four ‘stream ripping’ services.

I. International Media Distribution and New TV

In March 2019, representatives of International Media Distribution and Lebanese TV station New TV (Al Jadeed) appeared before the Federal Court of Australia, bringing a copyright action seeking to block the use in Australia of the Reelplay set-top box.199 The judge told the legal representatives to expect scrutiny of their attempt to block online services associated with an IPTV set-top box. Burley J stressed said that he would pay ‘particularly close attention’ to proof of service and that the applicants should ensure that ‘all the requirements’ of Section 115a of the Copyright Act were met.200 In August 2019, the coalition of three international distributors dropped its action to block online services used by the Reelplay set-top box.201

J. Subtitling case

In late 2018, the Federal Court of Australia has granted an application for site-blocking. The application was brought by a large group of entertainment companies including Roadshow Films and major movie studios.202 Other


196 Ibid.


200 Ibid.


202 Corinne Reichert, ‘Subtitle Piracy: Will It Be Enforced in Australia?’, ZDNet, 14 December 2018, https://zd.net/2UBOs7A; and Rohan Pearce, ‘Unauthorised subtitle services to be
participants included Television Broadcasts (TVB) Limited and its local subsidiary, as well as Australian distributor Madman Entertainment Pty Limited and Tokyo Broadcasting System Television, Inc. In addition to standard sites, the application targeted Addic7ed, Yifysubtitles, Opensubtitles.org and Subscene, which provide subtitle downloads that can be used with copies of films and TV shows. The question of whether subtitles constitute a literary work was debated in the Federal Court of Australia. Nicholas J granted the application.\textsuperscript{203} There has been a discussion of the scope of the order.\textsuperscript{204}

K. \textbf{Madman cases}

In 2019, group of companies led by Village Roadshow and including major film studios as well as Australian distributor Madman sought orders against sites that allegedly offer illicit streaming or downloads of copyright material, or link to other locations that provide streaming or download services.\textsuperscript{205} The application listed 21 movies (including \textit{The Lego Movie}, \textit{Cinderella}, \textit{Toy Story}, \textit{Tron: Legacy} and \textit{Kingsman: The Secret Service}), as well as episodes of 'The Big Bang Theory', 'Shameless' and 'Dagashi Kashi'. According to the application for injunction, the target sites offer streaming or downloads of copyright material, or they link to other services that provide streaming or downloads. This provided a test case for the new regime passed in the \textit{Copyright Amendment (Online Infringement) Act} 2018 (Cth).

There has already been efforts to test the efficacy of the new regime in June 2019.\textsuperscript{206} Nicholas J granted the site-blocking orders.\textsuperscript{207} The interesting part of this dispute was that Dr Socrates Dimitriadis, the operator of Greek-Movies.com website, questioned the orders. Nicholas J held:

\begin{quote}
The facilitation of the copyright infringement is in my opinion flagrant. Dr Dimitriadis does not deny that many of the films catalogued on his website are protected by copyright and that visitors to his website who download such films using the links he has created will do so in breach of copyright. Dr Dimitriadis has authorised the infringement of
\end{quote}

\begin{footnotes}
\textsuperscript{203} Roadshow Films Pty Ltd v Telstra Corporation Limited NSD1246/2018 (20 December 2018)
\end{footnotes}
copyright in films that are catalogued on his website where such films are downloaded by Australian users using links he has created. The fact that Dr Dimitriadis does not host the copyright material on his own website or server is not inconsistent with that proposition.  

The judge observed that ‘Dr Dimitriadis has not proposed any alternative remedy or resolution of the applicants’ complaints with respect to his website’ and ‘he has not offered to remove links to infringing content or to take any other step that might lessen the amount of infringing material that may be accessed using the facilities made available at his website’. Moreover, he ruled: ‘Nor has he identified any hardship or inconvenience that will be suffered by any users of his website in Australia if a blocking order is made.’

In August 2019, Thawley J handed down a judgment in a matter involving Roadshow, TVB Applicants, and Madman. Amongst other things, the case involved the work, *Tokyo Ghoul*, distributed by Madman. The judge held: ‘I am satisfied, having regard to the matters mentioned and the volume and flagrancy of the infringements and the facilitation of infringements, that disabling access to the various Target Online Locations is a proportionate response and that it is in the public interest.’

Strikingly, Netflix’s production arm, Netflix Studios, has backed legal action in respect of site-blocking in 2019. The company has been concerned about copyright infringement of episodes of *Santa Clarita Diet* and *Stranger Things*.

Part 3: The Copyright Amendment (Online Infringement) Act 2018 (Cth)

The last 44th Australian Parliament hosted a ‘Parliamentary Friends of the Internet’. Apparently, the aim of this bipartisan Group was ‘to support the development, innovation and use of the internet for the benefit of all Australians’. The key contacts of this organisation were Senator Chris Ketter; Mrs Jane Prentice MP; and Senator Scott Ludlam. The ‘Parliamentary Friends of the Internet’ seems to have been dissolved in the 45th Australian Parliament. The disappearance of this organisation perhaps reflects a new hostility towards information technology in the Australian Parliament. The Australian Parliament seems to have de-friended the Internet.

It has been troubling times in respect of internet policy in Australia. While promising digital transformation, the Australian Parliament has enacted rather dystopian laws of late. Privacy-grabbing data retention laws have been passed. As predicated, such surveillance laws have been expanded in their

---

208 Ibid.
209 Ibid.
210 Ibid.
212 Ibid.
application, soon after their enactment. The Census was bedevilled by problems in respect of privacy and information security. There have been concerns about the cruel and capricious RoboDebt laws. The opt-out system for My Health Record has faced criticism for its disrespect for privacy, medical confidentiality, and information security. The Australian Government has also been seeking to pass anti-encryption laws in a so-called ‘War on maths’. There has been a strange effort to regulate e-commerce and the internet through the means of a regional trade agreement in the Trans-Pacific Partnership. There have been radical new criminal laws passed in respect of the sharing of abhorrent violent material. To top it off, the Australian Government sought to expand rather draconian site-blocking laws in respect of copyright law, with little time for scrutiny or consideration or consultation surrounding the bill. Given the recent disastrous experiences with internet policy, perhaps the Australian Parliament should have exercised some due diligence in subjecting the Copyright Amendment (Online Infringement) Bill 2018 (Cth) to some close and rigorous examination.

Instead, there was a short review conducted in-house by the Department of Communications and the Arts. There were submissions from stakeholders – such as APRA, AMCOS, the Australian Copyright Council, Australian Copyright Council, the Australian Digital Alliance, Australian film and TV bodies, Australian music industry bodies, the Coalition of Major and Professional Participation Sports, the Communications Alliance, Digital Rights Watch, Fetch TV, Foxtel, Free TV Australia, Optus, Pirate Party Australia, Screenrights, Telstra, the Law Society of New South Wales, and Village Roadshow.

220 Department of Communications and the Arts, Review of the Copyright Online Infringement Amendment.
The House of Representatives only provided cursory consideration of the Copyright Amendment (Online Infringement) Act 2018 (Cth). There was no committee inquiry into the topic. The speeches given in the House of Representatives on the legislation lacked any depth of analysis of the legislative changes proposed, or their larger public policy implications. It is remarkable that the Environment and Communications Legislation Committee provided only a week for stakeholders to comment upon the complex and radical Copyright Amendment (Online Infringement) Act 2018 (Cth). It was equally surprising that the Environment and Communications Legislation Committee spent two weeks investigating the topic, before reporting to the Australian Parliament.

A. The Discourse of ‘Piracy’

In a press release, the Minister for Communications and the Arts Senator Mitch Fifield commented upon the Copyright Amendment (Online Infringement) Act 2018 (Cth):

> Online piracy is theft. Downloading or streaming a pirated movie or TV show is no different to stealing a DVD from a shop. The government is providing enormous support to creative industries, including through small business tax relief and our Location incentive program. We can’t have that good work undone by allowing local creators to be victims of online piracy. We are always looking at what more we can do, and we want copyright owners to have the right tools at their disposal to fight online piracy.221

Including the title, this press release mentions ‘piracy’ eleven times. The Ministry press release asserted: ‘Online piracy hurts Australia’s creative industries and is particularly damaging to our local film and television production sector.’222 The curious thing about the press release is that echoes the language and the discourse of the copyright industries in the debate over site-blocking.

This statement confuses and conflates property law and intellectual property law. There is a significant difference between physical property and intangible property. This statement also mixes up civil and criminal law. Although the Minister invokes the language of theft, the Copyright Amendment (Online Infringement) Act 2018 (Cth) does not relate to criminal sanctions in respect of copyright infringement. The legislation concerns civil remedies. The High Court of Australia in the Stevens v Sony litigation expressed its concern about loose language around piracy, theft, and misappropriation in copyright matters.223 The judges expressed their preference for the much more neutral language of copyright infringement.

The Hon. Graham Perrett from the Australian Labor Party also lacks precision in terms of his discussion of the topic, using the terms ‘copyright

---

222 Ibid.
infringement’, ‘piracy’ and ‘theft’ interchangeably.\textsuperscript{224} His speech confounds and conflates terms related to property law and intellectual property law. The Shadow Attorney-General Mark Dreyfus is also careless in his use of language. He lumps the ‘theft of intellectual property’ together with a whole range of other unrelated regulatory issues: ‘We in Labor understand the importance of effective regulation in this area, whether it’s to stop the selling of illegal weapons, to shut down the vile trade in child pornography, to prevent online radicalisation of Australians by terrorist groups or, as this bill does, to prevent the theft of intellectual property.’\textsuperscript{225} The copyright bill under discussion, though, relates to civil remedies, not criminal offences. The copyright bill before the Parliament is unrelated to the selling of illegal weapons, matters of pornography, or terrorist offences.

The Hon. Ed Husic MP has taken issue with the exaggerated rhetoric employed by copyright industries:

> Some of the arguments these rights holders use are incredible. Graham Burke, from Village Roadshow, likened Google to big tobacco. That’s what Graham Burke said as a rights holder. It’s embarrassing that that is the level of advocacy by rights holders. But this is what these people think.\textsuperscript{226}

As William Patry has observed, copyright owners have often deployed rhetoric to create a moral panic in order to push policy-makers towards passing new laws.\textsuperscript{227}

\section*{B. Legislative Drafting}

The original \textit{Copyright Amendment (Online Infringement) Act 2015} (Cth) was rushed through Parliament before the end of the winter sitting.

The Federal Court of Australia has considered the parameters of the current site-blocking regime in a series of cases.\textsuperscript{228} Such judicial consideration of the legislation has not necessarily resolved some of its uncertainties and ambiguities.

The High Court of Australia has been critical in the past of poor legislative drafting in respect of digital copyright. In the case of \textit{Stevens v. Sony}, Gleeson,

---

\textsuperscript{224} The Hon. Graham Perrett, ‘Second Reading Speech on the \textit{Copyright Amendment (Online Infringement) Bill 2018} (Cth)’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10907.

\textsuperscript{225} The Hon. Mark Dreyfus, ‘Second Reading Speech on the \textit{Copyright Amendment (Online Infringement) Bill 2018} (Cth)’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10894.

\textsuperscript{226} The Hon. Ed Husic MP ‘Second Reading Speech on the \textit{Copyright Amendment (Online Infringement) Bill 2018} (Cth)’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10900.

\textsuperscript{227} William Patry, \textit{Moral Panics and the Copyright Wars} (Oxford University Press, 2009) and William Patry, \textit{How to Fix Copyright} (Oxford University Press, 2012).

Gummow, Heydon and Hayne JJ commented on the difficulties of engaging in the statutory interpretation of the Digital Agenda Act: ‘Copyright legislation, both in Australia and elsewhere, gives rise to difficult questions of construction.’. In the same case, Kirby J reflected upon the difficulties of making sense of the legislation:

‘Copyright’, it has been rightly declared, ‘is one of the great balancing acts of the law. Many balls are in play and many interests are in conflict.’ To the traditional problems of resolving such conflicts must be added, in the present age, the difficulties of applying the conventional model of copyright law to subject matters for which that model is not wholly appropriate; adjusting it to the ‘implications of the online environment’; and adapting it to international pressures that may reflect economic and legal interests that do not fit comfortably into the local constitutional and legal environment. ‘The dance proceeds’, as Professor Ricketson has observed; but the multiplicity of participants and interests now involved in its rhythms inevitably affect the contemporary judicial task of resolving contested questions of interpretation of the Copyright Act.

No doubt the High Court of Australia may encounter similar problems if it were to interpret the Copyright Amendment (Online Infringement) Act 2015 (Cth) and the Copyright Amendment (Online Infringement) Act 2018 (Cth) (which have been much less carefully designed than the Digital Agenda Act). Indeed, the problem with the Copyright Amendment (Online Infringement) Act 2015 (Cth) and the Copyright Amendment (Online Infringement) Act 2018 (Cth) has been that the regime has been designed to please a narrow group of copyright owners – rather than take into account what Kirby J describes as ‘the multiplicity of participants and interests now involved in its rhythms’.

C. The Efficacy of Site-Blocking

The Copyright Amendment (Online Infringement) Act 2018 (Cth) radically expands the availability of site-blocking orders. The proposed threshold of ‘primary effect’ is a much lower threshold than ‘primary purpose’. Copyright holders will be able to much more easily obtain site-blocking orders – even against sites, which have mixed purposes.

The Minister for Communications and the Arts, Senator Mitch Fifield, argued that the regime had sufficient safeguards to discourage overreach by copyright owners. He contended:

Some also expressed concern about the primary purpose or primary effect test—that it would enable sites such as Pinterest and Google Translate to be captured by a copyright-blocking injunction. This is highly unlikely to occur, particularly as the court may consider, under subsection 115A(5), a number of factors when determining whether to grant an injunction, including proportionality and public interest. It’s

---

230 Ibid.
231 Ibid.
difficult to imagine that legitimate websites with other purposes or effects, such as social media websites and translation websites, would satisfy this test.\textsuperscript{232}

Fifield argued: ‘The website-blocking scheme simply provides a fallback if voluntary measures prove to be insufficient or are not implemented broadly across the industry.’\textsuperscript{233}

Seeking to justify the new legislative amendments, Minister Paul Fletcher has pointed towards the film industry's own evidence is respect of site-blocking: ‘Research commissioned by the film industry shows that traffic to blocked sites in the months after blocking dropped by around 50 per cent.’\textsuperscript{234}

Associate Professor Nicolas Suzor noted: ‘The report said traffic to blocked sites has gone down, but there's no way of knowing if people are just accessing proxy sites or using a VPN.’\textsuperscript{235} In any case, industry self-reporting seems to be weak evidence upon which to base new copyright policies.

Digital Rights Watch has questioned the efficacy of the Copyright Amendment (Online Infringement) Act 2015 (Cth). In consultations with the Department, Digital Rights Watch commented:

The effectiveness of website blocking is difficult to assess. The fact that the system is relatively cumbersome and extremely easy to circumvent means that it is unlikely to impose any significant deterrent to the set of consumers who are highly motivated to infringe. For the bulk of ordinary users who we know would prefer to pay for content if it is available, we believe that it is vastly inferior to changes in the marketplace that make legitimate access to content easier and cheaper.\textsuperscript{236}

A number of journalists have pointed out in the course of site-blocking copyright litigation that such action seemed futile given the protean nature of the Internet.


\textsuperscript{233} Ibid.

\textsuperscript{234} The Hon. Paul Fletcher, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2018 (Cth), Hansard, the House of Representatives, 24 October 2018, 10911, https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber\%2Fhansardr\%2F4fa4c3cb-5541-4547-98c1-81b998c56718%2F0038%22


The Hon. Ed Husic MP doubted that site-blocking and search-filtering will be effective means of addressing copyright infringement:

The problem is that the bloated, greedy, resistant-to-change rights holders will always refuse to reform in this space. Copyright reform is used as their way to shield themselves from the modern era, to shield themselves from new ways of doing things. The internet is not a challenge to rights holders; the mentality of rights holders to move with the times is the biggest challenge to rights holders in this country. Piracy is their go-to lever—'We’re all about fighting pirates.' Apparently there are pirates all over the place who we have to be watching out for, who are ready to rip people off, who are demonising these hardworking rights holders. We get this argument all the time. These rights holders think that, by constantly using legal mechanisms through this place and elsewhere, piracy will disappear. The reality is that piracy is a reflection of a market failure.\textsuperscript{237}

He observed: ‘What we are providing for with these types of bills, which the rights holders all champion, support and claim credit for, is a form of regulatory hallucinogen, where they think that, if they get this type of regulatory reform through, piracy will disappear. No, it won’t.’\textsuperscript{238} Husic concluded: ‘When rights holders get serious about the consumer offering and the way in which they’re helping consumers access content in a much more affordable way, that will have a bigger impact.’\textsuperscript{239}

In the House of Representatives, a number of MPs sought to suggest that the amendments to Australia’s copyright laws were only minor or small or modest. The Hon. Julie Owens maintained that the \textit{Copyright Amendment (Online Infringement) Act 2018} (Cth) ‘is actually quite a small but sensible change to our copyright law, which seeks to protect rights-holders in a time of incredible transition.’\textsuperscript{240} This seems to be a serious understatement of the powers provided by the legislation. Cory Doctorow has highlighted how the legislation radically expands the scope of the site-blocking power:

The current Australian censorship system allows rightsholders to secure court orders requiring the country’s ISPs to block sites whose ‘primary purpose’ is to ‘is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).’ Under the new proposal, rightsholders will be able to demand blocks for sites whose ‘primary effect’ is copyright infringement.\textsuperscript{241}

\textsuperscript{237} The Hon. Ed Husic MP, ‘Second Reading Speech on the \textit{Copyright Amendment (Online Infringement) Bill 2018} (Cth), Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10900.
\textsuperscript{238} Ibid.
\textsuperscript{239} Ibid.
\textsuperscript{240} The Hon. Julie Owens, ‘Second Reading Speech on the \textit{Copyright Amendment (Online Infringement) Bill 2018} (Cth), Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10909.
Cory Doctorow has worried about what the operation of the ‘primary effects’ test in practice. He observed that copyright owners could seek to use such site-blocking powers against sites, with mixed purposes – such as YouTube: ‘This is the norm that the entertainment industry is pushing for all over the world: a service's ‘primary effect’ is infringing if there is a significant amount of infringement taking place on it, even if ‘a significant amount’ is only a small percentage of the overall activity.’

Cory Doctorow has also highlighted the dangers of private copyright owners being able to filter search engine results. He noted: ‘What's more, rightsholders will be able to secure injunctions against search engines, forcing them to delist search-results that refer to the banned site.’ Cory Doctorow observed:

The new Australian copyright proposal allows rightsholders to dictate search-results to the likes of Bing, DuckDuckGo, and Google... The copyright industry's 2015 position was that blocking worked. The 2018 position is that blocking doesn't work: you have to keep the existence and location of infringing files a secret, too.

Doctorow notes that such a regime is ineffective: ‘Users can still use VPNs to see search-results that are censored in Australia, and also use the VPNs to bypass their ISPs' blocks.’ He also comments that such a regime can also be deceptive: ‘But because search-results are blocked in Australia, ordinary Australians trying to do legitimate things will not be able to know what is blocked in their country, and will thus not be able to push back against abusive or sloppy overblocking.’ The support of the Coalition and the Australian Labor Party for such an Internet filter does create cognitive dissonance. Having espoused the importance of civil liberties and free speech and the rule of law, it seems surprising that the Liberal Party would countenance such a broad Internet Filter. It also appears that the Australian Labor Party has not learnt from its past lessons of pursuing an ill-fated Internet Filter under the direction of Stephen Conroy.

The Copyright Amendment (Online Infringement) Act 2018 (Cth) enables copyright owners to filter search engine results by compelling search engines to de-index results. Such a proposal is far too broad and wide in its intent and its impact. There could be dangers involved in respect of abuse of such copyright powers. The Copyright Amendment (Online Infringement) Act 2018 (Cth) also seeks to target cyber-lockers. Such a proposal could have a negative impact upon cloud computing and storage services.

Cory Doctorow also observes that the extra-territorial nature of the site-blocking regime is extremely problematic given the diversity of copyright regimes throughout the world. He notes that there is a lack of harmonisation in respect of copyright term and duration: ‘But it gets worse: the 2015 and 2018 censorship systems don’t limit themselves to censoring sites that

---

242 Ibid.
243 Ibid.
244 Ibid.
245 Ibid.
246 Ibid.
infringe Australian copyright: they also ban sites that violate any copyright in the world.247 This particular aspect of the legislation seems open to challenge – as there may be no clear nexus between Australia and the copyright infringement being complained of.

The Copyright Amendment (Online Infringement) Act 2018 (Cth) lacks appropriate safeguards to address the problem of copyright abuse. Research by Professor Jennifer Urban from Berkeley Law School has highlighted the problems of abuse of takedown notices in respect of the Digital Millennium Copyright Act 1998 (US).248 Similar problems could arise in respect of the radical new powers of site-blocking, search-filtering, and controlling cyber-lockers. Cory Doctorow noted: ‘The final piece of the new copyright proposal is to allow rightsholders to demand blocks for sites, services, addresses and domains that ‘provide access to’ blocked sites, without a new court order.’249 He observed: ‘This language is potentially broad enough to ban VPNs altogether, as well as a wide range of general-purpose tools such as proxy servers, automated translation engines, content distribution networks - services that facilitate access to everything, including (but not only) things blocked by the copyright censorship orders.’250 Doctorow noted: ‘If this power is wielded unwisely, it could be used to block access to major pieces of internet infrastructure’.251 He commented: ‘So this is the kind of order that you’d want used sparingly, with close oversight, but the new rules make these blocks the easiest to procure: under the new proposal, rightsholders can block anything they like, without going to court and showing proof of infringement of any kind, simply by saying that they’re trying to shut down a service that ‘provides access’ to something already banned.’252

The Shadow Attorney-General Mark Dreyfus is prone to talking up minor safeguards in the face of the introduction of radical new technology legislation. In respect of this copyright legislation, he maintains: ‘We in Labor are satisfied that the bill contains adequate safeguards to prevent its misuse.’253 However, he can identify little in the way of actual substantial safeguards. Dreyfus observes that ‘this bill includes a measure that will enable a minister, by disallowable instrument, to declare that particular online search engine providers or a class of those providers are exempt from the scheme.’254 He insists: ‘This last measure is essentially a safeguard to ensure that

250 Ibid.
251 Ibid.
253 Ibid.
254 Ibid.
injunctions are directed only against larger service providers facilitating the infringing of copyright. Much like Dreyfus’ limited, weak and ineffectual safeguards for the data retention regime, this measure seems speculative and hypothetical. Protection against site-blocking orders should not be at the discretion of a Minister.

In her second reading speech, the Shadow Minister for Communications Michelle Rowland refers to the work of Professor Kathy Bowrey, Professor Kim Weatherall and Professor Lawrence Lessig in her speech in favour of site-blocking. She neglects to mention that all these scholarly authorities have been critical of site-blocking as a measure to regulate copyright law.

Professor Kathy Bowrey’s book *Law and Internet Cultures* is an ardent critique of the policies and practices internet censorship. The book cannot be cited as providing intellectual legitimation of a regime of site-blocking and search-filtering.

Likewise, Professor Kimberlee Weatherall has been highly critical of the model put forward in the *Stop Online Piracy Act*. She commented upon the United States regime: ‘SOPA created a sweeping set of rules that allowed for ‘execution’ of a website on accusation, and without any real consideration of whether it was a proportional remedy in the particular case, or appropriate from the perspective of international comity’. It is a shame that her work has been misrepresented in the speech by Michelle Rowland.

Indeed, Professor Lawrence Lessig was one of the key opponents of the *Stop Online Piracy Act* in the United States. Far from endorsing site-blocking, he has been one of its most vociferous critics. Rather than supporting crude regulation of intermediaries, he has argued for a much more subtle and nuanced understanding of regulation of the internet.

D. Human Rights

The explanatory memorandum asserted that the *Copyright Amendment (Online Infringement) Act 2018* (Cth) is compatible with human rights principles relating to freedom of speech. However, copyright site-blocking

---

255 Ibid.
260 Alex Fitzpatrick, ‘SOPA 2.0 Why the Fight for Internet Freedom is Far From Over’, *Mashable*, 6 April 2012, https://mashable.com/2012/04/06/sopa-lawrence-lessig/#C7z6V2JU88qI
262 *Copyright Amendment (Online Infringement) Bill 2018 – Explanatory Memorandum* (Parliament of Australia)
has often been discussed as a form of censorship. Site-blocking poses challenges for freedom of speech, freedom of expression, and freedom of political communication. Cory Doctorow comments: ‘Australia has become a testbed for extreme copyright enforcement and the entertainment business in the twenty-first century.’\textsuperscript{263} He observed that ‘Australia may be a net copyright importer, but it is in imminent danger of becoming a net copyright censorship exporter’.\textsuperscript{264}

The architects of the Internet – such as Sir Tim Berners-Lee, Vint Cerf, and Brewster Kahle – have been alarmed by the proclivity with which national governments have sought to interfere with the free and open architecture of the Internet. Such designers have been concerned about the impact of site-blocking and surveillance upon the operation of the Internet.

The human rights assessment of the Copyright Amendment (Online Infringement) Act 2018 (Cth) in the explanatory memorandum in terms of a right to a fair hearing is also flawed. The litigation thus far has been involved contests between copyright owners and intermediaries.\textsuperscript{265} Site holders have not appeared. The site-blocking regime has lacked proper representation of community interests and public interests.

The human rights assessment of the Copyright Amendment (Online Infringement) Act 2018 (Cth) in the explanatory memorandum in terms of a right to a fair hearing is also flawed. The litigation thus far has been involved contests between copyright owners and intermediaries. Site holders have not appeared. The site-blocking regime has lacked proper representation of community interests and public interests.

The human rights assessment of the Copyright Amendment (Online Infringement) Act 2018 (Cth) in terms of cultural rights is also strained. The site-blocking power has thus far been used by major corporations in the film, television, and music industries. The site-blocking power has not been deployed by creative artists. If the site-blocking power is abused, there could be censorship of artistic expression and creative freedom.

The human rights assessment of the Copyright Amendment (Online Infringement) Act 2018 (Cth) in respect of freedom of speech and freedom of expression is inadequate. There has been a failure to consider the larger implications of this censorious legislation for a free and open Internet. Sir Tim Berners-Lee has highlighted the dangers of site-blocking and surveillance for the architecture of the Internet. Moreover, there are significant dangers of the site-blocking power being deployed in respect of copyright works – with

\textsuperscript{264} Ibid.
political content. The further expansion of site-blocking by the Australian Parliament will have larger implications for freedom of speech and expression in the digital age.

The recent work of the Australian Human Rights Commission has highlighted the various impacts of digital technologies upon political freedoms, civil liberties, and human rights. Australia does need a bill of rights to better protect the freedoms of Australian citizens. This is particularly important in the context of regulation of the Internet, search engines, and cloud computing.

E. Cultural Justifications

In his concluding speech, the Minister for Communications and the Arts Senator Mitch Fifield said that the legislation would modernise Australia’s copyright regime:

The bill will ensure that website blocking remains an effective means for copyright owners to address large-scale copyright infringement by overseas operators. Together with small business tax relief and location incentives, these changes will help our creative industries to produce Australian content and tell Australian stories. They will also support investments that have made it possible for Australians to enjoy their favourite films, TV shows and music where and when they want.

Senator Mitch Fifield argued: ‘This bill is an important reform to Australia’s copyright framework that will ensure that the Australian creative sector can continue to invest in quality content and stories.’

The human rights assessment of the Copyright Amendment (Online Infringement) Act 2018 (Cth) in terms of cultural rights is rather hyperbolic: ‘The proposed amendments would promote the right to benefit from the protection of the moral or material interests in a production, by strengthening the protection provided to copyright owners in enforcing their copyright’. A number of politicians – such as the Hon. Graham Perrett, the Hon. Julie Owens, the Hon. Mark Dreyfus, and the Hon. Nicolle Flint – also try to make idealistic romantic arguments about how site-blocking will be of benefit to creative artists. However, there is little evidence of a causal relationship

---

267 Senator Mitch Fifield, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2018 (Cth)’, Hansard, Australian Senate, 28 November 2018.
268 Ibid.
269 Copyright Amendment (Online Infringement) Bill 2018 — Explanatory Memorandum https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6209_em 5e338b6-e85c-4cf7-8037-35f13166ebd4%22
270 The Hon. Graham Perrett, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2018 (Cth)’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10907; The Hon. Mark Dreyfus, ‘Second Reading Speech on the Copyright
between site-blocking and creative artists being remunerated for their income. The site-blocking is not particularly focused upon the protection of the moral rights of creative artists. In reality, the site-blocking has been used by multinational companies – not individual creative artists. It is ultimately misleading to try to dress up giving corporations the power to block websites and filter search engines as some form of local cultural policy. If the site-blocking power is abused, there could also be censorship of artistic expression and creative freedom.

Long a champion of Indigenous intellectual property, Senator Patrick Dodson of the Australian Labor Party was a supporter of the bill.\(^{271}\) He contended that the legislation would support cultural objectives: ‘Labor will be supporting this bill because it makes a number of improvements to the existing regime for protecting the rights of artists and others whose livelihoods depend on them being paid for what they create, whether that’s music, movies, television programs, books or any other form of intellectual property.’\(^{272}\) He maintained that the legislation would address disruptions caused by the digital revolution: ‘This bill makes important improvements to the Copyright Act that will help ensure it continues to protect intellectual property rights in the digital age.’\(^{273}\) Dodson noted: ‘Although some companies and individuals have expressed concerns about the potential of this bill to be used inappropriately to shut down legitimate sites, we in Labor are satisfied that it contains sufficient safeguards to prevent its misuse.’\(^{274}\) Although he did not mention that site-blocking action had been taken in respect of the copyright of Indigenous artists, that perhaps that was an important factor for Senator Dodson.

After the Australian Greens had opposed the copyright site-blocking legislation in 2015, it was confusing to see the Australian Greens supporting the copyright search-blocking legislation in 2018. The departure of Senator Scott Ludlam had obviously a significant impact upon the public policy position of the Australian Greens in the Federal Parliament. In his second reading speech, Senator Jordon Steele-John explained the position of his party:

We suggest, in support of this bill, as we have contended in the past, that site blocking is not the most effective way of stopping piracy. Rather, copyright is most effectively addressed by making content available conveniently, affordably, and in a timely way.\(^{275}\)

---

\(^{271}\) Senator Patrick Dodson, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2018 (Cth)’, Hansard, Australian Senate, 28 November 2018, 8788-8792.

\(^{272}\) Ibid, 8788.

\(^{273}\) Ibid, 8789.

\(^{274}\) Ibid, 8791.

\(^{275}\) Senator Jordon Steele-John, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2018 (Cth)’, Hansard, Australian Senate, 28 November 2018, 8792.
Senator Jordon Steele-John concluded: ‘In doing so, we’d like to make clear that we are strongly supportive of both creative and innovative industries in Australia.’

The reversal of the position of the Australian Greens seemed to leave commentators a little perplexed. It seemed strange that the Australian Greens were fundamentally opposed to an internet filter in 2015 – but acquiescent to an expansion of the internet filter in 2018. This change of policy was not clearly or adequately explained or rationalised.

Senator Sarah Hanson-Young was also a supporter of the legislative regime. Senator Sarah Hanson-Young rather simplistically said that the bill would ‘ensure Australian artists are given due credit and payment for their work and to protect them from having their work stolen, pirated or abused’. She maintained: ‘It will do this by targeting those who intend to steal their work online.’ However, its not clear that the main beneficiaries of the legislation are in fact creative artists. The main beneficiaries seem to be the distributors of copyright work who would have the legal expertise and the resources to take action. Hanson-Young contended that there was a need for further cultural policy reforms in addition to the copyright changes: ‘This bill creates a pathway for artists and creators to have their rights protected, but we need to do more than this to ensure that Australian artists are given strong policy backing in this country.’ Hanson-Young also advocated the creation of a creativity commission: ‘A creativity commission would give Australian artists and creators the ability to have their contribution to the economy and to society recognised.’

Senator Stirling Griff of the Centre Alliance also spoke in favour of the copyright legislation. He emphasized: ‘Copyright protection is a crucial mechanism that provides for the viability of Australia’s creators and creative industries.’ Namechecking copyright lobbyist Village Roadshow, Senator Stirling Griff recapitulated the submission of the film industry company:

In the statistics provided in their submission, the film *Mad Max: Fury Road* had 600,000 legal downloads and a staggering one million illegal downloads. The film *Lion* was downloaded some 710,000 times, with over half of that number being illegal downloads. These are staggering numbers. Both highlight the concerns and issues

---

276 Ibid, 8792.
279 Ibid.
280 Ibid.
281 Ibid.
282 Ibid.
283 Senator Stirling Griff, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2018 (Cth)’, Hansard, Australian Senate, 28 November 2018, 8792.
this bill sets out to address and exemplify the reason we need to protect copyright owners from threat of copyright infringement.\textsuperscript{284}

Griff concluded: ‘By expanding the legislation to provide for more protection to copyright material, Australian films such as Mad Max: Fury Road and Lion will be further protected from illegal downloads.’\textsuperscript{285} However, it is not clear whether Village Roadshow has made political donations to the Centre Alliance – like it has with the Australian Labor Party and the Liberal Party.

It was striking that a number of other minor parties did not speak about the legislation during the Senate debate. There remained disquiet as to whether the regime would be effective in practice.\textsuperscript{286}

F. Safe Harbours, Fair Use, IT Pricing, and VPNs

While the site-blocking amendments have been rushed through the Australian Parliament, there has been little progress in respect of the safe harbours regime in Australia. While the United States has enjoyed a broad safe harbours regime for twenty years, Australia has had a much more limited regime of benefit only to telecommunications carriers and Internet service providers. The Coalition Government extended the safe harbours regime to include educational institutions and cultural institutions. The Australian Labor Party has adopted the extreme position that search engines, social media sites, and cloud computing services should not be able to benefit from safe harbours protection. The Shadow Communications Minister Michelle Rowland has decried: ‘In the past, we’ve been concerned that some of this government’s ill-considered announcements on policies would roll back copyright protections, such as in relation to safe harbour laws’.\textsuperscript{287} She has insisted that ‘Labor stood with Australia’s creative industries in opposition to the government’s reckless plans to diminish copyright protections and we were pleased to see that the government backed down on those proposals.’\textsuperscript{288}

Far from being reckless, it would seem eminently sensible for Australia to have a similar safe harbours regime to that of the United States. Australia’s lopsided copyright laws may otherwise make innovators and investors look elsewhere to establish technology companies.

\textsuperscript{284} Ibid.
\textsuperscript{285} Ibid.
\textsuperscript{287} The Hon. Michelle Rowland, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2018 (Cth)’, Hansard, House of Representatives (Parliament of Australia, 24 October 2018) 10903.
\textsuperscript{288} Ibid.
The Hon. Ed Husic MP has warned that Australia’s limited safe harbours regime will scare off inventors and investors alike.\textsuperscript{289} He observed that intermediaries such as Redbubble were vulnerable to actions for intellectual property infringement in Australia:

In the case of Redbubble, as I’ve previously told the House, they were challenged and taken to court by the Hells Angels because they thought their copyright had been breached by Redbubble, which was operating out of Melbourne and providing hundreds of jobs and huge economic opportunities for content generators—artists and the like. That’s what exists. Redbubble was taken on by Sony because of apparent breaches to do with Pokemon. The legal case was upheld and Redbubble was charged the princely sum of $1 as a fine by the court because Redbubble had a whole series of mechanisms in place to be able to respond to concerns about copyright breach and to ensure that artists were looked after.\textsuperscript{290}

The Hon. Ed Husic urged his own party to see reason on the issue: ‘We need to find a way in copyright reform to rightly protect artists and their income and livelihood but also to allow other innovative companies be able to generate, through innovative ideas, new ways of getting things done, to create commercial value in the growth of those firms—such as Redbubble, Bardot, 99designs and the like—and to have those firms and platforms thrive, survive and grow.’\textsuperscript{291}

There have been a multitude of public policy inquiries recommending reforms to update and modernise Australia’s limited, narrow and sclerotic copyright exceptions. The Copyright Law Review Committee, the AUSFTA Parliamentary Inquiry, the IT Pricing Inquiry, the Australian Law Reform Commission, the Harper Review, and the Productivity Commission have all recommended the introduction of the defence of fair use in Australia.\textsuperscript{292} In spite of this chorus for copyright law reform in exceptions, the Australian Parliament has been slow to respond to such recommendations. It is a stark contrast to the hasty efforts to rush the \textit{Copyright Amendment (Online Infringement) Act 2018 (Cth)} through the Australian Parliament before the next election. It should be noted that the site-blocking, search-filtering, and cyber-lock powers will operate in the context of a copyright regime, which lacks proper copyright exceptions.

The IT Pricing Inquiry revealed that Australian consumers were being ripped off in terms of the pricing and availability of IT products and services (including in respect of TV, film, and music). The IT Pricing Inquiry dubbed this problem ‘The Australia Tax’.\textsuperscript{293} The Australian Parliament has failed to take any action to alleviate this problem. A recent study by ACCAN reveals

\textsuperscript{289} The Hon. Ed Husic MP, ‘Second Reading Speech on the \textit{Copyright Amendment (Online Infringement) Bill 2018 (Cth)}’, Hansard, House of Representatives (Parliament of Australia, 24 October 2018) 10900,

\textsuperscript{290} Ibid.

\textsuperscript{291} Ibid.


\textsuperscript{293} The House of Representatives Standing Committee on Infrastructure & Communications, \textit{At What Cost? IT Pricing and the Australia Tax} (Parliament of Australia, 2013)
that the problems in respect of the pricing and availability of IT products and services still persist in Australia.\textsuperscript{294} The Explanatory Memorandum notes:

The Productivity Commission noted that timely and competitively-priced access to content appeared to limit copyright infringement, citing surveys on consumer attitudes undertaken by CHOICE and the Communications Alliance. This is an important factor that should be a key part of an overall strategy to combat online copyright infringement.\textsuperscript{295}

Yet, the legislation does nothing to ensure that copyright owners provide access to copyright material in a timely and affordable manner – even though this may be the most effective means of combating the problem in respect of black markets. Copyright owners have not been voluntarily changing their behaviour. Sponsor of the bill Village Roadshow Ltd has been criticised for the slow release of their works in the Australian market. The film industry has also been criticised for the high prices in respect of its products.

Over a number of years, the Hon Ed Husic MP has been concerned about the ambiguous position of virtual private networks (VPNs) under copyright law. During the IT Pricing inquiry, he expressed worry that the use of VPNs could fall foul of copyright laws and technological protection measures.\textsuperscript{296} In the 2015 debate, Husic worried about the expansion of site-blocking laws to include VPNs.\textsuperscript{297} In the 2018 discussion, Husic lamented: ‘I imagine at some point we’re going to have a debate in here about banning VPNs because they allow people to access content on other sides of the planet that are not able to be accessed here.’\textsuperscript{298}

Likewise, Cory Doctorow has warned ‘VPNs are next’.\textsuperscript{299} He observed that VPNs are important to Australian consumers to ensure that they have fair access to copyright content: ‘By buying VPN service and subscriptions to overseas online services, Australians are able to correct the market failure caused by US and British companies’ refusal to deal.’\textsuperscript{300} Doctorow said: ‘The entertainment companies know that a frontal assault on VPNs is a nonstarter

\begin{thebibliography}{9}
\bibitem{295} \textit{Copyright Amendment (Online Infringement) Bill 2018} – Explanatory Memorandum https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Ffr6209_ems_b5e338b6-e85c-4cf7-8037-35f13166ebd4%22
\bibitem{298} The Hon. Ed Husic MP, ‘Second Reading Speech on the \textit{Copyright Amendment (Online Infringement) Bill 2018} (Cth)’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10900.
\bibitem{300} Ibid.
\end{thebibliography}
in Australia, but they also hate this evasion of regional release windows’.\textsuperscript{301} He warned: ‘Three years from now, after the same people who defeated blocking orders with VPNs have shown that they can defeat search-engine censorship with VPNs, the same companies will be back for Australians’ VPNs.’\textsuperscript{302}

It is striking that there was lobbying in Canada during the renegotiation of the North American Free Trade Agreement (NAFTA) and the development of the United States-Mexico-Canada Agreement (USMCA) to block the use of VPNs.\textsuperscript{303}

Disturbingly, the film industry has been promoting this industry-dictated model for other jurisdictions. Tim Anderson, the managing director of Madman Entertainment, has argued that Japan should adopt such a regime: ‘Site blocking is essential and valuable, especially when combined with legal alternatives, and it needs to be continuous.’\textsuperscript{304} Arguably, the Australian copyright regime is not a good template for other jurisdictions, given its impact upon consumer rights, competition policy, and internet freedom.

\section*{G. Political Donations}

Professor Lawrence Lessig from Harvard Law School has shifted the focus of his work of late from copyright, cyberlaw, and the Creative Commons to the reformation of the United States political system.\textsuperscript{305} He has highlighted the distorting impact of political donations on intellectual property decision-making in the United States. He has argued that progressive reform of the copyright regime in the United States will be impossible unless there are stronger rules governing political lobbying and political donations. Similar problems have been occurring in Australia – with intellectual property holders lobbying for stronger, longer intellectual property rights in a range of contexts, including copyright law and the creative industries; trade mark law and tobacco control; patent law, data protection, biologics, and access to essential medicines.

Much like its predecessor, the Copyright Amendment (Online Infringement) Act 2015 (Cth), the Copyright Amendment (Online Infringement) Act 2018 (Cth) is a piece of corporate welfare. Such legislation seems to have been dictated by political donors – most notably, the film company, Village Roadshow. Disappointed by its loss in an action for copyright infringement

\begin{footnotesize}
\textsuperscript{301} Ibid.
\textsuperscript{302} Ibid.
\textsuperscript{305} Lawrence Lessig, \textit{Lesterland: The Corruption of Congress and How to End It}, TED Conferences, 2013; Lawrence Lessig, \textit{Republic, Lost: Version 2.0}, (Twelve, 2015); Lawrence Lessig, \textit{America, Compromised} (University of Chicago Press, 2018); and Lawrence Lessig, \textit{They Don’t Represent Us: Reclaiming Our Democracy} (Dey Street Books, 2019).
\end{footnotesize}
against iiNet in the High Court of Australia.\textsuperscript{306} Village Roadshow has made extensive political donations in the hope of obtaining more extensive copyright protections. Chris Duckett commented for \textit{ZDNet}:

One of Australia's most unapologetic and enthusiastic backers of legal mechanisms to prevent copyright infringement has returned the political donation big time, as Village Roadshow parted with more than AU$600,000 in donations to Australia's two largest political parties. Annual returns for 2015-16, released by the Australian Electoral Commission (AEC) on Wednesday, showed Village Roadshow donations skewed slightly in favour of the ruling Liberal party, with AU$357,000 donated in comparison to AU$279,200 to the Australian Labor Party.\textsuperscript{307} Duckett noted: 'Within that number for Labor, Village Roadshow gave AU$20,000 on April 14 last year to the ALP in the seat of Shadow Attorney-General Mark Dreyfus.'\textsuperscript{308} He observed: 'Under a potential Labor government, Dreyfus would be responsible for overseeing many of the regulations and laws that Village Roadshow could take advantage of in its attempts to stymie online piracy.'\textsuperscript{309}

The passage of the \textit{Copyright Amendment (Online Infringement) Act} 2015 (Cth) and the \textit{Copyright Amendment (Online Infringement) Act} 2018 (Cth) highlights the need for further reform of the Federal system in respect of political lobbying and political donations. Queensland has introduced a new real-time electronic disclosure of political donations. Such a system would be helpful at a Federal level. In the case of the \textit{Copyright Amendment (Online Infringement) Act} 2018 (Cth), it is currently unclear whether supporters or opponents of the bill have made political donations to either the major political parties or the crossbench. The Queensland real-time electronic disclosure of political donations revealed that Roadshow donated $50,000 to the Liberal National Party and $50,000 to the Australian Labor Party during the period of recent state elections.

With the passage of the copyright laws, Village Roadshow reported that the Liberal Party received a $110,000 contribution, and the ALP received a $51,144 contribution in 2019.\textsuperscript{310}

There was also a report of gifts by Roadshow to a number of key decision-makers - Communications Minister Mitch Fifield, Shadow Communications Minister Michelle Rowland and Shadow Attorney-General Mark Dreyfus.\textsuperscript{311} The Shadow Attorney-General Mark Dreyfus donated his gift to the Human Rights Centre. Communications Minister Mitch Fifield was presented a three

\textsuperscript{306} Roadshow Films Pty Ltd v. iiNet Ltd [2012] HCA 16 (20 April 2012).
\textsuperscript{308} Ibid.
\textsuperscript{309} Ibid.
\textsuperscript{310} Kylar Loussikian and Samantha Hutchinson, ‘Pitiable Profit Won’t Tighten Burke’s Pursue for Pollie Pals’, \textit{The Sydney Morning Herald} (Sydney, 4 February 2019).
year Village Roadshow VIP Pass by the CEO, Village Roadshow Limited - 17 December 2018.

Moreover, there is a need to ensure that political donations do not distort democratic decision-making. The Hon. Ed Husic MP has commented that political donations should not dictate copyright policy-making: ‘As lawmakers, just because... a political party gets a donation from a rights holder, does not mean that we should stop looking at how to make the types of reforms that balance the needs of creatives and the needs of producers versus the needs of consumers.’

Writing for the transparency project for The Guardian, Christopher Knaus highlighted that Village Roadshow donated millions to the major parties, while lobbying on copyright law. He observed that such contributions seemed to peak during parliamentary debates. Speaking to Knaus, University of Melbourne academic George Rennie said donations at the scale of Village Roadshow’s clearly bought access and influence: You might say that the policy is reasonable but it is that ultimate question of what is the reasonable policy that gets up.’ He added: ‘And the reasonable policy that gets up is almost always really monetarily well-backed.’

The passage of the Copyright Amendment (Online Infringement) Act 2015 (Cth) and the Copyright Amendment (Online Infringement) Act 2018 (Cth) highlights the need for further reform of the Federal system in respect of political donations. There should be real-time electronic disclosure of political donations at a Federal level. Independent member Cathy McGowan has made a number of recommendations about how to promote public trust and confidence in the integrity of the Parliament with the National Integrity Commission Bill 2018 (Cth) and the National Integrity (Parliamentary Standards) Bill 2018 (Cth). A number of those measures are directed towards political donations.

Australia needs to have independent policy processes in respect of copyright law reform. The in-house Department review of site-blocking was unsatisfactory. Tellingly, the Department did not consider the policy option of repealing the site-blocking laws, even though such laws seem to be ineffectual. Instead, according to the explanatory memorandum, the Department considered three policy options. The first option would require no change. The second option would extend section 115A to online search engine providers and lower the threshold to ‘primary purpose or primary effect’. The Department suggested that such a measure would only cost $500,000 (which seems a rather low estimate of regulatory costs). The third option would be

314 Ibid.
315 Ibid.
extend section 115A to online service providers and lower the threshold to ‘substantial purpose or effect’. The Department also suggested that this option would only cost $500,000 (which seems a small number of regulatory costs). The Department’s framing of the issue seems to mirror that of major copyright industries in film, television, and music. The Department is also selective in the comparative law, which it cites. The significance of the huge controversy over the Stop Online Piracy Act in the United States is ignored.

After Village Roadshow litigated against iiNet and lobbied for site-blocking and search-filtering copyright laws, there has now been consideration of Village Roadshow pulling out of the film industry altogether. 316 It is remarkable that there is a push for Village Roadshow to divest its film business - after all the copyright litigation, and political donations for site-blocking copyright laws. A former executive at the Hollywood movie studio Warner Brothers has argued that Village Roadshow has been slow to adapt to the new digital environment. 317 There was an internal struggle within the company over its control, given its dramatic loss in market value. One commentator provided the withering assessment of the share price in December 2018 - 'Burke leaves behind a carcass of a company with a share price cratered from $7.50 three years ago to barely $2.53 today.' 318 In the end, after Village Roadshow had lost more than $500 million in market value over five years, Village Roadshow chief executive Graham Burke has announced his retirement in February 2019. 319 There remains speculation that Village Roadshow could be forced to offload its struggling film business, behind films such as Zoolander and Ocean's 8. 320

In retrospect, it seems that Graham Burke’s push for site-blocking and search-filtering copyright laws in Australia was a rather quixotic quest. Village Roadshow certainly has been successful in the legal action that it has brought for site-blocking – but that action does not seem to have been a cure for problems with its business model. Perhaps Village Roadshow would have been better off using its resources to help adapt and shift the company to a digital model of distribution in order to better challenge its competitors such as Netflix, Apple, and Amazon.

**Conclusion - The Future of the Web**

Australia’s copyright regime is closely tied to the United States copyright system – in part as a result of the **Australia-United States Free Trade Agreement 2004**. Given the United States Congress rejected the controversial Stop Online Piracy Act (SOPA) site-blocking legislation, it is surprising that

---


the Australian Parliament should have adopted the policy options of site-blocking and search filtering. The Australian Government’s copyright site-blocking and search-filtering laws will further enhance the private power of copyright owners in respect of the governance of the Internet. Bernard Keane worries: ‘We’ve thus arrived at the fully fledged war on the internet by this government that some of us have long been predicting, a war motivated by commercial interests and the never-satisfied greed of security agencies for more powers of surveillance and control, and a deep and abiding fear of what citizens will do with communications technology that is no longer controlled by governments.’

This is disturbing. The Internet will be increasingly subject to the rule of private sovereigns. Australia’s site-blocking and search-filtering regime has been presented by copyright industries as a model for other jurisdictions – such as Japan. It would be a worrying development if Australia’s copyright regime became a template for the rest of the world.

Disturbingly, the explanatory memorandum suggests that the Australian Government will even contemplate the link tax and the censorship machine measures of the European Union. The EU Directive Model has been hugely controversial – particularly in respect of its impact upon an open and free Internet. There has been a concern that the Australian Government will go further than merely site-blocking and search-blocking copyright laws, and adopt some of the measures in the new European Copyright Directive. Ominously, the report of the Department of Communications and Arts – extracted with the Explanatory Memorandum – shows a consideration of this model:

The Department will monitor the development of new enforcement mechanisms following the EU Parliament’s recent copyright proposals which will require digital platforms, including online search engine providers, to take further steps to assist with copyright enforcement.

The passage of the European Copyright Directive in March 2019 has been highly controversial. Despite an intense debate in parliament, MEPs meeting in Strasbourg ended up passing the draft law with 348 votes in favour, 274 against, and 36 abstentions. The Government of Poland has initiated a legal challenge against Article 17 of the European Copyright

---


322 Copyright Amendment (Online Infringement) Bill 2018 – Explanatory Memorandum https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr6209_ems_b5e338b6-e85c-4cf7-8037-35f13166ed4%22


Directive, complaining that the regime violates the right to freedom of expression and information.\textsuperscript{325} The World Wide Web Foundation warned that the new European Union laws are a threat to an open and free web: ‘The Directive will most likely lead to the mass incorporation of filters for content uploaded in Europe, putting people’s right to free speech at the mercy of an algorithmic lottery.’\textsuperscript{326} The World Wide Web Foundation noted that ‘grave concern [has been] voiced by human rights advocates, internet experts, entrepreneurs and the UN Rapporteur for Freedom of Expression’.\textsuperscript{327}

Just as there was a creeping expansion of Australia’s data retention laws, there could equally be a further mainstreaming of site-blocking. The Copyright Amendment (Online Infringement) Act 2015 (Cth) and the Copyright Amendment (Online Infringement) Act 2018 (Cth) are an alarming precedent for other legal disciplines. There is a danger that the Australian Parliament will seek to introduce site-blocking in other intellectual property contexts – such as trade mark law,\textsuperscript{328} designs law, patent law, plant breeder’s rights, and trade secrets.\textsuperscript{329} There is also a concern that the Australian Parliament will apply site-blocking in respect of the Internet regulation and new media. Site-blocking could be sought for instance in respect of defamation law,\textsuperscript{330} privacy law, and the right to be forgotten. The Shadow Attorney-General Mark Dreyfus said: ‘We in Labor do not believe the online world should be allowed to exist as a lawless frontier.’\textsuperscript{331} It is concerning that the Australian Labor Party is contemplating using crude measures such site-blocking in other contexts. There has already been radical new Australian criminal laws proposed in respect of the sharing of abhorrent violent material in the wake of the Christchurch massacre.\textsuperscript{332}

Australia’s Parliament needs to review the tranche of rather crude Internet regulation introduced by the 45th Parliament. The problematic Copyright Amendment (Online Infringement) Act 2018 (Cth) is but one of a host of radical legislative and administrative changes. There has also been controversy over such initiatives as data retention, the Census Fail, RoboDebt, My Health Record, and encryption. New Australian criminal laws in respect of the sharing of abhorrent violent material were passed with little parliamentary


\textsuperscript{327} Ibid.


\textsuperscript{329} See the case of Google Inc. v Equustek Solutions Inc. 2017 SCC 34

\textsuperscript{330} Google Inc. v Duffy [2017] SASCFC 130 (Oct. 4, 2017)

\textsuperscript{331} The Hon. Mark Dreyfus, ‘Second Reading Speech on the Copyright Amendment (Online Infringement) Bill 2018 (Cth)’, Hansard, House of Representatives, Australian Parliament, 24 October 2018, 10894.

\textsuperscript{332} Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019 (Cth) This legislation was passed through the Australian Parliament with only brief debate.
debate or scrutiny. Such measures are varied but share a dated instrumental approach to regulation. There needs to be a much responsive regime for regulation for the digital age.

The Electronic Frontier Foundation has highlighted the adverse impact of content-blocking on the goal of an Open and Free Internet: ‘Governments around the world block access to online content for a variety of reasons: to shield children from obscene content, to prevent access to copyright-infringing material or confusingly named domains, or to protect national security’.334

Jeremy Malcolm from the Electronic Frontier Foundation highlighted that censoring the web is not a solution for social problems.335 He observed that ‘it seems to be that it’s politically better for governments to be seen as doing something to address such problems, no matter how token and ineffectual, than to do nothing—and website blocking is the easiest ‘something’ they can do’.336 Malcolm warned: ‘But not only is blocking not effective, it is actively harmful—both at its point of application due to the risk of over-blocking, but also for the Internet as a whole, in the legitimization that it offers to repressive regimes to censor and control content online.’337

As Sir Tim Berners-Lee says, we need a Magna Carta to protect an open and accessible Internet—rather than a copyright crackdown. 338 As Sir Tim Berners-Lee says, we need a Magna Carta to protect an open and accessible Internet—rather than a government web of censorship and surveillance. Sir Tim Berners-Lee reflects:

Governments must translate laws and regulations for the digital age. They must ensure markets remain competitive, innovative and open. And they have a responsibility to protect people’s rights and freedoms online.339

Berners-Lee has been working on a proposal for a decentralised, open internet.340 He has also keen to develop a new social contract in respect of the world wide web.341

---

334 Electronic Frontier Foundation, ‘Content-Blocking’, https://www.eff.org/issues/content-blocking
336 Ibid.
337 Ibid.
Canberra Law Review (2019) 16(1) 64

***


Soundcloud - https://t.co/3fCHZhKVFz
The Case For Codifying The Powers Of The Office Of Governor-General

Bede Harris*

Debate on the question of whether Australia should become a republic has masked a far more important underlying issue, namely whether the conventions of the office of Governor-General should be codified. The issues are linked in that opinion polls have consistently shown that if Australia was to become a republic, voters would prefer a model which included direct election of a President, yet the risk that an elected President might breach the conventions of the office has proved to be an obstacle to its adoption. Codification of the powers of the office would address this problem. It would also provide an opportunity to clarify areas of uncertainty that became evident during the constitutional crisis of 1975 and to bring the text of the Constitution into alignment with how responsible government actually operates. Codification would therefore be beneficial irrespective of whether Australia became a republic. The constitutions of many other countries – both those that have retained the link to the Crown and those that have become republics – provide examples of how this might be done. The article ends with a model codification of the conventions.

I INTRODUCTION

At the outset, it is important to understand what this article is and is not about. As indicated by the title, it is about the codification of the powers of the office of Governor-General. It is not about whether the office should continue to be filled by a Governor-General appointed by the Crown or whether Australia should instead become a republic. Obviously the two questions are connected, simply because much of the opposition to a republic stems from a fear – whether genuinely held or mischievously propagated – that replacing the Governor-General with a President - and in particular by an elected President - would be damaging to our constitutional fabric. Yet the central thesis of this article is that codification of the powers of the office would be beneficial to our constitution, irrespective of whether Australia became a republic. Part II of this article addresses a terminological issue which has confused the debate over the office of Governor-General. It then provides an overview of the powers of the office. Part III examines the consequences of the failure, both during the 1999 republic referendum to give adequate attention to the issue of codification. Part IV examines the law of other jurisdictions where the powers of a Governor-General or President operating within a system of parliamentary government have been codified. Part V concludes with a set of model constitutional provisions which could be adopted to codify the powers of the office in Australia.

* BA(Mod) Dublin, LLB Rhodes, DPhil Waikato, Senior Lecturer in Law, Charles Sturt University.
II THE POWERS OF THE OFFICE

Before outlining the powers of the office of Governor-General, it is necessary to address a terminological issue which has bedevilled debate, which is whether the holder of the office is 'head of state'.

Possible correct answers to the question ‘Who is our head of state?’ are: no-one, the Queen or the Governor-General - depending entirely on what one means by the term.

Since the term is not used in the Constitution, it would be most correct to say that no-one is head of state, as the office does not exist.

But leaving that option aside, if one wants to determine whether the Queen or the Governor-General is head of state, one needs to examine what the Constitution says about their respective roles.

The constitutional position, as stated in s 61, is that executive power is vested in the Queen, and that that power is exercised ‘on her behalf’ by the Governor-General. It is therefore incontrovertible that the Queen is the source of executive power, even though the Governor-General exercises it for her. If there were no Queen, there would be no Governor-General. The Governor-General’s powers are thus entirely derivative, however much monarchists seek to divert attention from this truth in furtherance of an argument that we have an ‘Australian head of state’ in the person of the Governor-General.¹

From this it follows that, if by ‘head of state’ one means ‘the person who is the ultimate source of executive power under the Constitution,’ then the Queen is head of state. However, if by ‘head of state’ one means ‘the person who actually wields executive power,’ then it would be true that the Governor-General is head of state. The problem is that because the term ‘head of state’ is unknown to the Constitution, people are free to use it as they like, and while some use it to refer to the Queen, many use it to refer to the person who exercises powers on behalf of the Queen - which is harmless so long as there is clarity that the Governor-General’s powers are not his or her own. It is only because the legally accurate phrases ‘the person who is the ultimate source of executive power’ and ‘the person who wields executive power’ are clumsy that people have fallen into the habit of using the ambiguous term ‘head of state’, with all the attendant confusion that has caused. For this reason, the term is best avoided.

The powers of the office of Governor-General are well known, and can be summarised briefly. They can be classified into three categories: legislative powers, executive powers exercised on advice and executive powers exercised independently (the so-called ‘reserve powers’).

¹ As an example of this see David Smith, ‘Australia’s head of state: The definitive judgment’ (2015) 89 Australian Law Journal 857.
The legislative powers are either regulated by convention or are redundant: Section 58 of the Constitution gives the Governor-General the power ‘according to his discretion’ to assent to Bills passed by Parliament, to withhold assent, or to reserve a decision pending advice from the Queen. Convention requires that the Governor-General always assents to Bills, and there has therefore been no instance where the power to withhold assent has been exercised. The power of reservation is no longer relevant in that it was exercisable only under s 74 in respect of a law removing the right of appeal to the Privy Council. This section effectively became redundant after s 11 of the Australia Act 1986 (Cth) removed that right to appeal. Section 59 gives the Queen (and thus the Governor-General) the power to disallow legislation. This power has never been used and was declared redundant at the 1926 Balfour Conference.

Most of the Governor-General’s executive powers are exercised on the advice of the government of the day, rather than according to his or her own discretion. In some cases where the Constitution confers power on the Governor-General, the relevant section expressly refers to the ‘Governor-General in Council’, defined by s 63 as meaning the Governor-General acting on advice. Examples of this are calling an election of the House of Representatives (s 32), creating government departments (s 64), appointing public servants (s 67) and appointing federal judges (s 72). However, even where the Constitution does not expressly refer to the ‘Governor-General in Council’, but only to the ‘Governor-General’, convention still requires that the Governor-General acts only on the advice of the government, for example in summoning, proroguing and dissolving Parliament (s 5) (but see the discussion of the reserve powers, below); recommending money Bills to Parliament (s 56); ordering a double dissolution and convening a joint sitting (s 57); appointing members of Executive Council (s 64); serving as Commander-in-Chief of the armed forces (s 68) and submitting constitutional amendments to a referendum (s 128).

The third category of powers consists of those executive powers which are exercised in circumstances where it is evident that the Governor-General cannot take advice. These ‘reserve’ powers are the powers to appoint a Prime Minister, to dismiss a Prime Minister, to dissolve Parliament and to refuse to dissolve Parliament. However, even though these powers are exercised independently, they are still subject to conventions which restrict the circumstances in which they may be exercised and the way in which they may be exercised.

---

2 The High Court recognised in Western Australia v Commonwealth (First Territorial Senators Case) (1975) 134 CLR 201 and Victoria v Commonwealth (PMA Case) (1975) 134 CLR 81 that any discretion apparently vested in the Governor-General is, in reality, exercised at the behest of the government of the day. Although the Governor-General is within his or her rights to ask the government to reconsider the advice it is tendering, ultimately, effect must be given to that advice.

The power to appoint a Prime Minister is subject to the convention that the Governor-General must appoint whoever leads the party or coalition with a majority in the House of Representatives. The operation of this convention requires cooperation between politicians and the Governor-General: convention requires that an incumbent Prime Minister who loses the majority in the house after an election must resign, leaving it open to the Governor-General to appoint whoever is able to command the support of the House. In the possible but unlikely event that a general election produces a result where no one was able to command a majority in the House, convention would require the incumbent Prime Minister to advise the Governor-General to dissolve Parliament and call another election.

The power to dismiss a Prime Minister can be exercised where an incumbent Prime Minister loses his or her majority in the House of Representatives and refuses either to resign or to ask the Governor-General to call an election, where a Prime Minister who had lost an election refuses to resign and to allow the Governor-General to appoint a new Prime Minister or where a government persists in unlawful action. So much is uncontroversial. What was of course controversial was the question that arose during the 1975 constitutional crisis, which is whether the Governor-General could dismiss a Prime Minister who enjoyed the confidence of the House of Representatives but who could not get supply legislation through the Senate. Academic literature on the crisis is vast and, despite the elapse of time, shows no sign of diminishing.4

Analysis of the competing views on the actions of then Governor-General Sir John Kerr lies outside the scope of this article but, in anticipation of the rules contained in Part V, the following points are made:

Some have argued that convention dictated that the Senate should not block supply. Although it is questionable whether such a convention existed, the issue is academic in light of the fact that s 53 of the Constitution explicitly confers such a power on the Senate. That section was a key component of the federal bargain struck at the Constitutional Conventions, deliberately included upon the insistence of the smaller colonies.5 Given the unenforceable nature of conventions, there is no doubt that the Senate was within its rights in using its constitutional power to block supply.6

---

4 For two recent books see Paul Kelly and Troy Bramston, The dismissal: in the Queen’s name (Penguin Australia, 2015) and Jenny Hocking, The dismissal dossier: everything you weren’t meant to know about November 1975 (Melbourne University Press, 2015). Still unknown is what correspondence between Kerr and the Queen would reveal, particularly with regard to whether Kerr raised with the Queen what would happen if Whitlam asked the Queen to dismiss Kerr, which is what Kerr feared might happen if he had forewarned Whitlam that he would dismiss him. In Hocking v Director-General of National Archives of Australia [2019] FCAFC 12 the Federal Court of Appeal held that the correspondence with the Queen was personal property of Kerr and thus not subject to the normal rule that Commonwealth documents are released after 30 years.

5 Meagher et al, above n 3, 156.

6 For a statement on the fact that conventions do not limit legislative capacity see Madzimbamuto v Lardner-Burke [1969] 1 AC 645, 722 G – 723 C (Reid LJ).
There is also no doubt that Governor-General Kerr acted lawfully in dismissing Prime Minister Whitlam, as s 64 of the Constitution gave him the power to do that. The question was what convention governed how a Governor-General should exercise that power in circumstances when the upper house to which the government was not responsible used its constitutional powers to deny supply to the house to which the government was responsible. This illustrates the inherent weakness of having key parts of the constitutional system governed by convention: Because there are, to use Hart’s analysis, 7 no rules of recognition, adjudication or change for conventions, the system is at risk of breaking down when conventions do not address a particular set of circumstances, because there is no way in which a convention can suddenly be created to address those circumstances. Furthermore, as was stated by the Supreme Court of Canada in its comprehensive analysis of the nature of conventions in Re Amendment of the Constitution of Canada, 8 conventions frequently conflict with the legal rules that must be applied by the courts. In such circumstances, conventions create a false view of the constitution and thus promote uncertainty. In addition, contrary to the argument raised by proponents of government by convention to the effect that conventions are beneficial in that they provide flexibility in addressing new developments, 9 the crisis of 1975 provides evidence for the exact opposite argument. Because conventions arise from facts, in the sense that they develop in response to different circumstances, and take decades or centuries to become sufficiently recognised, they are inferior to law which anticipates facts by framing rules to cover them. The 1975 crisis is all the more remarkable in that it could hardly be said that conflict between the House and the Senate was unanticipated – indeed it was clearly anticipated, because At the 1897 Constitutional Convention, Alfred Deakin said that to combine a government that was responsible to the House with a Senate having the power of veto would be ‘to create on the one side an irresistible force and on the other an immovable object.’ 10

However, leaving aside the problem that no convention had become established which would have addressed the circumstances in which Kerr found himself, and even leaving aside Kerr’s power under s 64 to dismiss Whitlam, what conclusion do the principles of responsible government underlying the conventions indicate should one reach as to the correctness of his actions? Was his dismissal of Whitlam consistent with those principles or at variance with them? Although a government is entitled to hold office if it has a majority in the House of Representatives, the underlying reason why that entitlement exists is because its majority enables it to govern. However, a government that is unable to obtain supply is not able to govern, and thus ought to resign – or be dismissed if it does not resign. 11 Kerr’s dismissal of Whitlam was therefore correct, not only as a matter of law but also under

---

8 (1981) 125 DLR (3d) 1, 84-6.
10 Debates of the Australasian Federal Convention, Sydney, 15 September 1897, 582 (Alfred Deakin).
convention, because dismissal in the prevailing circumstances was consistent with the underlying principle served by the conventions. On this basis, Kerr was correct in acting as he did. This is the approach to the power of dismissal that is embodied in the model code in Part V of this article.

The 1975 crisis also raised the question of who the Governor-General should appoint in place of a Prime Minister who had been dismissed. If the conventions were codified, they would need to make some provision for the continuance of government in that circumstance. Two different situations need to be addressed: The first would be where the Prime Minister had been dismissed for not resigning following loss of confidence, or for failure to secure supply, but there was no-one else who was able to command majority support in the House. In that situation I would argue that since the (former) Prime Minister would obviously be an unsuitable person to appoint as caretaker, the Constitution should provide that the Governor-General should be appoint as acting Prime Minister the leader of the largest party in Parliament which had not formed part of the dismissed government. This, of course, is precisely what happened in 1975 when Kerr appointed Fraser as caretaker Prime Minister pending the election of a new House of Representatives. The other situation in which the Constitution would have to make provision for a caretaker would be where the Prime Minister had been dismissed for illegal conduct. In that circumstance the Prime Minister might still have majority support in the House, but here too it would obviously be inappropriate for him, or even another member of his government, to be appointed as acting Prime Minister, and so again the best option would be for the Constitution to require that the Governor-General appoint the leader of the largest non-governing party as acting Prime Minister until after a general election has been held. The prospect in either of these circumstances of having the leader of the opposition appointed as Prime Minister, even in a caretaker role, would act as a powerful disincentive on Prime Ministers to act unconstitutionally.

The power to dissolve Parliament is usually exercised on the advice of the Prime Minister. However the Governor-General could exercise this power on his or her own initiative after dismissing a Prime Minister (in accordance with the rules described above) if there was no one else able to command a majority in the House of Representatives. In these circumstances the deadlock could be resolved only by Parliament being dissolved and an election being held.

It has been argued that, if a government has recently been elected but shortly thereafter loses the confidence of the House of Representatives, the Governor-General has the power to refuse a request by a Prime Minister to dissolve Parliament if there is someone else who can form a government. However, given that the conventions serve the doctrines of representative and responsible government, the better view is that a Governor-General can never refuse a Prime Minister’s request to refer to the voters the question of who should form the government, and this is the approach adopted in the model code.

III THE ROAD NOT EXPLORED
The 1999 constitutional referendum on an Australian republic was marked by political gamesmanship by the Howard government, which was designed to ensure that the referendum would fail. This started with the process by which the question to be put by voters was determined. Given that there were a number of proposed models for a republic, the most democratic method for framing the question would have been to hold a plebiscite in which voters were asked to choose which republican model they favoured, followed by a constitutional referendum at which voters would have been asked whether Australia should remain a monarchy or should become a republic according to the model favoured at the plebiscite. Instead the referendum question was framed by a Constitutional Convention, half elected and half appointed, which produced a compromise model (ultimately supported only by a simple rather than an absolute majority of delegates) under which a committee would consider public nominations for President and would put forward a name to the Prime Minister who, along with the leader of the opposition, would then have proposed that person for approval by a joint sitting of the House of Representatives, which would have to have approved the nomination by a two-thirds majority. Because the process of deciding on a model was given to the Constitutional Convention, voters were never given the opportunity of expressing their preference among the various possible models. Had that occurred it would have in all likelihood led to direct election of a President being the model put to referendum, as opinion polls had shown that that model had the greatest public support. Direct election has remained the popular choice according to polls conducted over the past 20 years.

---

12 This was the process followed in New Zealand when the electoral system was reformed. In 1992 a non-binding plebiscite was held in which voters were asked two questions: the first as to whether they wanted to depart from the existing electoral system, the second as to which of four possible alternative systems they favoured. Then, in 1993, voters were asked in a binding referendum whether they wanted to retain the existing system or adopt the Mixed Member Proportional system, which was the system that had been overwhelmingly favoured in 1992, and which voters approved in 1993. The referenda are discussed in Jack Vowles, ‘The Politics of Electoral Reform in New Zealand’ (1995) 16 International Political Science Review 95.


16 See John Warhurst, ‘The Trajectory of the Australian Republic Debate’ (Papers on Parliament No. 51, Department of the Senate, Parliament House, Canberra, 2009) 1, 9, who cites opinion polls taken in 2007 which showed that 80% of respondents favoured a directly-elected President if Australia was to become a republic. See also the survey results published Bede Harris, Exploring the Frozen Continent – What Australians Think of Constitutional Reform (Vivid Publishing, 2014) 72-3 citing a 2014 poll which showed that 73% of respondents favoured direct election.
The adoption of the indirect election model split the republican camp, a division which was skilfully exploited by monarchists during the referendum campaign, who urged voters to reject ‘this republic’ – the implication being that they would have another opportunity sometime in the future to vote for the type of republic they really wanted.\footnote{Australian Electoral Commission, Your official Referendum pamphlet, (1999) 11 https://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/yes_no_pamphlet.pdf} The result was that despite the fact that opinion polls had showed a clear majority in favour of a republic before the referendum,\footnote{Ray Cassin, Unpalatable choice sank the republic, The Age (Melbourne, 6 November 2009) 13.} the proposed constitutional amendment failed to win a majority in any State or Territory, bar the ACT.\footnote{The results are accessible at Australian Electoral Commission, 1999 Referendum Report and Statistics (1999) https://www.aec.gov.au/Elections/referendums/1999_Referendum_Reports_Statistics/summary_republic.htm.} Malcolm Turnbull, who led the republican referendum campaign, laid responsibility for the result at the feet of the government, describing John Howard as the ‘Prime Minister who broke the nation’s heart.’\footnote{Malcolm Turnbull, Fighting for the Republic (1999, Hardie Grant Books) 245.}

A key reason why direct election was rejected by the Constitutional Convention, thereby dooming the referendum, was the opinion voiced by many, including prominent politicians from both the Coalition and Labor, that direct election of a President would create a risk that the office-holder might feel that, because they had been directly elected, they had as much of a mandate as did an elected government, and might therefore be tempted to act contrary to convention during a constitutional crisis.\footnote{For a discussion of this see George Winterton, ‘Reserve Powers in an Australian Republic’ (1993) 12 University of Tasmania Law Review 249, 260-1.} Under what specific set of circumstances that might occur was not elucidated, but even assuming that such a risk existed, the argument ignored the fact that, even under the current system, there is nothing to prevent a Governor-General from breaching convention - a vulnerability which exists precisely because the constraints on the office are only conventions and are therefore legally unenforceable. In other words, a Governor-General is no less able than a President (however chosen) to breach the conventions, and so a change to a republic would not have created a risk that did not already exist. Unfortunately, this counter-argument was never made by proponents of direct election.

More importantly however, if the key impediment to giving the people what they wanted – that is, an elected President – was the apprehension that the conventions might be breached, surely the most effective counter to that argument would be to propose that the powers of the office be codified, thereby making them legally enforceable? This too was an argument which direct-election republicans failed to pursue with sufficient vigour, despite the fact that it might have tipped the balance in their favour. Although Malcolm Turnbull stated that if the direct election model was adopted the powers
should be codified, codification never became a central plank of the republican campaign. Furthermore, on the rare occasion when codification was raised, it was met with the argument that codification was not possible. That argument too was not adequately countered, with the consequence that the codification argument was lost by default. This then brings us to the question as to the practicalities of codification, and what Australia can learn from the experience of other jurisdictions.

IV CODIFICATION AND LESSONS FROM OTHER JURISDICTIONS

The opposition encountered by proponents of codification reflects a broader problem which affects debate on constitutional reform in Australia. The essential problem is attitudinal, and has a number of dimensions, two of which are of particular relevance here. The first of these is the tendency to abandon reform proposals as soon as the first negative argument is raised against them. The reason why naysayers are so easily able to capture the field in debates on constitutional reform is that, for the most part, people do not have the necessary knowledge of the constitution which is needed to counter these objections, a problem which has its roots in a history of poor civics education. This also has the effect of making voters averse to constitutional change, because people naturally feel apprehensive about changing a system the workings of which they do not understand. The second attitude which impedes reform is insularity—an attitude that Australia’s problems are in some way unique and that the experience of other jurisdictions is inapplicable to us. The combined effect of these attitudes is to give an advantage to constitutional conservatives in resisting change, as is evidenced by the unhappy history of constitutional referenda.

Constitutional conservatives have an almost mystical attachment to the conventions. Yet the conventions arose by accident rather than design, and are, at base, the product of laziness in 18th and 19th century Britain, where no-one bothered to put new constitutional rules into legislative form. Their opposition to codification rests on two key planks—the first is that conventions give flexibility to the Constitution and that codification would therefore not be inadvisable because it would (although an example of circumstances this might occur is never adduced) prevent the Governor-General from responding to the exigencies that might arise. The second is that it is not possible to express the conventions with sufficient specificity to codify them.

---

Turning first to the flexibility argument, it is puzzling why if one would not want flexibility (which means ambiguity) in the rules defining what constitutes the crime of murder, or defining personal tax rates or what procedures must be adhered to when registering a corporation, one would want ambiguity in fundamental rules of the Constitution. Leaving rules both ambiguous as well as unenforceable by the courts is fundamentally incompatible with the doctrines of constitutionalism and the rule of law, which require that rules be definite in their content and application and able to be enforced by judicial remedy when they are breached. The fact that conventions are not justiciable \(^{25}\) means that compliance with key constitutional rules hangs by the slender thread the good will of political actors. There is no rational basis for the argument that a Constitution should be uncertain or that it should operate in ways which in some instances (think, for example, of the Governor-General’s s 59 power to refuse to assent to legislation) are the direct opposite of what is stated in its text. There is thus nothing to be gained by leaving key constitutional rules unstated – the question is simply one of drafting them comprehensively.

This then brings us to the next argument, which is the supposed impossibility of reducing the conventions to statutory form. This argument is founded on the view that constitutional practice is somehow different from all other areas of law and incapable of being subject to expressed rules. Perfection is, of course, unattainable in any area of law, but there is nothing qualitatively different about constitutional law in general or the rules of responsible government in particular that prevents the reduction of its rules to codified form. Furthermore, if conventions were as ethereal as is alleged, surely it would be impossible to make definitive statements about them at all? In simple terms, if language is capable of stating what the conventions are – as it manifestly is - then surely those statements can be put into the form of legal rules?

As Part II of this article shows, the contours of most of the conventions are well-known, and that in those two instances where there are dispute (whether a Governor-General should have the power to dismiss a Prime Minister who has the confidence of the House of Representatives but cannot get supply legislation through the Senate, and whether a Governor-General can refuse a request to dissolve Parliament) rules which are consistent with the underlying doctrines of representative and responsible government can be devised. The fact that ongoing political rancour between the Coalition and Labor over the events of 1975 has prevented resolution of the question of what should happen if a Prime Minister cannot get supply legislation through the Senate would be laughable were it not for the seriousness of the issues involved. The choice was, and remains, simple: either s 53 should be amended so as to deny the Senate the power to block supply, or the conventions should be codified and should include a provision stating that the Governor-General has the power to dismiss a Prime Minister who cannot get supply legislation through both houses of Parliament. One would have thought that the adoption of either of these courses of action would have been the first order of constitutional

\(^{25}\) For a statement on the non-justiciability of conventions see *Re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1, 84-6.
reform in the aftermath of 1975, yet failure to address this issue over the past 45 years means that we would face another crisis if the same circumstances were to arise today.

So how does one counter the argument either that codification is not possible or the entirely unwarranted concern about what its effects on the Constitution would be? The reality is that taking such a step would not be complex from a constitutional point of view. Debate on this issue has been conducted largely without reference to the experience of other countries, an examination of which shows that Australia's situation is not unique, in that many countries have codified the conventions without difficulty and without adverse consequences for the operation of their constitutions.

Evidence of this is provided by the fact that many countries, both Commonwealth and non-Commonwealth, have office-holders whose functions are the same as those currently performed by the Governor-General in Australia, and whose powers are specified in rules of law contained in the Constitution.26 Thus in countries such as Bahamas,27 Barbados,28 Grenada29 and Jamaica,30 all of which are Commonwealth countries which are still constitutional monarchies - the Constitution states that the Governor-General must appoint whoever is able to command a majority in the legislature as Prime Minister, that the Governor-General must dismiss a Prime Minister who no longer commands a majority in the legislature and who refuses to resign or call an election, and either permits or requires the Governor-General to dissolve the legislature if a Prime Minister who has lost the confidence of the legislature fails to resign.

Then there are a number of Commonwealth countries – Dominica,31 Malta32 and Mauritius33 - which are republics with a President occupying the same office formerly held by a Governor-General, whose Constitutions embody the same rules as stated above. Finally, one can point to two other republics - Germany and Ireland - who are not members of the Commonwealth but where similar Westminster-type responsible government systems operate: In Germany the President appoints as Chancellor whoever is elected by a majority of the Bundestag.34 Where a Chancellor has lost the confidence of the Bundestag and the Bundestag has elected a successor, the President must dismiss the Chancellor.35 Where the Bundestag fails to elect a new Chancellor the president may dissolve the Bundestag.36 In Ireland the President must

27 Constitution of Bahamas 1973, Arts. 73, 74 and 66.
30 Constitution of Jamaica 1962, Arts 64, 70 and 71.
31 Constitution of Dominica 1978, Arts. 59, 60 and 63.
32 Constitution of Malta 1964, Arts 76, 79, 80 and 81.
33 Constitution of Mauritius 1968, Arts. 57, 59 and 60.
34 Constitution of Germany 1949, Art. 63.
35 Ibid Art 68.
36 Ibid Art 63.
appoint as Taoiseach (Prime Minister) whoever is selected by the Dail (the lower house of Parliament)\textsuperscript{37} and a Taoiseach who has lost the confidence of the Dail must resign or ask the President to dissolve the Dail.\textsuperscript{38} The fact that the impossibility argument continues to be made despite the evidence from overseas reflects the insularity of debate in Australia - although it is difficult to determine whether that is the product of genuine ignorance of what goes on in other countries or of determination on the part of constitutional conservatives to keep quiet about facts that are inconvenient to them.

These examples show not only that codification is possible but also that the experience of overseas jurisdictions exposes the invalidity of the ‘flexibility’ argument. Constitutional draughtspersons in those countries had no difficulty in framing the rules directing the powers of a Governor-General or president with sufficient specificity as to cover the eventualities that might arise in the relationship between that person, the Prime Minister and Parliament.

V A MODEL CODE

This code incorporates the conventions as described in Part II. It also addresses the two areas of uncertainty identified there: It resolves the question that lay at the heart of the 1975 crisis, which is whether a Governor-General may dismiss a Prime Minister who has a majority in the House of Representatives but who cannot get supply legislation through the Senate, by stating that in such circumstances a Governor-General may dismiss a Prime Minister. This is consistent with the principle underlying responsible government, which is that a government should hold office only if it has the ability to govern. The model code also requires that a Governor-General should always accede to a Prime Minister’s request to dissolve Parliament, thereby giving effect to the principle that voters should never be denied the opportunity to determine their government.

Codification would not only ensure congruency between the text of the Constitution and how responsible government actually operates, but would also enable people to more easily understand the Constitution. Although the issue of codification arose in the context of the debate on whether Australia should become a republic, I would argue that codification is a more important reform than Australia becoming a republic, because although severance of the link with the Crown would serve an important symbolic purpose, codification would give clarity to the day-to-day workings of the Constitution. It would also mean that there would no longer be a difference between how the Constitution reads and how it operates in fact. This reform ought therefore to be pursued irrespective of whether Australia becomes a republic. Having said that, it is also relevant to note that codification would assist in the achievement of a republic, as it would prevent a President from abusing his or her powers, thereby countering the objection raised to the direct-election model which voters overwhelmingly favour. The following model code

\textsuperscript{37} Constitution of Ireland 1937, Art 13.1.1.
\textsuperscript{38} Ibid Art. 28.10.
contains the text of a constitutional amendment by which the powers could be codified.

1 Exercise of power by the Governor-General

(1) All references to the Governor-General in this Constitution are to be taken as references to the Governor-General acting on the advice of the Executive Council, unless the reference is to the Governor-General acting on the advice of some other person or body, or as directed by this Constitution.

(2) The powers of the Governor-General include the power to summon, prorogue and dissolve Parliament and to be Commander-in-Chief of the defence forces.

2 Appointment of the Prime Minister

Subject to section 3(4), the Governor-General must appoint as Prime Minister the person who has the support of a majority of members of the House of Representatives.

3 Dismissal of the Prime Minister

(1) The Governor-General must dismiss the Prime Minister when

(i) the Prime Minister no longer has the support of a majority of members of the House of Representatives or

(ii) the House of Representatives or the Senate has rejected a proposed law for the appropriation of money or the imposition of taxation

and, in either of the circumstances mentioned in (i) or (ii), the Prime Minister refuses either to resign or to advise the Governor-General to dissolve the House of Representatives.

(2) The Governor-General must dismiss the Prime Minister when the Prime Minister has refused to comply with an order of the High Court.

(3) If the Governor-General dismisses the Prime Minister in accordance with sub-section (1)(i) of this section, and there is no other person who has the support of a majority of the House of Representatives, or if the Governor-General dismisses the Prime Minister under sub-section (1)(ii) or (2) of this section, he must immediately dissolve Parliament.

(4) If the Governor-General has dissolved Parliament under sub-section (3) of this section, the Governor-General must appoint as Acting Prime Minister the parliamentary leader of the political party which has the most numerous members in the House of Representatives but which did not have any members who were
Ministers immediately before the dismissal of the Prime Minister. The Acting Prime Minister shall hold office until the day upon which the House of Representatives meets after the dissolution contemplated by sub-section (3) of this section.

6 Appointment and dismissal of members of the Executive Council

The Governor-General, acting on the advice of the Prime Minister, shall appoint and dismiss members of the Executive Council.

7 Dissolution of Parliament

The Governor-General must dissolve Parliament when and only when the following circumstances exist:

(i) the Governor-General is advised to dissolve Parliament by the Prime Minister or
(ii) the Prime Minister has been dismissed in accordance with section 3(1)(i) and there is no other person who has the support of a majority of the members of the House of Representatives or
(iii) the Prime Minister has been dismissed in accordance with section 3(1)(ii) or section (3)(2).

***
On a screen darkly: Outback Noir, Erasure and Toxic Masculinity

Bruce Baer Arnold*

Australian cinema’s depiction of male-on-male rape offers a lens for understanding homosociality, erasure and justice within Australia and other jurisdictions. Male rape is an assault that objectifies the victim and valorises the perpetrator as both powerful and outside the rules. It is a feature of the Australian screen in four iconic works: *Wake in Fright, The Chant of Jimmie Blacksmith, Mad Max* and *Ghosts ... of the Civil Dead*. They involve brutality in an environment in which legal authority is absent, weak or indifferent. It is a homosocial environment in which ‘mates’, men whose deepest emotional relationships are with each other, are complicit bystanders. They are contemptuous or even amused by the ‘unmanning’ of a victim through force or intoxication, placed outside their brotherhood and without a redemptive ending. The films offer a dark view of complicity and violence within a land where bystanders valorise force and perform homosocial solidarity through silence about harms. More broadly, they tell us something interesting about anxieties at the heart of toxic masculinity and about the efficacy of law where victimisation excludes men from justice.

There is increasing recognition of what has been dubbed hegemonic toxic masculinity: behaviour that results in self-harm and harm to others in the performance of values regarding authority, aggression and discipline.¹ This article is about power, violence, erasure and images – on screen and in our minds – of men behaving badly. It offers a queer reading of Australian identity and cinematic understandings of law in four iconic works: *Wake in Fright* (1971), *The Chant of Jimmie Blacksmith* (1978), *Mad Max* (1979) and *Ghosts ... of the Civil Dead* (1988). They are at odds with the articulation and affirmation of diversity evident in film such as *Priscilla, Queen of the Desert* (1994), *Holding The Man* (2015) and *The Sum of Us* (1994).

The article aims to provide a perspective rather than an exhaustive truth about law, film and social solidarity. The contention is that the depiction in Australian cinema of male-on-male rape offers a lens for understanding masculinity, homosociality, silences and justice within Australia and across the globe. The following pages use that lens for a subversive view of mateship, a male social solidarity that is a supposedly distinctive expression of Australia values. The same lens also provides offers a view of how Australian film

---

* 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 technologies, privacy and secrecy. His current research focuses on regulatory incapacity at the intersection of public health, consumer protection and technology.

engages with power, justice and erasure. It complements analysis elsewhere of sexual violence and misogyny in films such as *Wolf Creek* (2005) and *The Nightingale* (2019).²

The article draws on a presentation at the 2018 OzLenses Australian Law & Film seminar under the auspices of Kieren Tranter at Griffith University.

**Introduction**

Male rape is a sexualised assault that objectifies the victim and valorises the perpetrator as both powerful and thus either making or outside the rules. It is a recurring but largely unrecognised feature of the Australian screen. It has attracted less attention from feminist and other scholars of toxic masculinity than depictions of heterosexual assault in films such as *Shame* (1988), *Brilliant Lies* (1993), *Blackrock* (1997) and *The Boys* (1998).

The four films discussed below involve brutality with an Australian accent, a dark view of erasure, belonging and exclusion that is at odds with sunny Australian drama such as *The Castle* (1997), *Australia* (2008), *Strictly Ballroom* (1992) or *Muriel’s Wedding* (1994). The brutality is expressed in an environment in which formal legal authority is absent, weak or indifferent. Authority is instead a matter of socially accepted and privately enforced conventions about rules and remedies that are determined by self-regulated embodiments of male toxicity: violent, aggressive, self-gratifying, indifferent to their own pain or that of others, devoid of empathy or care. The environment is one in which there are bystanders: the homosocial ‘mates’ whose deepest emotional relationships are with each other but are silent about any expression of their own homoerotic desires or emotional intimacy. Those bystanders are complicit, contemptuous or even amused by the ‘unmanning’ of a male victim through force or intoxication. As such they deny their potential agency and instead perform acts of erasure that deny the existence of the assault and preclude reparation for the victim through either legal mechanisms or a social solidarity that stigmatises the offender (and themselves as bystanders) rather than the victim.

The films depict rape as placing the victim, unlike the perpetrator, outside the homosociality that is central to mateship. As such the films lack the redemptive ending of noble suffering and triumph over adversity that is a feature of US films such as *The Shawshank Redemption* (1994), *American History X* (1998) or *Midnight Express* (1978) in which male rape is the salient expression of power. Their dark view of male belonging, power, complicity and exclusion is also at odds with United States adventures such as

---

Deliverance (1972), where heroic masculinity is sufficiently self-confident to support a male victim.

If ‘mateship’ is a distinctively, although increasingly fictive, Australian value the films offer a dark view of complicity and violence within the sunburnt country, a land of sweeping plains, kangaroos and male eyes that are shut to brutality in an exercise of erasure. Those eyes are male, because women (and values of empathy) are absent. At a global level the films tell us something interesting about anxieties at the heart of toxic masculinity and about the efficacy of law where sexual victimisation excludes men from justice.

The first part considers homosociality as an aspect of the ‘Australian character’ in ‘Australian film’. The second part contextualises the discussion by considering aspects of male-on-male rape. That sexual assault is an offence that encompasses what has historically been dubbed ‘rape, sodomy, indecency or buggery’ but is not restricted to anal penetration. ³ Rape is a matter of power. It is more than, to adapt a characterisation by Keneally, the white phallus, a colonisation of the Indigenous body. ⁴ The part notes the challenging nature of data about rape in Australia. It suggests we can fruitfully ask questions about law by looking at cinematic depictions of sexual assault, in particular beyond conventional depictions of female victimisation. The third part identifies the depiction of male rape in the four films. They are works that are regarded by Australian audiences or critics as representatively Australian, with distinctly Australian landscapes and voices, recognisably neither the American West nor the snow-clad forests and rain-swept streets that background ‘Scandi’ and ‘Nordic Noir’. ⁵ Those films are examined for insights about masculinity, belonging and law, including a bureaucratic indifference that is potentially universal. The final part provides a conclusion about the performance of power on-screen and in real life.

Ⅰ HOMOSOCIALITY AND THE AUSTRALIAN LENS

Is the Australian lens, in engaging with law (most specifically the characterisation of toxic masculinity, male rape and its legal consequences) more than kangaroos, Akubra hats, corrugated iron on the roof of a remote pub or a car chase down a desert highway that could equally be in Arizona or Namibia? If we dub the supposedly unintelligible Australian accent damned by US film critics reviewing Mad Max, ⁶ is the lens mid-Pacific, a lens that because of the financial imperatives of international distribution is increasingly cosmopolitan rather than parochial and thus not distinctive? ⁷ Are

---
⁷ Sue Matthews, 35mm Dreams: Conversations with Five Directors (Penguin, 1984) 13; Marcus Breen, Offshore Pot o’Gold: The Political Economy of the Australian Film Industry’ in Greg Elmer and Mike Gasher (eds), Contracting out Hollywood: Runaway productions and foreign location shooting (Rowman & Littlefield, 2005) 69; and Jordi McKenzie and W.
some of the films an instance of offshore ‘ozploitation’, reflected in one critic’s astringent dismissal of *Wake in Fright* as simply a ‘parking space’ for a Canadian director and a UK star?28

One response to that question is that Australian feature film often embodies an ideology of mateship and masculinity.9 That embodiment valorises what many Australians choose to conceptualise as ‘most Australian’, a manifestation of Australian values and relationships that are superior to those of other cultures. The ideology of mateship is a gendered, homosocial and populist. It is an ideology in which men often have their most significant but typically unstated emotional connection with each other: their mates.10

It is an ideology that valorises particular attributes such as physical strength, resilience, initiative, risk taking, practicality, competitiveness, drinking and gambling. It is evident in respect for manual labour, awkwardness in interaction with women (in some instances a marked misogyny),11 disrespect for elites and education, wariness about language, 12 contempt for physical/emotional weakness, acceptance of sexualised humour, advocacy of an egalitarian ‘fair go’, opposition to ‘dobbing’ and a perception that life outside cities is most authentic. Robert Hughes noted that it was enshrined in the Australian legend but provocatively suggested that in part it was a convict import rather than indigenous. He thus referred to

Mateship, fatalism, contempt for do-gooders and God-botherers, harsh humor, opportunism, survivors’ disdain for introspection, and an attitude to authority in which private resentment mingled with ostensible resignation ... They also brought, if men, the phallocracy of tavern and ken, and, if women, a kind of tough passivity, a way of seeing life without expectations.13

It is an ideology propagated through popular film, through official rhetoric such as ANZAC Day and Australia Day speeches,14 explanations of law,15 public administration16 and norms in the day-by-day lives of ordinary men.17

---


12 Russell West, ‘This is a man’s country’: Masculinity and Australian national identity in *Crocodile Dundee* in Russell West and Frank Lay (eds) *Subverting masculinity: Hegemonic and alternative versions of masculinity in contemporary culture* (Rodopi, 2000) 44, 46.


It is an ideology that many men, particularly those in a bureaucratised workplace, find hard to live up to. It is at odds with the realities of contemporary life, such as ongoing depopulation of the rural Australia in which the iconic stockman (an individual with the same function as a US cowboy) represents exemplary masculinity. It situates the toughest, roughest, most emotionally distant and most aggressive man as the one most deserving of respect and worthy of emulation. That man will on occasion be the most disturbed man among his peers, prepared to unthinkingly enforce his will and impose his desires on mates. His superiority is not a function of lineage, class or intellect. It is instead a function of the capability to exercise power and the weakness of inhibitions about that exercise.

Australian homosociality is accompanied by uneasiness about the expression of affection towards ‘mates’, potentially perceived as an indication of homosexual desire. It is thus appropriate in a moment of emotional exuberance to hug your mates after your team wins the football match or to huddle in a trench for warmth and comfort under existential challenge at Gallipoli or the Somme, two battles enshrined by Australian cinema during the past 90 years. In the land of mateship it is not appropriate to kiss, caress or communicate emotional needs unless intoxicated. The archetypal Australian man’s best friend is his dog.

Incomprehension, hostility and homophobia is the flipside of Australian homosociality in the bush or the beaches of Bondi and Gallipoli, with masculinity potentially being asserted through sexual assault that denies the autonomy of a victimised male. Because that assertion is coercive it cannot be condemned by peers as homosexual. Within the lens of mateship such assault is a matter of performing or subverting authority rather than a manifestation of a stigmatised sexual affinity. It is about power, not affection or desire, what Cotton and Groth characterise as ‘more the sexual expression of aggression than the aggressive expression of sexuality’, something that occurs ‘to hurt, to humiliate, to dominate, to control and to degrade’.

II  POWER AND ERASURE IN FRONT OF THE LENS

Rape is a matter of law and social values. Susan Brownmiller provocatively characterised rape as a

sexual invasion of the body by force, an incursion into the private, personal inner space without consent ... [that] constitutes a deliberate violation of emotional, physical and rational integrity and is a hostile degrading act of violence.\textsuperscript{21}

Her preoccupation is with gendered relationships. Sexual assaults on males, typically but not exclusively by male perpetrators, however have a long history in both law and culture.\textsuperscript{22} Male rape occurs in Australia.\textsuperscript{23} As an expression of power it can be discerned as universal. It is for example a feature of action by armed forces since at least the time of the Romans, with defeated officers and troops being violated as both a signifier of submission and a ‘release’ for victors after the battle.\textsuperscript{24} It is evident in total institutions such as prisons,\textsuperscript{25} with depictions in various national cinemas.\textsuperscript{26} It is also evident in migration detention facilities and places of enforced residence by young people, for example homes operated by religious bodies, or where spiritual authority is betrayed by senior clergy.\textsuperscript{27}

That activity is apparent in studies of victimisation,\textsuperscript{28} litigation regarding offenders and bystanders,\textsuperscript{29} proposals for institutional reform\textsuperscript{30} and tropes in

\begin{footnotesize}
\begin{enumerate}
\item [21] Susan Brownmiller, \textit{Against Our Will} (Bantam, 1975) 422.
\item [22] Ivor H Jones, ‘Cultural and historical aspects of male sexual assault’ in Gillian Mezey and Michael King (eds) \textit{Male victims of sexual assault} (Oxford University Press, 2\textsuperscript{nd} ed, 2000) 104, 113.
\item [27] \textit{DPP v Pell (Sentence)} [2019] VCC 260.
\end{enumerate}
\end{footnotesize}
popular culture such as ‘don’t drop the soap’. Male rape is also increasingly evident in litigation and media accounts of sexualised violence outside those institutions. Changes to social attitudes are reflected in increasing reports of assaults on gay and straight males, adults or youths, who were attacked while in public places or abused by a partner or, in what is dubbed date rape, involve a casual contact met in a social setting such as a bar or online dating platform such as Grindr. Fear of assault has been used to legitimate violence against gay and other men under the so-called homosexual panic defence, a defence founded on anxiety about the erasure of masculinity rather than merely pain and disregard of consent.

Characterisations of rape in law and in common understandings of what is permissible, wrong or speakable have varied considerably over time. In part that variation reflects historically contingent views of sexual expression and masculinity. The Romans for example, in valorising agency, stigmatised the recipient of sexual penetration as ‘unmanly’, a value reinforced in elite/popular culture by tropes about rhaphanidosis, in other words state-sanctioned penetration with a barbed fish. Late mediaeval and Tudor jurists condemned every participant in ‘unnatural vice’ as guilty of an abomination, irrespective of consent. They established a crime that was both unnameable but sufficiently capacious to encompass buggery (at

---

30 Brouwer, op cit.
33 Alan Arthur Farrell v R [1996] TASSC 58
37 Shawn O’Bryhim, ‘Catullus’ Mullets and Radishes (c. 15.18-19)’ (2017) 70(2) Mnemosyne 325.
times construed as oral rather than merely anal penetration) and mutual masturbation.\footnote{Patrick White, \textit{The Twyborn Affair} (Cape, 1979).}

In contemporary Australia courts, journalists, rights advocates, criminologists and others have come to engage with what was traditionally erased from public discourse as too offensive or shameful to be publicly acknowledged and formally reported, whether in court reports or by victims. That engagement reflects both an acknowledgement of crime and changing social values. In law and increasingly in popular culture Australians similarly re-visualization as assault what in the past was construed as adolescent horseplay.\footnote{Royal Commission into Institutional Responses to Child Sexual Abuse, \textit{Report of Case Study 45: Problematic and harmful sexual behaviours of children in schools} (2017) 10-11, 15.} In contemporary Australian law we have belatedly decriminalised consensual same sex activity.\footnote{Barbara Baird, ‘Sexual citizenship in Tasmania: Stories of gay law reform’ (2003) 17(1) \textit{Continuum: Journal of Media & Cultural Studies} 3; and Alan Berman, ‘The Repeal of Sodomy Laws in Tasmania in 1997’ in Shirleene Robinson (ed), \textit{Homophobia: An Australian History} (Federation Press, 2008) 236.} (Consensual activity within Australian prisons, a human right as an aspect of sexual citizenship, is still proscribed as contrary to good discipline.)\footnote{Diane Richardson, ‘Constructing Sexual Citizenship: Theorizing Sexual Rights’ (2000) 20(1) \textit{Critical Social Policy} 105; and Juliet Richters, Tony Butler, Karen Schneider, Lorraine Yap, Kristie Kirkwood, Luke Grant, Alun Richards, Anthony MA Smith, and Basil Donovan, ‘Consensual sex between men and sexual violence in Australian prisons’ (2000) 41(2) \textit{Archives of Sexual Behavior} 517.}

With that decriminalisation Australian law is properly instead concerned with questions of physical/psychological injury, disregard of consent and denial of dignity through objectification by a perpetrator of another person for the perpetrator’s sexual or other gratification.

In making sense of that gratification we should acknowledge that the motivation for sexual assault may be as much about power as it is about physical pleasure. Such an expression of power transcends gender and what an offender would identify as the desired partner in intimacy. Judith Butler argues that power works to shape sex and sexuality, determining what are legitimate modes of sexual affinity, sexual acts and sexual relationships.\footnote{Judith Butler, \textit{Bodies that matter: On the discursive limits of sex} (Routledge, 2nd ed, 2011) 18.} Power provides a language in which some acts are criminal and some in an echo of the Tudors are socially unspeakable. That silence is discussed in Moran’s \textit{The homosexual (ity) of law}.\footnote{Leslie Moran, \textit{The homosexual (ity) of law} (Routledge, 2002) 33.} It is illustrated for example by the ‘rustic sodomite’s assault in Tarentino’s \textit{Pulp Fiction} (1994) on crime czar (and hegemonic male) Marsellus Wallace, a rape that is to be forever unspoken by both Wallace and witness Butch Coolidge and thereby erased.\footnote{David Bell, ‘Farm boys and wild men: Rurality, masculinity, and homosexuality’ (2000) 65(4) \textit{Rural Sociology} 547, 550; and Margo Kaplan, ‘Sex-Positive Law’ (2014) 89(1) \textit{New York University Law Review} 89.}

In making sense of assault and historical contingency we should also acknowledge that law has struggled with sexual activity that involves the consensual infliction of physical pain, subjection or humiliation. Such
conventionally disruptive activity encompasses S&M or Master/Slave role-play, sometimes deeply theatrical. It also encompasses the depiction of sexual violence or paraphilia that disturb heteronormative expectations about pleasure and propriety. Law’s struggle is evident in the frameworks for regulation of print, broadcast, live theatre, cinema and online dissemination of films. Such frameworks are relevant to the contentions in this article because they propagate norms about behaviour and belonging. They also represent a soft power, the state shaping what law is and how it is shown.

The historic social and legal unspeakability of consensual same-sex activity has resulted in an erasure that deepens the silence in contemporary and historic Australia regarding the rape by males of other males, including adults and minors. The silence is sporadically broken by reports of prosecutions, criminological studies and depictions in Australian film, television and novels that range from White’s The Twyborn Affair to Adamson and Hanford’s Zimmer’s Essay.

Those depictions are the foundation of this article. The official literature regarding the incidence and other aspects of that sexual assault is incoherent. We have acknowledgement that the rape of males occurs in institutional settings but data is patchy. That is unsurprising given concerns about liability and about wariness on the part of victims and bystanders about reporting. Perforce many scholars, such as the author of this article, draw on research from overseas. Rape outside institutions encompasses non-consensual activity by strangers and intimates. We may infer that its incidence is under-reported, consistent with research regarding under-reporting of assaults on


adult and minor females.\textsuperscript{50} We may recognise that many perpetrators do not identify as gay.\textsuperscript{51} The history noted above indicates that some perpetrators may indeed use rape to erase the masculinity of their victims.\textsuperscript{52} That erasure is a rewriting how both victims and bystanders understand the victim’s identity within a homosocial setting where being a ‘man’ is paramount.

\textbf{III \ TOXIC MASCULINITY ON SCREEN}

One way of both asking and answering questions about law in relation to rape is to look beyond the scholarly literature and interrogate cinematic representations. Australian feature film is diverse and the following discussion does not purport to be definitive. It instead offers a lens that reveals images of authority, belonging, indifference and acceptance at the heart of four Australian films.

\textbf{Carl Schmitt in a V8}

Sexual violence begins George Miller’s iconic Australian road movie \textit{Mad Max}, a tale of speed, violence and grotesques that echoes a John Ford Western. In the post-apocalyptic wilderness Max Rockatansky and sidekick Jim Goose encounter a young ‘rev head’ couple who have been detained while on the road and sexually assaulted by some of the lawless tribals unavailingly policed by Max as the surviving embodiment of an ineffectual state. Those tribals are camp versions of the cannibals and child molesters in John Hillcoat’s slower speed and psychologically more persuasive \textit{The Road} (2009) or of the First Nations people in Hollywood Westerns,\textsuperscript{53} dangerous entities outside the law and thus undeserving the protection of law that is inherent in notions of universal human rights.

Several critics, notably Rebecca Johinke, have noted the homoerotic undertones of \textit{Mad Max}.\textsuperscript{54} Given the film’s emphasis on movement and excitement it is unsurprising that the rape has not been considered in detail by scholars. Its function is arguably to illustrate that ‘anything goes’ after the end of civilisation as we know it. Its function is also to provide some viewers with a discomforting laugh, given Freud’s insight that laughter is often a response to what we find unsettling. For the purpose of this article the incident is suggestive because the sight of the traumatised male victim, running for the horizon with bleeding posterior on display, is regarded by Max and Goose as amusing rather than something deserving of empathy.

\textsuperscript{50} Denise Lievore, \textit{Non-reporting and hidden recording of sexual assault: An international literature review} (Commonwealth Office of the Status of Women, 2003).
\textsuperscript{51} See for example Samantha Hodge and David Canter, ‘Victims and perpetrators of male sexual assault’ (1998) 12(2) \textit{Journal of Interpersonal Violence} 222.
\textsuperscript{54} Rebecca Johinke, ‘Manifestations of masculinities: Mad max and the lure of the forbidden zone’ (2001) 25(67) \textit{Journal of Australian Studies} 118.
As a master craftsman of spills and thrills Miller then takes us on a high octane ride that depicts Australia as a place of absence, where law comes to be a matter of the agency exercised by our self-regulated invulnerable and alienated leather-clad hero, and exponent of Schmitian decisionism. It is a given on that journey that Max, as the essential man, the hero against whom all other men when judged are deemed inadequate, may well be overpowered, detained, tortured and scarred but will never be sexually violated. He is a manifestation of both Australian homosociality and pre-colonial hero sagas in which the wronged protagonist exercises exemplary private vengeance against those perpetrators he deems to be outside the law, without regard for any code embraced by members of that ‘other’ and without the humour seen in Crocodile Dundee (1986).

Mad Max is a film of surface: kinetic action and gothic images rather than nuance, unfolding characterisation, legal dilemmas and personal conundrums. It presents a world where force and endurance are paramount, a paramuncty that is the law and was valorised by Carl Schmitt. In the post-apocalyptic state of nature we are not invited to empathise with victims or indeed recognise victimisation and offence. Instead we are to embrace the masculinity of Max, who embodies power but not empathy. Reparation for harm to the raped male and female partner will be incidental, will be determined by the most powerful and self-accountable actor (in this instance Max) and will be endorsed by those who lack his charismatic potency. It is a legal world reminiscent of that conceptualised by Schmitt, where the struggle is existential and the saviour is the law, makes the law and is above the law. We cheer the superman in leather and disregard the pain of others, for example the physical and psychological trauma of the sodomised victim pictured disappearing into the middle distance.

Silently watching the colonial phallus

Fred Schepisi’s The Chant of Jimmie Blacksmith depicts Australia at an inflection point in its legal history: the move towards Federation. The film is a tale of dispossession, anger, injustice and power: power expressed and power sought, including expression through sexual violence and silence. The tale begins with Indigenous tracker Blacksmith assisting senior constable Farrell with capture of Blacksmith’s peer Harry Edwards. Blacksmith is an obedient servant of the colonial justice system, instrumental in the apprehension of Edwards and dismissive of the captive on the basis that those without power deserve what they get. Blacksmith’s identification with his master means that

58 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.
he provides no comfort to the frightened Edwards. The prisoner is subsequently raped and murdered by Farrell (two illegal actions by an individual who embodies the law).

Blacksmith is consciously deaf to the offence and complicitly cleans the corpse on Farrell’s behalf. He lacks ‘voice’: he does not warn or defend Edwards and does not reprove Farrell. Instead, in what Hirschman might describe as the other option for the subservient, in the absence of voice he chooses to exit: in this instance clearing out of Farrell’s service. The ‘tidying up’ is a manifestation of the erasure evident in several of the films: procedure affirms legitimacy and thereby fosters silence.

That snapshot has not attracted scholarly attention. It can be read as a paradigm of the colonial relationship. A corrupt Irish-Australian representative of the imperial state exercises his power on the subservient body of a First Nations person without fear of intervention by Blacksmith as someone who appears to be aware of what is likely to happen to Edwards and who is conscious of the offence as it takes place. Within the frame of this article the incident might more narrowly be construed as emblematic of questions about contemporary justice and masculinity. In disrupting Schepisi’s tale of a misjudged drift from injustice to savagery and Blacksmith’s death on the gallows, we could revision the incident.

It is convenient to found the tale on Blacksmith’s ethnicity; but would Farrell restrict his predation to people of colour? Is Farrell’s murder of Edwards a matter of disposal of evidence or an expression of guilt about a stigmatised affinity, an affinity whose manifestation in consensual and nonconsensual activity alike was at that time a criminal offence? Could we envisage a version in which Blacksmith has agency rather than complicity: warning Edwards, reproving Farrell, intervening during the rape, liberating Edwards or even appropriating justice by harming Farrell after the event?

Is Blacksmith’s incapacity symptomatic of the denial that is evident in contemporary Australian correctional institutions, noted below. More broadly, within the context of the recent Royal Commission into Institutional Responses to Child Sexual Abuse and the Australian Defence Abuse Response Taskforce, where generations of authorities disregarded claims made by abused minors, would a Federation-era court have heeded a claim by Edwards? Would Edwards have become the subject of empathy rather than derision, given the persistent belief that ‘real men’, the men valorised through hegemonic Australian feature film, do not get raped?

---


Disquietingly, in thinking about law and identity, could we revision Blacksmith as a precursor of the National Socialist kapo, an active participant in an assault rather than someone who wants to ignore the crime and avoid the perpetrator? Tragically some inmates of concentration camps adopted the values and mannerisms of their masters, serving as auxiliaries in crimes against humanity and on occasion pathetically mimicking the attire of the guards.\textsuperscript{63} The Chant depicts Blacksmith as initially diligently embracing his position in the colonial justice system: wearing the white man’s clothes, using Farrell’s pejorative language, assimilating the master’s values. As someone who is denied agency by virtue of his ethnicity we might envisage Blacksmith assimilating power by himself assaulting Edwards, given that assault with immunity is a privilege of the powerful and not specific to gender.

One response to such re-visioning is that it is inappropriate because outside the filmmaker’s intentions\textsuperscript{64} or that, as an instance of postmodernism, it relativises harms and agency. A rejoinder is that law reform is an exercise of the imagination noted by Posner, Minow and Spellman: a willingness to conceive of different relationships and reduced harms through legal change.\textsuperscript{65} A society that respects the dignity of all people, irrespective of gender, ethnicity and sexual affinity would for example not be one in which the disempowered subjects of the law are buggered by representatives of the state while others shield their eyes and ears from that harm. If film is an exercise of imagination on the part of the author/s and viewer, so is law reform and writing about law.

\textbf{Learning homosociality}

\textit{Wake In Fright} has been described as ‘arguably Australia’s greatest feature film’.\textsuperscript{66} Set in the Australian outback, it is based on Kenneth Cook’s novel of the same name.\textsuperscript{67} It depicts the vicissitudes of a young male teacher, an occupation positioned as one deserving of less respect than those involving ‘real men’ who earn their living through physical labour in rural Australia.

That location is salient, given the longstanding cultural values that are periodically invoked by politicians of a conservative bent articulating manual work as more ‘authentic’, worthy and ‘Australian’ than labour at a desk or through professional credentials.\textsuperscript{68} It is a location to which many Australians pay lip service but in which increasingly few Australians choose to live. Apart from the absence of amenities that avoidance is in part a reflection of

\textsuperscript{63} Nikolaus Wachsmann, \textit{KL: A history of the Nazi concentration camps} (Hachette, 2015).
\textsuperscript{66} Simon Caterson, ‘The Best Australian Film You’ve Never Seen’ (2006) 50(1-2) \textit{Quadrant} 86, 86.
\textsuperscript{67} Kenneth Cook, \textit{Wake In Fright} (Michael Joseph, 1961).
perceptions of latent lawlessness and abuse by (or incapacity on the part of) law enforcement personnel. Such perceptions are evident in similar locations overseas, with for example US dramas featuring misadventures involving corrupt sheriffs in the Deep South or North West, such as Welles’ *Touch of Evil* (1958), Jewison’s *In The Heat Of The Night* (1967) and Winterbottom’s *The Killer Inside Me* (2010).

In *Wake in Fright* the teacher protagonist is misled and exploited by the clannish locals for whom he will always be an outsider, before being sexually abused by a drunken ex-doctor. In this nightmare there is no support from the law in the person of archetypal ‘Aussie’ actor Chips Rafferty. Social solidarity among mates means there is no assistance from the townspeople. As with the two onlookers in *Mad Max*, the community is complaisant: indifferent if not amused by his exploitation. Most chillingly, he is so incapacitated that after an ineffectual escape he ends up returning to the locale in which he was harmed, perhaps to unstated further victimisation. He reconciles with his assailant and the locals, no longer dismissive of rural rednecks and their homosociality.

*Wake in Fright* offers a view of law and masculinity in which social solidarity within the peer group of insiders is fundamental, law is local, abuse of outsiders is endorsed and people whose strength or resilience is deficient are exploited without consequences to perpetrators. It is not a dog eat dog, all against all Hobbesian state of nature. Instead, it a legal culture of silence and assent, in which groups of men look the other way through fear that they may themselves become victims if they dissent or look on with approval at the infliction of pain by peers who lack their internal or social restraints.

The film offers a dystopian view of Australian society as one of little imagination, an inability on the part of bystanders to place themselves in the shoes of the victims and to exercise the moral independence that as noted above is supposedly a key facet of the Australian character.69 As such it may resonate with readers of works such as Christopher Browning’s *Ordinary Men*, an account of ethical autonomy and men engaging in repugnant activity in order to keep in step with their peers rather than merely evade punitive sanctions.70

*Wake in Fright* can be read as a particularly bleak view of homosociality as a matter of education. Rape educates for belonging. It results in the victim embracing both his rapist and peers, learning his place and learning not to look down on the blokes who were indifferent to the abuse. Being Australian, from that perspective, is a matter of fitting in, embracing punitive social norms. The laconic archetypal Australian has much to be quiet about.

**Civil Dead**

If *Wake in Fright* is grounded in the desolation of remote rural Australia, John Hillcoat’s *Ghosts ... of the Civil Dead* has an interior landscape that is

---

69 Lucas, op cit, 141.
decidedly and chillingly high-tech. We see the antiseptic interior of a carceral ‘supermax’ and the stainless steel of the escalators at Parliament House station in Melbourne, an ironic ascent from the underworld with an allusion to Malle’s 1958 *Ascenseur pour l’échafaud*.

*Ghosts* lacks the redemptive quality of *The Shawshank Redemption* or *Brubaker* (1980). The central character of *Ghosts* is progressively brutalised after incarceration, failing to negotiate interactions with peers who are tougher and more disordered than himself in an environment where correctional staff are as brutal as those peers but clinically detached. This detachment is facilitated by a panoptic architecture and management regime in which the authorities are aware of, but indifferent, to abuses. That is an echo of findings of inquiries into systemic violence in the Victorian, New South Wales and Queensland prison systems, and historic penal colonies such as Norfolk Island.71 The protagonist is raped, scarred and robbed by fellow inmates. There is no rescue by the inmate community or by ‘mates’. Eventually anomic, he is released into the outside community. The viewer infers that his subdued rage against a world responsible for the protagonist’s injuries will be unleashed in acts of violence.

The facility’s management is complicit in his suffering, like the guards in the 1971 *Fortune and Men’s Eyes*: bored official bystanders observing a gang rape while gawkers enjoy the show and other inmates a few feet away unconcernedly eat lunch. Indeed, the *Ghosts* executives are happy to release a high-risk offender into the community because his next crime will justify their plan to increase revenue through a bigger facility. One message is that crime pays if your business is a containment facility. The embodiment of law as a privately operated correctional facility, a for-profit state-sanctioned jungle, legitimates itself in *Ghosts* by creating criminals, that is those violent males who need containment.

The *Ghosts* supermax regime brutalises inmates through a culture in which managers turn a blind eye to the assaults, including sexual violence, that are normative. Their disregard elides any duty of care.72 It is a homosocial culture in which the norms are set by the *Mad Max* style uber-male: the sociopathic super-predator at the top of the carceral ecosystem. In this instance the exemplary male is one identified by the supermax managers as an authority figure and accordingly given agency to exercise his will, directly or through subordinates, as long as he does not challenge those executives or their delegates. Offences will not be averted or reported by the victim’s peers.

Saliently the institution in *Ghosts* is privately operated and profit-oriented. It is an expression of the neoliberal zeitgeist in advanced economies that, over the past two decades, saw privatisation of prisons73 and other public services

hitherto regarded as the sole province of the state. It is an institution whose managers share an ideology and performance metrics with peers in similar bodies across the globe. They understand ethical questions through a transnational language of managerialism centred on cost reduction at odds with the legitimacy derived from liberal democratic corrections facilities as places of reform for offenders who have civil disabilities but retain inalienable rights. In that environment inmate-on-inmate rape is a matter of accounting, not of human dignity and rights for Ghosts’ civil dead.

Max Weber’s encapsulation of the state as providing a legal framework in which it has a monopoly on determining the legitimate exercise of violence. From that perspective law in the world of Ghosts is founded on acceptance of males enacting authority by engaging in sexual violence against each other, sanctioned violence that harms the victim but is less administratively inconvenient than inmates killing each other. Rape by an individual inmate or gang of inmates may indeed be more feared by potential victims because being sodomised is less heroic, less masculine, than being killed in battle, dying an exemplary death in the mode of Maximus in Ridley Scott’s Gladiator (2000) or the gunfighter in a score of US Westerns and gangster dramas.

If we construe Australian law as a matter of dignity and fostering individual flourishing the depiction of justice in Ghosts may be both repugnant and frighteningly close to our fears about the realities of life behind bars, a life that for many viewers and voters is conveniently out of sight and thereby out of mind. We owe a duty to minimise assaults by inmates on each other, people who have a civil disability but are not outside the law. The judgment in R v Fern thus explained:

This Court, whatever sympathy it may feel for the appellant, has a very serious responsibility to extend what protection it can to persons who are incarcerated by force of law in penal institutions. Those people have no choice about being there; they are sent there by the courts as punishment for their crimes. They are entitled to serve their punishment free of abuse and indignity and interference with their basic rights as human beings. ... If prisoners can abuse fellow prisoners in the way in which this appellant abused the victim and escape severe punishment, it must expose other prisoners in the system to the risk of being similarly abused and increase their vulnerability to violence and particularly sexual violence at the hands of fellow prisoners. ... A prisoner is entitled to expect that a

sentence will be served according to civilized standards and free from barbaric outrage.79

The barbaric outrage is not same-sex activity per se. It is instead private appropriation of the law and, by extension, confinement systems in which assault is prevalent but observers are indifferent.80

One basis for the comment regarding administrative inconvenience is that although the dead have no voice, and indeed have no legal standing, their death may be apparent. Put more simply, they can be identified as discrepancies in a roll call or an audit. They do not speak but because they are now visible as bodies on the mortuary slab or coronial statistics someone may speak for them. Historically that has not been the case for most male victims of sexual violence in Australia, the United Kingdom, Ireland, United States and elsewhere. Those people may choose not to speak for themselves, may not have advocates to speak on their behalf and may speak to deaf ears and averted eyes.

A preceding comment thus noted the persistent disbelief by authorities and others when minors claimed they had been victimised by clergy, school teachers, students, sports coaches, superiors in the armed forces or guardians in residential institutions. That disbelief is evident when those victims have subsequently as adults reported the abuse to police, senior clergy and other entities. It coexists with the reluctance of men who have been sexually abused as adults, whether by intimates or strangers or people with whom they are forced to share space, to disclose they have been victimised.81

That silence is in part a function of the pervasive cultural values about masculinity noted towards the beginning of this article. Men, as entities whose attributes are reified by law (evident in conflation of the legal person with agency and masculinity), are likely to construe their self-worth and the worth of their peers in terms of physical strength and resilience, independence, acceptance by their cohort, and reticence in expressing empathy, fear, pain or affection. Assault is something that is not to be voiced by victims; being victimised and failing to repel the assault is deeply shameful and potentially provoking questions in a heteronormative society as to whether the victim ‘asked for it’ and indeed enjoyed it.82 Historically, it has juridically been on occasion unspeakable, with a representative statement by a Tasmanian court in 1832 that merely hearing about victimisation, as distinct from its experience by the man who was violated, is too painful to relate.

The disgusting details of this horrible transaction, must have been exceedingly painful to all those whose avocations compelled them to be

---

80 Heilpern, op cit; and Brower, op cit.
auditors thereof, as they are of that revolting nature, which render them utterly unfit to meet the public eye.\textsuperscript{83}

An observation from the four films is that bystanders are well aware of the existence of assault but do not talk about it using a language of reparation and law reform, as distinct from tacit endorsement through silence and laughter. There is social solidarity among the mates in the community, prison and justice administration, remembering that mates do not ‘dob’ or otherwise step out of line.\textsuperscript{84} Crucially, there is no empathy for and solidarity with the ‘othered’ victim.\textsuperscript{85} A viewer in search of more than entertainment is required to supply that empathy herself and, drawing on her imagination, to ask how might law cure and prevent such harms.

There is a more disturbing observation from a critical reading of the films. The iconic male in those works is sociopathic rather than collegial, putting himself ahead of lesser men because he is both stronger and uninhibited by the law. He resembles Schmitt’s Dictator figure; the charismatic individual who embodies the law (potentially a law of the jungle), makes the law (obeyed by and enacted on lesser creatures) and is above the law.\textsuperscript{86}

\section*{IV CONCLUSION}

The law in the films discussed in this article is a matter of performance and appropriation, individual agency rather than collective action. It may be sanctioned by ‘mates’, imprisoned or otherwise. It is not a performance by a delegate of the community on behalf of that community for the flourishing of individuals within the community. It is also a matter of silence, with peers neither speaking out, nor coming to the aid of victims, and institutions being complicit in harms of abuse. The depictions of that abuse have an Australian accent but, as expressions of power and of complaisance by onlookers are universal.

The four films discussed in this article screen the dark side of mateship: a homosociality in which peers are indifferent or complicit in sexual assault and authority appropriated by exemplary men is unrestrained by the legal system. The output of the Australian film industry, particularly outside work for arthouse distribution, often features violence. That is unsurprising given that action, hence violence, sells. Mainstream cinema rarely features nonconsensual same-sex activity. (Overall, Australian cinema, along with its overseas peers, is a manifestation of sexual erasure. It rarely features any same-sex activity and when an expression of that affinity is evident it is typically exceptional rather than something incidental to the lives of a film’s characters.)

\footnotesize
\textsuperscript{83} R v Charles, Dutches, Going and Glover [1832] TASSupC 40.  
\textsuperscript{85} Norman E. Smith and Mary Ellen Batiuk, ‘Sexual victimization and inmate social interaction’ (1989) 69(2) The Prison Journal 29, 34.  
\textsuperscript{86} 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.
A more challenging response is that the author has cherry-picked genres rather than merely individual works. Preceding paragraphs have for example not engaged with questions about the depiction of coercion, authority, identity and violence in domestic and overseas production of gay erotica. Such selectivity is acknowledged, given both the concentration on ‘Australian film’ and the paucity of scholarly research about Australian gay porn production, much of which appears to feature the bronzed surfers and Snowy Mountains cattlemen that we would otherwise expect to see in films about heroic boys at ANZAC Cove, Changi or Bondi Beach.

This article began by questioning the ‘Australianness’ of Australian film and the specificity of the depictions in that cultural work of Australian law. One conclusion might be that recent film is located mid-Pacific rather than parochial, aptly construed on occasion as export fodder rather than as a deliberate exercise in nation building through articulation and affirmation of a desired national character understood as shared values and relationships.

In a postcolonial economy the Australian myth of the rugged bushman has faded. ‘Billabong’ is now a signifier of board shorts worn by style-conscious young people in a gentler, less hip Australian version of California and ‘Brumbies’ are either a Canberra football team or conservation problem in national parks. The myth we see in Mad Max is timeless, an echo of the self-reliant gunslingers affirmed by John Ford and the ‘savage’ infested badlands in 80 years of wild west dramas. The carceral wrongs depicted in Ghosts ... of the Civil Dead could equally be located in Pixote’s Brazil, in Alcatraz, Attica and chillingly antiseptic French prisons or inferred from a thoughtful reading of Dante, a realm of those who have yielded to bestial appetites and violence, or perverted their intellect to fraud or malice against their fellow men.

The four films depict imagined worlds, alas not too far from our own, in which men perform masculinity by imposing violence on other men, violence that in the snapshots discussed in this article may have a sexual character and accordingly more erosive of the victim’s self/social identity than the loss of an eye or acquisition of a scar. They are worlds in which other men perform their homosociality by staying in line, displaying a lack of initiative, robustness and

---

89 Murri, op cit, 68.
ethical integrity that is at odds with the national myth of the rugged independent bloke.\textsuperscript{92}

\*\*\*

\textsuperscript{92} Murri op cit, 74; Lucas op cit, 141.
Op Ed: When it comes to cybersecurity, lawyers don’t need to embrace Dr Strangelove

Drew Gough*

ABSTRACT

This Op Ed, a conversation starter for the Canberra Law School 2020 symposium on artificial intelligence and law, critiques recent expressions among the information technology community that ‘cybersecurity is not very important’. The Op Ed suggests that systemic improvement in information practice is both necessary and achievable in the emerging IoT economy; cybersecurity involves forewar-looking law reform rather than being left to accountants.

I INTRODUCTION

In Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb (1964) Stanley Kubrick offered a mordant satire of inept US politicians, gung-ho generals and policy advisers ready with assurances that in ‘thinking about the unthinkable’ life after Armageddon might not be too bad.¹ We should relax, trust the experts and learn not to worry about cataclysm or simply have fun playing ‘duck and cover’ under beds, school desks and other defenses. In the age of Trump and Little Rocket Man that denialism – denial about the likely incidence and severity of harms and, as importantly, about the responsibility of people in positions of authority – is timeless.²

It is relevant to private and public thinking about digital harms and responsibilities. The past two decades have seen declarations that cyberspace ends the viability of the nation state, a superseded artifact from the era of coal, crinolines and big oil … something destined to evaporate like a mothball.³ We have seen assurances that ‘your privacy is gone, so get over it’⁴ and that if you have nothing to hide you have nothing to fear, a trope that assumes both a utopian openness to surveillance by the likes of Cambridge Analytica and the capacity of the government to ensure that nothing need be hidden.⁵

---

*Drew Gough works in the information technology sector and guest lectures at the University of Canberra

¹ Peter Krämer, Dr. Strangelove or: How I learned to stop worrying and love the bomb (British Film Institute/Bloomsbury, 2017).


In this Op Ed, I want to question a strain of thinking in law and practice about cybersecurity, in essence claims that everything we have been doing has worked so far, so why need to make a ‘quantum leap’ in cybersecurity an all-consuming goal. Thought is provoked by ‘Cybersecurity Is Not Very Important’ from mathematician Andrew Odlyzko, one of the more incisive analysts of the financial and technology bubbles in the first years of adoption of railways.

Odlyzo contends that there is no need to radically change our approach to IT Security, and that we if accept that all systems can be breached and plan for that event, we will be at peace with ourselves. In an introduction that might delight Kubrick and Dr Strangelove, he comments

> It is time to acknowledge the wisdom of the “bean counters.” For ages, multitudes of observers, including this author, have been complaining about those disdained accountants and business managers. They have been blamed for placing excessive emphasis on short-term budget constraints, treating cybersecurity as unimportant, and downplaying the risks of disaster. With the benefit of what are now several decades of experience, we have to admit those bean counters have been right. The problems have simply not been all that serious. Further, if we step back and take a sober look, it becomes clear those problems are still not all that serious.

This however assumes that the people on the other side of the cybersecurity equation share a similar philosophy. That assumption is viatiated through experiences such as the long-term and large-scale security failure at the Australian National University and problems with health, entertainment or other platforms such as Sony. Why should not we try to shift the Overton window when it comes to cybersecurity, thereby fostering greater agency on the part of consumers and greater awareness (with consequent liability) on the part of regulators and solution/hardware vendors or other stakeholders? Could we have a more nuanced conversation on the part of legislators and legal practitioners, including readers of the Canberra Law Review?

---


Andrew Odlyzko, ‘Novel market inefficiencies from early Victorian times’ (2017) 24(2) Financial History Review 143; and ‘This time is different: An example of a giant, wildly speculative, and successful investment mania’ (2010) 10(1) B.E. Journal of Economic Analysis & Policy 60.


One response to Odlyzko is that we should both question rhetoric about ‘cybergeddon’10 and try harder, try more often and try more creatively to identify and address opportunities for systemic improvements in information practice. In the United States many believe congresswoman Alexandria Ocasio-Cortez’s “Green New Deal” – as much a matter of changing public discourse as it is of specific initiatives – is not achievable, thus tagged by many detractors as too ambitious or unnecessary. Others believe that aiming for such a lofty goal is the only way to achieve real change: even if they don’t reach their targets, they will still have made incremental improvements that when aggregated represent meaningful change and result in public benefit.

The same thinking should be true for cybersecurity and lawyers have a role to play in building understanding.

If there are harms, in that view, the benefits of forward-looking best practice may offset any inconvenience and the cost of averting harms will be incommensurate, a manifestation of a social licence underpinning all digital platforms (which exist in a legal framework rather than as abstractions). That view is at odds with a neoliberal risk allocation schema in which administrative convenience is privileged and in which it axiomatic that law should fundamentally reduce, if not eliminate, burdens on government agencies and corporations such as Facebook, in other words entities that should be left alone to get on with public administration and making money (irrespective of whether that benefits Piketty’s 1% or society at large).11 Recommendations by the Australian Competition & Consumer Commission in its 2019 Digital Platforms report suggest that some Australian government agencies have a sense that corporate behavior does need to be shaped through statute law – rather than being left to Odlyzko’s exasperating bean counters and consumers – and that there is indeed scope to provide that regulation in ways that address the regulatory incapacity of some agencies (notably the Office of the Australian Information Commissioner) without unduly crimping investment for innovation.

Odlyzko offers a bracingly contrarian assault on doctrines about cybersecurity – a case of ‘not much to see here, folks, so move on’ – and about the agency of different stakeholders, from ordinary consumers through to specialist government agencies charged with maintaining the stability of the internet and averting the cataclysmic collapse depicted in Robert Harris’s new The Second Sleep.12

12 Robert Harris, The Second Sleep (Hachette, 2019).
In preparation for the Canberra Law School’s 2020 symposium on artificial intelligence and the law I want to dissent from Odlyzko’s analyses, while acknowledging that the occasional dash of cold water has a salutary effect in deepening public consideration of information technology frameworks rather than merely generating headlines.

**A Zombie Army of Smart Toasters?**

Picture if you will, hordes of shambling zombified IoT-enabled kitchen appliances roaming the cyber wastelands ... devouring DNS services, content delivery networks or ISP’s with indiscriminate abandon. All at the whim of some shadowy dark force that controls millions of these poor unassuming devices that, if they were sentient (unlike the devices I discussed last year) and wanted anything, wanted only to let you know via a smartphone app that your toast was 30 seconds away from being ready, or that you were indeed out of juice.\(^{13}\)

IoT, short for ‘Internet of Things’, refers to any device connected to the internet via an inexpensive Wi-Fi or cellular network interface card with some form of onboard processor and operating system. This has led to an explosion of internet connected devices, from fridges to deadbolts and hospital pathology equipment and university printers. It seems if you can ‘connect’, with apologies to the exhortation by E M Forster, they are. Gartner predicts that by 2020 there will be over 26 billion IoT connected devices. IoT security has not been high on the list of many manufacturers who simply wish to get a ‘smart’ version of their appliance (whether it be television, toaster, lightbulb, or juicer) to market. The upshot of this that there are suddenly now hundreds of millions of devices which are connected to the internet and running minimal security, if any at all.

Odlyzko contends that security practices are sufficient\(^{14}\) and this is evidence that the long feared ‘Cyber Pearl Harbor’ or ‘Cyber-hurricane Katrina’ is unlikely to happen. Without any disrespect for Odlyzko’s bean counters – some of whose fathers might have been responsible for regulation of the Ford Pinto\(^ {15} \) and other under-investment in product safety – I disagree with Odlyzko’s contention. Cyber disasters have indeed happened and are happening. Lawyers, accountants and information technology experts need to work together to reshape the information ecology rather than relying on images of bombs or planes dropping out of the sky. One area of concern that I discuss in the following paragraphs is a result of poor cybersecurity practices – and legal incomprehension – in IoT devices.

---


\(^{14}\) “The analysis of this essay does lead to numerous contrarian ideas. In particular, many features of modern technologies such as “spaghetti code” or “security through obscurity,” are almost universally denigrated, as they are substantial contributors to cyber insecurity. Cybersecurity Is Not Very Important, Odlyzko p3

For clarity, a “Cyber natural Disaster” is something that affects many stakeholders in an information ecosystem rather than merely a few actors. It has a systemic impact. It concerns services that are at the very core of the internet and has a far-reaching effect on entities that rely on them to function, much like cyclone or flood damage to power generation, water treatment and other critical infrastructure has a flow on effect to the well-being of the wider community.

In 2016, Dyn\(^{16}\) one the major DNS providers suffered a DDoS\(^{17}\) attack from a botnet\(^{18}\) army of millions of devices many of which were IoT devices which had been compromised by a piece of malware called Mirari\(^{19}\). It found its victims by scanning for devices listening devices based on ARM (a type of low power RISC based CPU used mobile and IoT) architecture, listening on port 23 (telnet) or 2323 (you’re not fooling anyone, that’s still telnet.) and then, once found, would attempt to brute force its way onto the system by using a dictionary attack of commonly used usernames and passwords, such as ‘admin/admin’. The result of that insecurity in this instance was that the botnet army of IoT devices compromised with Mirari was able to flood DYN’s servers with approx. 1.2 terabits per second.\(^{20}\)

The Dyn DNS infrastructure not able to withstand this deluge of data and collapsed. The result was wide scale disruption to online businesses and to the users of the services they provided in the US and parts of Europe. All told some 85 different companies (including major entities such as Paypal and Netflix) were affected over the course of the attack on Dyn. Although this DDoS attack was directed at only one company, Dyn provides part of the critical infrastructure of the internet. The flow on effect felt across the world was much larger than incapacitation of one single corporate entity. The effect was qualitatively different to the problems we see with defective airbags: The Australian Competition & Consumer Commission for example takes action regarding Takata but we still see traffic on Australian roads, groceries are still delivered to warehouses and children are taken to cricket or the park.

Mirai was so effective because, presumably the manufactures felt that “security through obscurity” was, using Odlyzko’s characterization, a sufficient approach to take when integrating connectivity into the IoT devices. In looking ahead to the 2020 Canberra Law School symposium, what is the harm if your smart toaster or marginally sentient fridge gets hacked? A single compromised toaster or other IoT device on its own is not much of a threat, but when it, and a few hundred million of its brethren are coming at you it is a

---


slightly different dynamic. (We can leave privacy and the physical security of domestic/commercial premises that are reliant on IoT to another time.)

There is predicted to be anywhere between 19 billion and 40 billion IoT devices online in 201921, with technologies such as 5G (on occasion promoted by business with perceived close associations with authoritarian governments) already being rolled out across the global.22 Many of the next generation of these devices set to leverage 5G technologies. Without a serious shift in our thinking about risk, responsibility, regulation and the practice of cyber security we are going to make that much easier for those wishing to do mischief to do so on a much wider scale and with potentially more existential consequences. Law has a role to play beyond criminalisation of that behavior and beyond granting law enforcement additional powers for investigation once harms have occurred.

In that environment it is unfortunately simplistic to rely on manufacturers of internet-connected devices to ensure their product meets an undefined minimum level of security. Assuming that we can trust the ‘wisdom of the bean counters’ on the basis that devices have the ability to be patched when exploits that affect their systems are released is problematic. Cambridge Analytica suggests that trust in protestations about a commitment to good corporate citizenship may simply be too much to hope for. Do we need to rethink consumer law for the IoT Age? The wise lawyer and informed beancounter might disregard complacency and be cautious about adding IoT connectivity to a range of appliances as cheaply as possible if faced with the likelihood of sustained litigation and meaningful penalties because the IoT juicers were used by a state agent or a 19 year old hacker to take down a company’s online services for a week. Estonia’s experience may be more relevant than what happened in Honolulu in 1941.23

Legislation may very well be required to ensure that manufacturers comply with a basic level of security to protect individual devices, their owner and the very critical infrastructure of cyberspace that we take for granted so much these days. A model is provided by ‘fit for purpose’ under the Australian Consumer Law. In California24 and in the UK25 legislation has been passed or is under development which ensure manufacturers meet a basic level of security on their devices.

---

21 Adam Thierer and Andrea Castillo O’Sullivan, ‘Projecting the growth and economic impact of the internet of things’ (George Mason University, Mercatus Center, 2015).
In Australia there seems to be some debate as whether the legislation is explicitly needed, or the market will self-regulate. Regardless of which side of that particular ideological divide you find yourself on, one area that will yield definite results is user education. The idea their smart appliances should have good cyber hygiene practices (and more disquietingly that their personal computer or smart phone needs the same hygiene) is one that many people do not consider. Those consumers enjoy the convince of connected devices but do not engage in effective self management and take responsibility after considering the security ramifications of these devices. That lack of agency becomes even more important from a personal rather than systemic aspect if that smart device wants to capture or store personal information, such as email addresses, passwords and credit card details.

**I solemnly swear they’re up to no good!**

Odlyzko contends that cyber criminals are, like their bricks & mortar counterparts, somewhat stupid. Although this is clearly true for a subsection of the criminal element the characterization is too broad and too backward looking for comfort.

Some actors who commits cyber dependent crimes are the equivalent of grifters, con artists or those committing smash and grab style crimes. For the last 10 to 15 years they are what we have been taught we need to defend ourselves against. We have gotten pretty good at spotting and ignoring those ‘I am a Nigerian Prince …’ scams. Importantly, just as we have gotten better at dealing with that kind of cyber-crime, some criminals have learnt as well. A salient aspect of the global information infrastructure (readily identifiable services at your fingertips) even the not ‘very smart’ ones can buy or rent the tools they need to commit crimes. CaaS, or Crime as a Service, allows more sophisticated criminals to build and sell or rent frameworks which others can use to commit cyber dependent crimes. Not having the necessary technical skills is not the impediment it used to be and will not necessarily be solved through official/corporate assembly of very big data sets and artificial intelligence.

It is not just the prevalence of these tool sets but the technical sophistication of the tools being employed. In 2010 a piece of malware known as Stuxnet destroyed the SCADA systems running centrifuges at the Iranian government’s nuclear enrichment program. This type of malware is known as an APT or adaptive persistent threat. Malware designed to sit quietly within a target network and collect information and or act when sent a specific trigger. The traditional school of thought about this type of threat is that it is only able to be executed by state actors. However, recent trends in cybercrime indicate cyber-crime syndicates are gaining access to and actively exploiting these

---


27 SCADA, i.e Supervisory Control and Data Acquisition, is a control system architecture which provides a command and control interface for industrial, water, power, and manufacturing facilities.
kinds threats against organizations that do not have the resources or technical sophistication for identification and defence. These are often small and medium size entities that provide a target rich environment. They are often targeted repeatedly.

In the case of ransomware attacks, Odlyzko is correct in the regard that these criminal entities will often ensure the victims can recover so that they can targeted again, and indeed will be unless they can perform an effective forensic analysis of the previous attack and establish effective defences. This might be outside the capabilities of many smaller organizations.

Recent years have seen WikiLeaks release the Vault 7\textsuperscript{28} technologies into the public domain and state actors engaging with cyber-criminal syndicates to carry out acts of cyber espionage on their behalf. Criminal organizations can and will apply these tools and techniques to their own ends. As their attacks evolve, so too much our approach to defending against those threats. FireEye the global security company monitors the top twenty major ATP groups who receive direction and support from nation states.\textsuperscript{29} These are examples of sophisticated criminal groups that operate at the direction of, or with support of state actors.

If our general approach to IT security was working as Odlyzko contends, why according to MacAfee’s annual security report\textsuperscript{30} has there been 118% increase in the number of reported ransomware attacks from Q4 2018 to Q1 2019 and overall holding at about the same levels, quarter to quarter. Similarly, there has been an increase in attacks using the software supply chain.

Odlyzko contends that spaghetti code can used to increase the security of a system.

They are based on increasing complexity, to enable many of the “speed bumps” that limit what attackers can do and help trace them. Spaghetti code has already been helpful, and can be deployed in more systematic ways.\textsuperscript{31}

This might have been true in the days when every single line of code was developed in house, (and even then, there were few things more tortuous than trying to troubleshoot code that had no structure and was not self-documenting.) In 2019, why write a piece a code when I can find a module online that does that exact function I need? I save time and hassle; I can focus on other things.

The salient problem is that author/s of that code has probably used other modules found online to perform a function in their code so they do not have write it, and so on down the line it goes. You have lost control over your

\textsuperscript{29} https://www.fireeye.com/current-threats/apt-groups.html
\textsuperscript{31} Code that is unstructured and extremely difficult to support after release, especially by those who did not have a hand in its development.
software, someone may have put a malicious function into a piece of code three points away from you on the supply chain and suddenly, your new in hour Payroll system, or new mobile app is compromised from inception. It does not matter how difficult you make understanding of your code, as an inheritance it has got malware baked into it. As a consequence in practice all that reliance on spaghetti code is going to do is to make that much harder for someone to try and figure how the system has been compromised.

**There’s an App for that, right?**

Odlyzko’s positions on several topics are expressed with verve and are not unreasonable. He makes many useful observations on cybersecurity and its role in society today. However, the idea that we just need to keep on keeping on (the policy version of the ‘Keep Calm And Carry On’ meme) will lead to problems at a systemic rather individual level. Addressing that risk involves asking some hard questions about law and responsibility, particularly in a discourse that brings together information technology experts, legal practitioners, educators and public policymakers.

In this Op Ed I have chosen a brief response to several topics raised by Odlyzko, highlighting that information cultures and technology change, and that a lack of forward thinking will result in substantive harms. To use an Australian idiom, the “She’ll be right, mate!” approach is not going to cut it. Technologies like IoT, 5g and deep learning are making our professional and personal lives richer but they also mean that we are arming those wishing to commit crime, espionage or social destabilisation with tools that pose real concerns.

After the Second World War the Japanese developed a customer-oriented zero-defect manufacturing and continuous improvement methodology which means they worked to deliver products to consumers that has a fewer flaws as possible.32 In today’s ‘first to market’ app driven society where ‘Minimum Viable Product’ is the socially and legally accepted mantra of many (and where conventional risk allocation means consumers are coopted for fault detection and experience ongoing patching) we seem to have forgotten this thinking. It is to our detriment, given the focus we place on our personal data and privacy. We need to make sure that our approach to cyber security from the technical, legal and educational perspective is a ‘boots and braces’ approach.

Good security practices should be baked into products, not tacked on at the end. That necessitates thinking about standards and liability, with a forward vision of what might be done through for example the Australian Consumer Law rather than merely through Australia/international criminal law. Just as importantly, education about good practices and processes should be incorporated into the education system as early as possible. This should happen through the course of people’s lives and as a basis for strengthening the information economy through consumer empowerment is potentially the most difficult response.

---

I began by questioning Dr Strangelove’s enthusiasm for looking on the bright side of Armageddon (fewer road accidents! No pesky voters! Companionship in the well-equipped executive bunker!) We do not need to embrace Dr Strangelove or the wisdom of the bean counters. Cybersecurity is extremely important and can be fostered through imaginative approaches to law reform. Just as important is the need not become complacent in your thinking about where the next threat will come from and how to defend against it.

To borrow from a term I used above, when it comes my own cybersecurity, or my daughters or my parents, we should be asking ourselves are we aware enough to know…. what is the “Minimum Viable Security” I need?

***
‘Recountbacks’ and Section 44 of the Constitution

Tom Round*

The High Court of Australia has caused much political disruption with its interpretation of what factors trigger disqualification of MPs under section 44 of the Australian Constitution, and of the deadline when those disqualifications operate. I argue - with many others - that these factors are unduly wide and sensitive. I also argue, however, that the High Court has taken a more sensible approach to the replacement of unseated Senators, in the common law silences of the Constitution and the Commonwealth Electoral Act, an outcome that follows the logic of Australian electoral law more closely than do the common-law precedents the Court rejected. However, one issue the High Court has not yet settled is whether a ‘recountback’ can be allowed to unseat an already-elected, not-disqualified candidate - either as one of the 12 elected Senators overall, or as one of the six for each State awarded a long (six-year) term following a double dissolution). Experience from local councils that use STV-PR with countbacks to fill ‘proper’ vacancies shows that this can occur. The Court was sensitive to the order of election in the 2013 Western Australia Senate challenge; it should be equally sensitive here.

THE ISSUE: THE PROBLEM, AND THE SOLUTION I’M PROPOSING

Section 44 of the Australian Constitution entrenches a list of grounds that disqualify members of the federal House of Representatives and Senate.1 Most of these grounds seem sensible and familiar to the casual reader: there is nothing in s44 as odd or objectionable as, eg, the USA excluding nationalised citizens from its presidency,2 the UK before 1829 disqualifying Catholics from its parliament, Argentina before 1994 excluding non-Catholics from its presidency, or Canada requiring that Senators be ‘seised or possessed for [their] own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture.’3 However, the devil lurks in the detail of s44, in some cases dictated by its wording and in other cases the result of interpretive choices made by the High Court of Australia, most notably in 1905, 1987, 1992, 1998 and (most dramatically) 2017-18.4

---

* Dr Tom Round BA(Hons)(Qld), LLB(Qld), PhD(Griff) is a Lecturer at Southern Cross University. He has lectured at Griffith University and the University of Queensland. Before teaching at SCU, he was a Research Fellow at Griffith’s Key Centre for Ethics, Law, Justice, and Governance (KCELJAG).

1 Somewhat confusingly, ss 16 and 34 specify additional criteria but these apply only ‘until the Parliament otherwise provides’.


3 All these clauses (have) survived only because of the inertia of constitutional entrenchment. No-one drafting a constitution for any UN member nation in 2020 CE would seriously suggest copying any of them.

4 Previously in Sarina v O’Connor (1946) and Crittenden v Anderson (1950) candidates claimed their victorious Catholic rival owed ‘allegiance’ to the Vatican as a foreign power, but
At two junctures, the High Court adopted a strict (if not the strictest possible) interpretative choice over a more lenient one. First, in 1905 the High Court held that the ‘time’ when federal MPs are ‘chosen’ is the entire period that begins when candidates lodge their nominations and ends only when candidates are finally declared elected. Then, in 1992, the Court again chose the stricter path when interpreting ‘foreign allegiance’ and ‘office of profit under the Crown.’ A foreign allegiance need not be voluntarily retained, and an office of profit need not yield any actual profit. The Court chose, if not the most draconian then the second-most-dracoian option before it for foreign allegiance, one that gives very little weight to the individual’s own knowledge and intention and that makes it impossible to remedy honest mistakes.

Many commenters have argued that the High Court went wrong here. The Court’s approach has been unpopular on the Left:

My mother obviously can’t confirm her birthplace with any certainty. Her earliest memories are of crossing countless borders as a refugee. [...] If I were ever elected to a very narrowly divided parliament, though, there would be a good many people with much better resources and motivation than me to solve the mystery of my citizenship. Somewhere, there may be an old Soviet record, or a wartime refugee camp form, or a surviving acquaintance of my grandparents, that could belatedly confirm me as a citizen of one of a potential dozen or so nations, each with its own highly complex and shifting citizenship laws. [...] The Court – which a week earlier struck down Tasmania’s vague anti-forestry protest laws because of their ‘effect of inhibition or deterrence on the freedom’ of political communication – seems entirely blind to the ‘significant deterrent effect’ its judgement will have on a sizeable fraction of Australians who might otherwise seek to exercise their right to participate in Australia’s representative system of government.

While the Constitution does not require federal judges to be free of foreign allegiances (or even to be citizens), it does (since 1977) impose a compulsory retirement age upon them. Analogously, while most people know their own

---

5 For brevity, ‘MPs’ here includes Senators as well as Members of the House of Representatives (MHRs).
6 Vardon v O’Loghlin (1907) 5 CLR 201.
7 The only stricter alternative would have been to make compliance impossible, just as naturalised citizens can never (under the current US Constitution) become President no matter what steps they take.
8 Note that I am not talking about overlooking ongoing breaches, but rather breaches that were remedied as soon as they were known.
date of birth (even if some conceal it), not everyone does. The actor Peter O’Toole did not know if he was born in June or August of 1932, or even in Ireland or England. My adopted cousin, orphaned as a baby during the war in Vietnam, does not know his day or month of birth. Experts can give estimates based on one’s bones and teeth, but I suspect our judges would not be happy to have what is supposedly a tenured position dependent on (possibly duelling) expert opinions:

The irony with the High Court’s ‘insurmountable obstacle’ test is that there is an insurmountable obstacle to its being tested. Before the court can rule on whether a particular country’s requirements are insurmountable, a dual citizen from that country must first run for office, be elected, and then be challenged. But what party would risk nominating such a candidate?11

The primary objective of the witch-hunt against some of the ruling elite’s most loyal parliamentary servants, on the grounds that they have had ‘divided loyalty,’ has been to fuel a broader ideological campaign of nationalism and paranoia about ‘foreign’ influence.12

The Court’s approach has won support on the Right of politics: ‘How many [MPs...] are still making laws for us when they know they’re breaking the law by just sitting there?’13

[Y]ou can see the gulf between ordinary Australians who take this nation and its laws and obligations very seriously, and sophisticated internationalist types who seem faintly confused by a 117-year-old document’s requirement that Australian politicians actually be provably Australian. [...] See how much a ‘witch hunt’ argument helps you the next time you challenge a speeding ticket.14

Mark Steyn criticises the Court from the Right, but more on the basis that Britons, Canadians and New Zealanders are obviously not ‘foreign’ than Gans’

10 In 2002, Deborah Bennett-Borlase, Western Australia’s first female stipendiary magistrate, was removed from the bench for lying about her date of birth (by 7 years) so she could keep working past the compulsory retirement age of 65: Layla Tucak, ‘Magistrate caught hiding her age,’ The Australian (Sydney) 10 April 2002.
13 Andrew Bolt, ‘All MPs Need to Reveal Eligibility,’ Herald-Sun (Melbourne, 1 November 2017).
15 ‘In breezily redefining Section 44 to mean a citizenship that was invented half-a-century after the law was written and whose anomalies and ambiguities persisted for another third-of-a-century after that, the modern High Court was engaging in a characteristic bit of post-colonial hyper-nationalism that has had the paradoxical effect of forcing not only the judges but the entire Australian political system to swear ‘allegiance to a foreign power.’ It’s like instituting Nuremberg racial purity laws and then outsourcing their administration to random bureaucrats around the planet. As the contrasting treatments of Ms Waters and Mr Xenophon
concerns about immigrants who were not subjects of his or her Britannic Majesty.

Others retort ‘It’s simple: just get your paperwork in order’ but (i) this is not always a solution, and (ii) it discriminates. Imagine if any average Australian could lose their job if their great-grandfather’s nationality were uncovered; the threat of this might even overcome the usual anti-politician Schadenfreude. Moreover, the burden of due diligence is unevenly distributed. It is true that it falls on people of colour, but it also falls upon those at the other extreme – ‘ten-pound Poms’ who arrived more recently but still at a time when any suggestion that the Queen of Britain was not also the Queen of Australia would have been regarded as fanciful.

In this article, I propose four improvements:

(i) Clarify terminology: First, we should refer to the ‘special count’ process crafted by the Court for replacing removed Senate candidates as a ‘recountback,’ a hybrid of ‘recount’ and ‘countback,’ in substitution for both.

(ii) Consider intent: Secondly, the High Court could alleviate the harshness of its current precedents by harmonising its readings with other areas of law, especially criminal responsibility and apprehended bias. The latter is especially appropriate if one important goal of laws like s44 is to uphold public confidence.

(iii) Narrow the deadline: The Court’s strict definition of the grounds of disqualification is exacerbated by the wide time-frame the Court has held these grounds can strike during. Much (not all) of the burden could be alleviated if the Court could be persuaded to reconsider its unnecessarily strict interpretation of ‘time chosen.’ Particularly because disqualifications of candidates hits ordinary citizens, not only successful professional politicians.

(iv) Add a fail-safe to recountbacks: Finally, the High Court was right to specify recountbacks (instead of by-elections for one seat or all seats, or Section 15 appointments) as the replacement method when Senators are disqualified. That much is uncontroversial among academics and politicians, at least within Australia. But I would gloss this by adding that the High Court should also adopt a rule that no already-elected

16 ‘Get your birth certificate, work out where your parents were born, check your four grandparents as well and if it involves anywhere other than Australia, tell the foreign country in writing that, for the avoidance of doubt, you renounce any entitlement to citizenship. Then, and only then, nominate for parliament.’ Peta Credlin, ‘The Turnbull Government is in Crisis,’ Sunday Telegraph (Sydney, 7 November 2017).
17 Pakistani-Australian comedian Sami Shah joked on Twitter (17 July 2017), https://twitter.com/samishah/status/88717289969860608 that ‘PoC know their citizenship all times, in case someone’s gonna try deporting us.’
candidate can be unseated (or demoted to a shorter term) as a result of a different candidate being unseated. This can happen, and has happened, in STV elections: it can be prevented by stipulating an override provision.

(i) CLARIFY TERMINOLOGY

First, some ‘rectification of names’ is needed. In this article I introduce a neologism, ‘recountbacks.’ It combines two terms already used in the media to describe the ‘special count’ process that the High Court has stipulated for replacing ‘removed’ Senators.

There are, properly understood, three different procedures for re-examining ballot-papers cast, and they have different goals and operation:

(a) In the traditional sense, a ‘recount’ means only that the number of votes for each candidate is re-ascertained more accurately: no candidates are added to the field or removed from it. The common law did not re-examine ballots to fill vacancies. Even when a runner-up was elected by default, the ranking of candidates was already established by the original count (or by an earlier recount); the ballots did not need to be re-examined – indeed, they could well have been disposed of, like Papal conclave ballots mixed with straw to give off white smoke, days or months earlier, as long as the original candidates’ totals were written down somewhere.

(b) On the other hand, a ‘countback’ proper is the procedure used in STV-PR systems, such as Tasmania, the ACT and Western Australia (also Malta), to replace a duly elected MP who has vacated office. The difference between this and the procedures that replaced Robert Wood, Heather Hill, Fiona Nash and other disqualified Senators is not merely

---

19 ‘If language be not in accordance with the truth of things, affairs cannot be carried on to success.’ Confucius, Analects, Book XIII, Chapter 3, verses 4-7, (James Legge trans, Clarendon Press, 1893).
20 A Google search on 13 October 2018 gave zero matches for ‘recountback’ as a single word.
21 Also, I refer to disqualified Senators and deceased candidates as being ‘removed’ rather than as ‘vacating,’ since the latter wrongly implies that they did once fill the seat, which is not the case.
22 Runners-up won by default in two infamous cases: the 1925 House of Representatives election in Kennedy, where the Labor candidate died shortly before polling day; Michael Kerrisk, ‘Dying for an election,’ Labor Herald (Barton, December 1999) 36-37. This led Parliament in 1928 to introduce supplementary elections for such contingencies; and the 1961 House of Commons by-election in Bristol South-East, where the court held not only that Tony Benn, the highest candidate, was disqualified for inheriting a peerage (even though he never requested a Writ of Summons to take his Lords seat) but also that the runner-up, Malcolm St Clair, should be seated instead: Re Bristol South-East Parliamentary Election [1961] 3 All ER 354. Because Benn’s ineligibility had been widely publicised (eg, his opponents had posters at every polling booth), his supporters were deemed to have thrown their votes away. (As with Hollie Hughes (see below), the court could not make up its mind as to whether ‘your own voluntary decision’ should matter or not). Parliament responded by enabling unwilling Lords to disclaim their titles: Peerage Act 1963 (UK).
23 As opposed to single-member systems (even preferential ones) on the one hand, which almost always replace all vacating members and removed candidates with a fresh election, and non-preferential party-list proportional systems on the other, which typically seat the runner-up from the same party team, without any need to re-examine ballots.
formal. Crucially, the four STV systems cited above all adopt overriding rules to exclude the risk that recounting the ballots among all the candidates minus the vacating MP might inadvertently unseat a sitting MP. In Tasmania, the ACT and Malta this is achieved by re-examining only those ballots that supported the vacating MP at the point in the count when he or she was elected.24 In effect, these jurisdictions’ countbacks are single-seat Alternative Vote races using a subset of the ballots. In Western Australia, by contrast, all ballots are re-examined in a full STV count, but with the overriding proviso that a sitting MLC cannot be eliminated even if he or she happens to have fewest votes.25

(c) In contrast to both, the ‘recountback’ procedure that the High Court fashioned in Wood as a remedy for disqualified Senators-elect – which drew inspiration from the procedure prescribed by Parliament for the analogous event of a Senate candidate dying before polling day26 – differs from both of the above. Unlike a ‘recount’ proper, a recountback (i) involves no allegations that ballots were initially counted inaccurately, and (ii) narrows the field of contenders by treating one or more of the candidates as defeated on the first count, ie removing them on the first stage of counting and transferring their ballots to next preferences. But unlike a ‘countback’ in the strict sense, no candidate has yet officially – or at least finally – been declared elected.

This procedure for replacing a never-qualified Senator is more or less the same as is used if a Senate candidate dies before polling day.27

The model for a candidate dying offers a useful template.28 Of course some differences would need to be accommodated. In most cases it is usually widely known, right away, when a candidate dies in mid-campaign (eg, Robert Kennedy in 1968). A candidate who dies after the term begins is treated as a casual vacancy, whereas even when disqualification is only discovered some time into the term, it may have accrued earlier, before the term began. In other words, it is entirely possible that voters may inadvertently elect, and parliaments may inadvertently seat, a candidate who was already disqualified.

24 Usually by reaching the quota, but sometimes by surviving to the final count with the highest near-quota if a lot of ballots have exhausted by the end.
25 Electoral Act 1907 (WA), s 156D(9), inserted by the Acts Amendment (Electoral Reform) Act 1987 (WA).
26 Commonwealth Electoral Act 1918 (Cth) s 181, also ss 239(4)(a), 273(27).
28 Arguably the rules should be amended to include a candidate who becomes, or is found to be, so seriously injured or unwell that they should retire mid-campaign, at least if the candidate herself either consents or is in no condition to object. Eg, in the 1972 US presidential campaign, Governor George Wallace was left wheelchair-bound after an assassination attempt, and Senator Thomas Eagleton withdrew as Hubert Humphrey’s running-mate after it became public that he had undergone shock therapy for depression. On the other hand, even a serious injury need not cause a vacancy. US Representative Gabrielle Giffords was put into a coma by a shooter in January 2011, but her seat was not declared vacant and she resumed service in the House seven months after the shooting.
but it is highly unlikely that a dead candidate would be elected and seated, like the post-mortem trial of Pope Formosus in 897.

However, two Australian examples show this might not always be the case. Donald Mackay had been an endorsed State and federal Liberal candidate in 1973, 1974 and 1976 but was not a candidate when he disappeared in 1977 (his body has never been found). Harold Holt, too, disappeared in a non-election period in 1967, and the search for him continued for several days; but a funeral was held for him five days after he disappeared and the Speaker (unchallenged) issued a writ for a by-election to replace Holt four weeks after his disappearance. In slightly different circumstances, either could well have vanished during an election campaign and the precise date (or even, for that matter, the fact) of their death might be highly indeterminate.

Sometimes officials and other public figures who disappear are never found again and can now, years later, be safely presumed dead, or may turn up eventually as a corpse. But at other times a candidate or official may reappear alive, after absconding AWOL or being kidnapped.

US jurisdictions (which give great weight to fixed election dates and everyone voting on the same day) do not usually re-schedule an election if a candidate dies; most States seem to go ahead with the deceased’s name on the ballot, and should it draw enough votes to win, is treated as immediately vacating.

---

29 Officials going missing at any time during their term raise analogous questions to candidates dying or going missing during the election period. I use ‘politicians’ here to cover both.
31 Eg, Quebec deputy premier Pierre Laporte, kidnapped and killed by the Front de libération du Québec, 1970; Italian premier Aldo Moro, kidnapped and killed by the Red Brigades, 1978.
32 Eg, British MP John Stonehouse, missing for five weeks in 1974 (financial troubles); South Carolina Governor Mark Sanford, missing for six days in 2009 (extramarital affair).
33 Eg, Ingrid Betancourt Pulecio, Columbian presidential candidate, kidnapped by the Revolutionary Armed Forces of Colombia (FARC) 2002, rescued by security forces 2008. One rare case where a polity did legislate to cover MPs or candidates being kidnapped was Ireland, shortly after its civil war: the Constitution (Amendment No 17) Act 1931, s25 (repealed 1937), empowered the executive to adjourn the parliament or appoint a replacement for an MP if satisfied that such MP ‘has died in consequence, directly or indirectly, of an unlawful act of another person or is prevented by physical incapacity arising [...] from the unlawful act of another person or by unlawful imprisonment or by threats or intimidation from [...] taking part in the sittings of the[ir] House [...]’. (Hat-tip to Professor John O’Dowd of University College Dublin). The plot of Air Force One (1997) centred on Harrison Ford’s President trying to communicate that his plane had been hijacked so that Glenn Close’s Vice-President could officially assume command.
34 Eg, when Missouri Senate candidate Mel Carnahan died in a plane crash three weeks before Election Day 2000, the Governor promised to appoint Carnahan’s widow Jean to fill the vacancy if the deceased won the election, which he did. By contrast, when Minnesota Senator Paul Wellstone died (also in a plane crash) only 11 days before Election Day 2002, his State party chose another candidate (former Vice-President Walter Mondale) to replace him on the ballot.
On the other hand, a disqualified candidate is a warm body like any other with no flashing orange sign on their back, which is why the Electoral Commission declines – on grounds of its lack of resources de facto and of judicial authority de jure – to inquire into candidates’ eligibility when they nominate. The AEC takes the view that it is simpler to let all candidates stand and then let the courts sort out eligibility after someone has been declared the winner. If disqualifications are rare, then this makes sense.

Also, court hearings in the middle of an election campaign are undesirable – time is limited and judges do not want to prejudice public perceptions. Yet they still happen, sometimes ex parte and sometimes inter partes. True, the validity of the outcome can only be challenged by an election petition for that specific electorate, but this does not bar an aggrieved person from seeking other outcomes, eg the fining or even imprisonment of a person responsible for a breach.

Having said that, having a court hearing in mid-campaign is not the only option. True it is if we draw the deadline for disqualification as ‘officially declared by a court to be disqualified,’ but not if we draw it earlier, ie objectively ‘became disqualified’ or subjectively ‘first knew, or had reason to suspect, that she was disqualified.’ In those cases, candidates act ‘In the shadow of the law’ but the actual hearing can be sorted out later if that candidate does get elected. With a hundred or more Senate candidates per State there is no need to tie up judicial resources on the eligibility of micro-minnows who may poll only single or double figures of first-preference votes.

This is important not just as a matter of jurisprudential nit-picking (of insisting that an unqualified candidate is not a ‘vacancy’ because he or she never really occupied the seat in the first place) but in very real political terms, because recounting the same ballots among the same candidates (minus only the disqualified nominee(s) could alter the order of elimination and elect a different combination of the remaining, qualified candidates. As explained below, this would be intolerable.

The High Court in 1987 wisely opted for a special count of existing preferences, rejecting claimed alternatives such as a fresh election for all the State’s Senate seats (which would be costly, and unfairly onerous on the other, eligible elected candidates) or for that particular seat (which would be disproportional and inconsistent with the tenor of the 1977 amendment of Constitution s15, which abolished Senate by-elections).

---

37 The High Court did decide on two defeated candidates in Sykes v Cleary, but only because these were the major parties’ nominees and likely to re-nominate in any re-scheduled by-election.
38 This quirk is less visible with single-seat AV because it is only possible to re-elect one incumbent at most.
39 Of course, if the polling itself is extensively compromised, then the Court has no alternative but to order the poll re-run for all seats, as occurred for Senators from South Australia in
established as long ago as 1905 that the s15 procedure did not apply to disqualified candidates, because the position had not yet been validly filled for that term, so no Senator could have ‘vacated’ it.40 The 1977 amendment, giving parties some veto rights over vacancies won by their endorsed candidates, reinforces this; the party hardly deserves a veto over a seat they have not yet ‘won fair and square’.

On the other hand, in Free v Kelly (1996) 185 CLR 296, the Court (also correctly) rejected the use of countbacks to replace disqualified House of Representatives candidates.41 This would certainly hand the seat to a different party, because Australian parties almost never endorse two or more candidates in the same single-seat electorate.

Historically, the Country/National Party practiced multiple endorsement extensively before the 1960s42 but it seems to have died out. Indeed, the Nationals and Liberals in the three biggest States refrain from even endorsing two Coalition candidates, at least when one is a sitting MP. This has been accelerated by the use of optional-preferential AV in the biggest and third-biggest States in the past few decades (NSW since 1981 and Queensland 1992-2015). The last occurrence seems to be Rankin, Queensland in the 1987 federal election.43 Even then, this seemed pointless because the NPA-Q’s official how-to-vote advertising ranked one Peter Jorgenson first and Gerard Walsh second, ie did not invite NPA supporters to choose between the two.

Apart from that, there is no Australian jurisdiction I know about whose electoral rules offer a party any advantage for running two (or more) candidates in the same district. By-elections – which are too onerous and non-proportional for multi-seat electorates – have neither defect for single-seat electorates. Even the single, rare example where replacing a vacating candidate by countback might be justified – in those Queensland local councils, such as the City of Brisbane, where a mayor is directly elected at large and the other councillors represent single-seat wards – it is not used. Candidates cannot run for both mayor and councillor at the same time.44 By

---

1906-08 and Western Australia in 2013-2014. In the Tasmanian State electorate of Denison in 1979-80, all seven seats were sent to a fresh election after three out of seven MHAs were unseated for campaign spending breaches.

40 Vardon v O’Loghlin (1907) 5 CLR 201.


44 As a result, Brisbane’s mayors have alternated between councillors elected from their own colleagues in mid-term – Frank Sleeman (1976), Roy Harvey (1982), Tim Quinn (2003), Graham Quirk (2012) – and complete outsiders with no previous elected office experience who win the position not just from opposition but with zero prior experience in elected office.
contrast, in NSW, Victoria and Tasmania, where local councils are elected by STV-PR, a candidate can run for both mayor and council at the same time; if elected mayor they are eliminated, and their preferences are transferred, at the very start of the council count.45

However, it must be noted that even for the Senate, the special count procedure could possibly give a seat to a different party, even within the same party ticket, as happened with Fiona Nash and Jim Molan. The National Party’s annoyance that Nash was replaced by a Liberal seemed to peak when it briefly seemed that Hollie Hughes would be the successor, but was mollified somewhat when Jim Molan eventually took the seat. (Hughes was a centrist ‘small-L’ Liberal party whereas Molan was more conservative and therefore more acceptable to the Nationals as a second best.)

The High Court also held that, while the (ostensible) election of a disqualified candidate would contaminate an election result, the mere presence of such a candidate on the ballot paper would not (if she lost).46

This is a fair assumption in two situations. Ironically, they are at opposite ends of the spectrum. One extreme is with voluntary voting, as in British or American elections. In theory, only people who know and care about the candidates turn out to vote.47 Even when voluntary voting is preferential (as in Ireland), including on the ballot a candidate who should not really be there should not change the result.

The other extreme is with compulsory, full-preferential voting, as for the House of Representatives.

But when voters are required by law both (a) to cast a ballot, if they do not want to be fined, and (b) to number a certain minimum number of candidates, if they do not want their ballot thrown away as informal (as opposed to exhausted), then the presence of pseudo-candidates on the ballot may actually serve as ‘cannon fodder,’ soaking up preferences that should rightly – had the election been conducted perfectly – have gone to other candidates instead.

---

45 To be fair, even if Queensland law did offer a similar fallback, it is unlikely [m]any candidates would take it. Imagine the negative advertisements: ‘Alderman Quink wants to be mayor, but he’s having a bob each way by also running for Council as a backup! Voters in his ward won’t even know until election night if they’ll get Mr Quink or his understudy as their alderman! (etc.)’


47 This is not strictly true. Because of various factors – especially social exhortations to ‘be a good citizen and vote,’ and interest in some but not all national and local elections held on the same day – Britain and the US have found it necessary to replace alphabetical ballot listing with random or rotated order, just as in Australia. The ‘donkey vote’ is less obvious in non-preferential and/or non-compulsory voting systems but its effects are still felt.
Of course, where the required minimum number of preferences is 1, someone who only liked the One Nation candidate but wanted to avoid being fined for non-voting may have simply lodged a blank ballot. And when full preferences for all candidates are required, that voter would have simply numbered the remaining candidates 1, 2, 3, and 4 instead of 2, 3, 4, and 5, with zero change to the legal outcome.

But when – as for the Senate since 2016, the NSW and Victorian upper houses, the ACT Assembly, and both Houses in Tasmania – a minimum number of preferences is required, greater than one, then including an ineligible candidate can distort the result, by depriving other candidates of grudging preferences they might otherwise have received in that candidate’s absence.

(ii) CONSIDER INTENT

The High Court has continually rejected attempts to read s44 as requiring intention to acquire foreign allegiance. (The other grounds of disqualification are much harder to get into accidentally). And indeed the wording of the clause does not refer to intent. It is true the Founding Fathers considered an earlier draft that disqualified anyone who had ‘done any act whereby’ they became ‘a subject or citizen of a foreign power’ (following the approach of all other Colonies at the time and States since), and apparently rejected it absent-mindedly rather than deliberately.49 But on its own that would weaken, rather than strengthen, the argument for following that interpretation. In the words of the noted jurisprude Cletus the Slack-Jawed Yokel, ‘Should have, but did not.’50

However, if we look back from the specific wording and drafting history, it is clear that the overall trajectory of the law is towards focusing on transgressions that are deliberate, substantial or both. Trivial and/or accidental breaches are more likely now to be overlooked. (The two factors normally rise and fall together because if a breach is minor in extent, it is more likely to have been an honest mistake or at least careless rather than deliberate).51 Even reckless disregard may not lead to invalidity where it would work hardship on innocent third parties.52
This presumption is strong enough that it can change the correct interpretation from a strictly literal one to one with implied exceptions. Ironically, the High Court has already done this when construing s44. After lecturing us on how the words are clear and leave no room for ambiguity, the majority Justices then made an about-face and ‘but of course’ in the most extreme cases of absurdity: first, when a foreign citizenship is irrevocable according to that country’s laws, and secondly if a foreign country were to confer its citizenship rights for the ulterior motive of unseating an Australian politician.

It is nice that the majority did not take literalism to its most absurd conclusion, by insisting on allegiance where renunciation is impossible.53 It is little consolation, though, that successive High Court majorities have gone nearly to that extent by insisting that unknown allegiance still disqualifies even if technically it could have been disclaimed. As Oliver Wendell Holmes Jr noted, in tort law ‘a choice that entails a concealed consequence is, as to that consequence, no choice.’54

Maintaining that someone could have easily renounced a foreign allegiance they did not know about, and had no reason to suspect, is true but trivial, akin to observing that I could become a millionaire today by taking five minutes to stop by a newsagent and pick next week’s Lotto numbers.

Ironically, any such hostile power would cause maximum havoc by conferring, not a legally irrevocable citizenship – which an Australian MP or candidate could simply ignore – but a citizenship which can be revoked only with great difficulty. ‘You must appear in person before the Valyrian Minister for Citizenship, on Valyrian soil, to request release from your Valyrian nationality, on three separate occasions, each not less than six months and not more than eighteen months after the previous occasion’ would probably fly under the High Court’s radar.55

I am also skeptical that an Australian court would ever venture into the political minefield of judging a foreign government’s bona fides. (Something similar was supposedly a limitation on laws implementing treaties under the external affairs power, but actually following through to enforce that would fly such contracts, as that would work hardship on an innocent third party who had bargained in good faith. Worse, it could actually advantage a party who ignored legal restrictions, by relieving them from the obligations of contracts they had purportedly entered. Contrast Pearce v Brooks [1866] LR 1 Ex 213 a century earlier, where a sex worker who had rented a horse-drawn coach got a windfall exempting from her contractual obligation to pay for repairs to it. The court reasoned, much less sensibly, that prostitution was against public policy so therefore the coach rental agreement was void.

53 Presumably if a foreign power were ever to start conferring its citizenship to wreak havoc on Australian parliamentary ranks, it would simply rinse and repeat every time a Senator or MHR duly renounced to maximise the political carnage. So ‘conferred for improper purpose’ probably shades into a subset of ‘irrevocable,’ de facto if not de jure.


55 I am using Valyria, from Game of Thrones, as a neutral example.
against almost everything else courts do in this area.56) But the real danger is not so much foreign powers conferring their citizenship rights with the intent of nobbling critics in Australian politics, but rather their doing so with benevolent intentions. Eg, Hungary restored citizenship retrospectively to anyone born in its territory who had been stripped of it by the Nazis in 1939. In almost every other country, this would be an unequivocal benefit. In Australia, however, it presented Josh Frydenberg with a political headache.57 Worse, it may re-emerge every time a country amends its citizenship laws.

The High Court allowed that a really determined and unambiguous attempt to renounce by a candidate must be accepted in Australian law, even if it is not effective in foreign law. This was the Court majority’s safety valve for individual responsibility. You might have been born with foreign citizenship rights you did not ask for or even know about; you might have foreign citizenship rights conferred on you against your will and without your asking, by unilateral action of a foreign government; but as long as you can renounce any such foreign citizenship rights, either by doing so successfully under foreign law or by doing so unambiguously (whichever takes less effort), it remains within your control.

But this concern for certainty seems odd given that so many other areas of law depend on ‘what did they know and when did they know it?’ The offence of insider trading, for example, may see someone jailed based on the precise time at which a court finds the defendant knew that, or was reckless as to whether, certain information was generally available and might materially affect share prices.58 Statutes of limitations typically allow extensions of time where fraud was involved, since a plaintiff cannot be said to have slept on their rights if they were deceived.59 And again, as noted above, the validity of a disqualified MP’s Ministerial decisions may depend on exactly the question the High Court deemed too hard for judges to handle in Re Canavan.

Finally, even if you are free to renounce, it only operates prospectively. It may clear you to stand again for the next Parliament but not to continue in the current Parliament. Even if in force for only one day, it still disqualifies you.

The High Court is quite correct that Re Webster (1975) 132 CLR 270 was wrongly decided and was far too narrow.60 But the Court has swung too far

56 Commonwealth v Tasmania [1983] 158 CLR 1 (Tasmanian Dams case) per Brennan J at 219, Deane J at 259. Briefly, following Minister for Immigration & Ethnic Affairs v Teoh (1995) 183 CLR 273, it looked as if the Mason Court might have found a way to enforce this ‘only treaties entered in good faith’ condition effectively, by requiring federal administrative actions to conform to obligations assumed by treaty. However, Teoh was soon overturned by bipartisan political retaliation.

57 Tony Wright, ‘Josh Frydenberg caught between monstrous history and an uncertain fate’ Sydney Morning Herald (Sydney, 3 November 2017).


59 Eg, Limitation Act 1969 (NSW), s14(1).

60 Webster ‘did not rest on a principle reinforced in successive cases. [...] Chief Justice Barwick’s narrow interpretation [...] has long been criticised for interpreting s 44(v) such that it had almost no effect at all. The High Court’s embracing of a broader interpretation marks a welcome remedy to these criticisms.’ James Morgan, ‘Protecting Democratic Integrity: Re Day
the other way, especially in relation to the allegiance ground of disqualification. (Other grounds like contracting with the Commonwealth are harder to walk into without one’s eyes wide open, albeit perhaps clouded with dollar signs). For example, Eddie Obeid, NSW MLC, showed allegiance to a foreign state when in 2004 he took urgent family leave to fly himself (and, allegedly, numerous other family members) to his former home village in Lebanon to campaign and vote in a local election. Voting in a foreign election is an unequivocal sign of foreign allegiance. Private individuals might – repeat, might – be forgiven if they were invited to vote in a special diaspora electorate; but (as with bankruptcy) would-be public officials should be held to a stricter standard.

(iii) NARROW THE DEADLINE:

However, much of the disruption could be minimised by reducing a different axis: by reducing the time-period for which compliance is required, as well as (or at least instead of) reducing the strictness of compliance required.

In 2017, the High Court reiterated its concern for certainty:

[...] to accept that proof of knowledge of the foreign citizenship is a condition of the disqualifying effect of s 44(i) would be inimical to the stability of representative government. Stability requires certainty as to whether, as from the date of nomination, a candidate for election is indeed capable of being chosen to serve, and of serving, in the Commonwealth Parliament. This consideration weighs against an interpretation of s 44(i) which would alter the effect of the ordinary and natural meaning of its text by introducing the need for an investigation into the state of mind of a candidate. [...]
The conceptual difficulty may be illustrated by considering the following questions. Does a candidate who has been given advice that he or she is ‘probably’ a foreign citizen know that he or she is a foreign citizen for the purposes of s 44(i)? Is the position different if the effect of the advice is that there is ‘a real and substantial prospect’ that the candidate is a foreign citizen? Does a candidate in possession of two conflicting advices on the question know that he or she is indeed a foreign citizen is accepted as correct by a court?64

In 1998 I argued that for purposes of Section 15, ‘chosen’ meant only the voting period.65 I acknowledged briefly that this was not the same as the High Court’s reading of ‘chosen’ in Section 44, but distinguished the two on the ground that Section 44 did not rely on what voters knew and when they knew it. In light of the High Court’s newfound resurgence of (already ample) Section 44 cases, this needs further and better particulars.

One can certainly question the reading of individual Section 44 grounds, but

(1) that interpretation is firmly settled (jurisprudence constante, as the French call it, and backed by a unanimous High Court in all the most recent times);

(2) however harshly individual grounds have been construed (‘rights of a foreign citizen’ not requiring volition; ‘under sentence’ can not be retrospectively annulled; ‘office of profit under the Crown’ includes unpaid leave; etc), the real problem is the wide and unforgiving time-frame, which, as Re Nash has shown, can rise from the grave like Glenn Close at the end of Fatal Attraction. If the relevant time of ‘chosen’ were narrowed – to the voting period for Section 15, to the taking-seat time for Section 44 – it would be easier to avoid unseating MPs for trivial and unforeseeable departures.

Section 15 has (fortunately) still never been litigated, whereas Section 44 has been richly litigated. But it will probably happen one day66 and when it does, passions will run high and political players will be tempted to espouse legal interpretations based on immediate self-interest.

So I am making a pre-emptive ambit claim here, trying to get in early to head off the (potentially disastrous but understandable) mistake of thinking that ‘chosen’ in s15 means the same process and therefore the same time-frame as in s44. I want to corral and quarantine the damage of a too-wide reading of ‘chosen’ by confining the Section 44 interpretation to that particular section. The word ‘chosen’ has a different

---

64 Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon [2017] HCA 45, [48]; [56]; Gabrielle Appleby, ‘The High Court sticks to the letter of the law on the “Citizenship Seven”,’ The Conversation (27 October 2017), https://www.theconversation.com/the-high-court-sticks-to-the-letter-of-the-law-on-the-citizenship-seven-85324.


66 Eg, the Liberal/ National merger in Queensland in 2008 might have provided some s15 fodder if any Liberal or National Senators from that great State vacated office during the 2005-2011 or 2008-2014 half-Senate terms. (This suggestion was made by someone posting or commenting at Larvatus Prodeo, but that blog is now defunct and I cannot source the author with precision).
meaning in Section 15 from Section 44 because it has a different context and purpose where voter knowledge is clearly of primary relevance.67

A candidate may be ‘chosen’ by one or more individuals at any point during the poll.68 But individuals give myriad different and mutually incompatible choices. To be ‘the choice’ of ‘the people’ – this single candidate representing this district, that combination of six names representing that State – only occurs once, after and as a (hopefully direct) result of all the individual choices (preferences, votes) being ‘boiled down’ to produce a single collective choice (outcome, result).

Whether a prospective parliamentary candidate should be required to relinquish some prior disqualifying factor (a job, an office, some citizenship) depends what that is. At one extreme, it would seem outrageous if a sitting judge could even campaign for Parliament without first resigning from the bench. At the other extreme, I agree with Jeremy Gans that it is also outrageous that an Australian citizen should be forced to abandon their potential citizenship rights (not even necessarily full foreign citizenship), probably forever, just to contest.69

67 Section 15 stipulates that a political party can only claim rights in relation to a candidate’s Senate vacancy if both the party and the candidate publicly represented the candidate as endorsed by the party for the entire ‘time when [she] was chosen.’ In 1998–99 I argued this ‘time’ meant the entire period starting when her nomination was lodged (or, perhaps, accepted) until the time she was finally declared elected. Like most commentators, I pictured this as occurring at most some months after the original Senate poll, with election petitions being lodged very shortly after the result was declared as clearly ‘unfinished business’ pending the election. Eg, Robert Wood was declared elected in August 1987 and unseated in May 1988 (although Elaine Nile’s earlier, unsuccessful challenge had been heard in December 1987); Phil Cleary was declared elected in April 1992 and unseated in November 1992; Heather Hill was declared elected October 1998 and unseated in June 1999.

However, the case of Hollie Hughes brings home dramatically that, for Senators, the ‘time… chosen’ could extend for nearly seven years after the original poll, due to the Senate’s combination of six-year terms, a lame-duck interval that can reach 12 months, and recountbacks to replace dead or disqualified candidates. Whereas if Ms Hughes and Ms Nash had been candidates in a House of Representatives division, Ms Hughes would certainly have resigned her AAT appointment before nominating for the by-election, and this 2018 by-election – not the 2016 double dissolution – would have been the relevant ‘time chosen’ for qualification purposes.

Even if the timeframe of ‘time chosen’ is not narrowed for the purposes of s44, it must certainly be narrowed for the purposes of s15 since the latter depends explicitly on what information is available to voters. It would cross the line from ‘inconvenient’ to ‘absurd’ to hold that the purpose of s15 as amended in 1977 is any way served by requiring Hollie Hughes to continue being ‘represented,’ by herself and by the Liberal Party, as an endorsed Liberal candidate after the Senate polls closed on 2 July 2016.

Insisting on endorsement for the entire polling period, even though shorter than what is required to avoid disqualification, still allows a candidate to defect from a party in mid-campaign, continuing to derive electoral advantage from the party label on the ballot paper (like Pauline Hanson in 1996; remembering that the 1977 amendment was drafted before party labels appeared on the ballot) while denying the party any voice in her replacement.


69 As Jeremy Gans (again!) notes, Tasmanian MHR Justine Keay’s explanation for not renouncing her British citizenship earlier (‘If I don’t get elected, I can’t get my citizenship back’) highlights ‘one of the Constitution’s cruelest details: its requirement that prospective politicians irrevocably rid themselves of disqualifying attributes – foreign citizenship, jobs in the public service, government business ties – not only before the election results are known, but before they even nominate.’ ‘The hesitators: The dual citizenship story is far from over –
Public servants are in the middle. Perhaps this reflects a tacit intuition that being a judge already gives someone a lot of not-electorally-accountable power (even if you are not [yet] elected); being a public servant gives them less power but still a great deal; while being a dual citizen does not give them any particular power within the Australian polity and only becomes an issue if they do successfully acquire power by succeeding in their electoral campaign.  

The High Court has held that intention or knowledge by the candidate should not be decisive because that would lead to uncertainty:

At the conceptual level, questions would necessarily arise as to the nature and extent of the knowledge that is necessary before a candidate, or a sitting member for the purposes of s 45(i), will be held to have failed to take reasonable steps to free himself or herself of foreign citizenship. In this regard, the state of a person's knowledge can be conceived of as a spectrum that ranges from the faintest inkling through to other states of mind such as suspicion, reasonable belief and moral certainty to absolute certainty [50]. If one seeks to determine the point on this spectrum at which knowledge is sufficient for the purposes of ss 44(i) and 45(i), one finds that those provisions offer no guidance in fixing this point. That is hardly surprising given that these provisions do not mention the knowledge of a person or the person's ability to obtain knowledge as a criterion of their operation.

The conceptual difficulty may be illustrated by considering the following questions. Does a candidate who has been given advice that he or she is 'probably' a foreign citizen know that he or she is a foreign citizen for the purposes of s 44(i)? Is the position different if the effect of the advice is that there is 'a real and substantial prospect' that the candidate is a foreign citizen? Does a candidate in possession of two conflicting advices on the question know that he or she is a foreign citizen for the purposes of s 44(i) only when the advice that he or she is indeed a foreign citizen is accepted as correct by a court?  

However, this is inconsistent with the trajectory of the common law and with recent decisions of the Court itself. The Court has held that statutes should be construed where possible to make both culpability and penalty proportionate to intent. Indeed, the mens rea requirement is so deeply embedded in the common law, so

and perhaps it was Barnaby Joyce who hit the nail on the head,’ Inside Story (13 November 2017), https://insidestory.org.au/the-hesitators/.
70 This trichotomy reflects that proposed by the House of Representatives Standing Committee on Legal and Constitutional Affairs, Report on Aspects of Section 44 of the Australian Constitution – Subsections 44(i) and (iv) (tabled 25 August 1997): ‘One [proposed new constitutional] provision should require a person who holds a judicial office under [...] the Commonwealth or a state or a territory to resign from the office before he or she nominates [...] Certain other public offices, specified by the Parliament, would be automatically declared vacant if the occupant [...] nominated for election [...] Under the third provision, certain other public offices, specified by the Parliament, would be automatically declared vacant if the occupant [...] were elected to the Senate or the House of Representatives’ (emphasis added).
71 Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon [2017], per Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ at [55-56].
deeply that it might be held a necessary precondition to the exercise of federal ‘judicial power’ to imprison for a crime.  

True, this is not a conviction for a crime, but qualification for a public office. But like a criminal conviction, it is relevant as a measurable proxy for character, judgment and impulse control. This is one reason why the Court allowed a safety valve where renunciation was impossible or every difficult. On a strictly literal ground, this is also nowhere found in the text, and it does not offer any more clarity. Its stated rationale was partly mercy for candidates (so no one is excluded for life) and partly collective Australian self-rule (so, to use the often-cited parade of horribles, Beijing could not unseat Bob Brown and other pro-Tibet MPs by unilaterally conferring honorary Chinese citizenship on them; in fact, exactly that could happen, provided Beijing allowed some avenue for renunciation – ‘must show up in person at a citizenship office on PRC territory’ – and meanwhile the MP would have been unseated).

However, it does not provide clarity; it provides no more mercy for candidates (a certainty of disqualification rather than an uncertain chance); and since, as the Justine Keay and Susan Lamb cases show, foreign bureaucrats’ delays in processing renunciations can, if they tick over the crucial deadline for nominations, have the same effect for a particular three- or six-year term as foreign legislators’ refusal to allow renunciations at all. Political careers are not quite as time-sensitive as Olympic athletes but it is still hard to come back from an enforced 3- or 4-year time-out.

Secondly, by establishing an absolute standard rather than excusing de minimis exceptions, the Court has moved away from its own approach in the closely analogous field of apprehended bias. The Court discarded the absolutist common-law rule that any detectible financial interest whatsoever would disqualify for apprehended bias and held instead that a judge’s ‘pecuniary or proprietary interest in the outcome of litigation’ must be ‘not insubstantial.’

Finally, the Court’s own rationale for the most anomalous case, that of Hollie Hughes, emphasised that Ms Hughes had brought these odd legal consequences upon her own head by her own choices:

Ms Hughes’ acceptance in the meantime of appointment to the Administrative Appeals Tribunal, with the entitlement to remuneration which that appointment brought, was understandable. But it was a voluntary step which she took in circumstances where reference by the

74 Hence the repeated references in judicial power cases such as *Chu Kheng Lim* (1992) 176 CLR 1 to ‘criminal guilt.’

75 ‘Ironically, while section 44 was created to protect Australian sovereignty, it has become the case that […] foreign nations have the power to shape our parliament by potentially limiting who can become a candidate for election.’ WA Liberal Senator Linda Reynolds, quoted in Paul Karp and Katharine Murphy, ‘Barnaby Joyce and others disqualified for dual citizenship have debts waived: Debts accrued by Joyce and five other parliamentarians included salaries and staff expenses,’ The Guardian (Thursday 29 March 2018, 16.24 AEDT), https://www.theguardian.com/australia-news/2018/mar/29/barnaby-joyce-and-others-disqualified-for-dual-citizenship-have-debts-waived. Even the perception of such influence can be damaging: ‘[…] what is the likelihood that either Malcolm Turnbull or Bill Shorten will take a hard line against the government of Egypt on a policy issue in coming months?’ Jeremy Gans, ‘Anne Aly and the insurmountable obstacle: The High Court has set a new citizenship test for parliamentarians of uncertain status, but who on earth could pass it?’ Inside Story (11 May 2018), https://www.insidestory.org.au/anne-aly-and-the-insurmountable-obstacle/;

76 *Ebner v The Official Trustee in Bankruptcy; Clenae v Australia and New Zealand Banking Group* (2000) 205 CLR 337, per Gleeson CJ, McHugh, Gummow and Hayne JJ at [58]; overruling *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759.
Senate to the Court of Disputed Returns of a question concerning whether a vacancy existed in the representation of New South Wales in the Senate by reason of the disqualification or lack of qualification of a senator who had been returned as elected was always a possibility. By choosing to accept the appointment for the future, Ms Hughes forfeited the opportunity to benefit in the future from any special count of the ballot papers that might be directed as a result of such a vacancy being found.77

So why then is scienter relevant for Hollie Hughes not for Fiona Nash, Scott Ludlam or Barnaby Joyce?

(iv) ADD A FAIL-SAFE TO RECOUNTBACKS TO PREVENT CAIAFA QUIRKS

While the Court was correct to adopt ‘special count’ as the remedy for a Senate disqualification, it is necessary to stipulate an override to prevent it producing paradoxical results. It has long been demonstrated STV-PR can produce such quirks in theory,78 and one in fact occurred in practice in 2017. Melbourne City Councillor Michael Caiafa – who was qualified to sit, and who had not resigned – was unseated due to a recountback, held six months after the original election, to replace another candidate who had resigned to avoid likely disqualification. Justice Greg Garde, writing for the Victorian Civil and Administrative Tribunal, sympathised with Caiafa as a ‘victim of circumstance’: ‘His conduct has been exemplary. He has done all that an elected councillor can do since he was declared elected’. Even so, Caiafa’s term was terminated by ‘the actions of another candidate over whom he had no control, and for whom he has no responsibility.’79

Results like this are politically unacceptable, at least where the innocent third-party candidates have already been declared elected and seated. This is partly because they have a legitimate expectation they have relied upon, but also because electoral laws should try as far as possible to close any loopholes that might reward manipulation. No one, of course, advocate using Tasmania/ ACT/ Maltese-style recountbacks (see above) for replacing a candidate who has not yet been duly elected; whatever the merits of recountbacks for filling actual vacancies, it makes no sense to divide the electorate into five, six or seven party-‘owned’ quotas when the whole point of a general or periodic election is to decide how those quotas are distributed among parties and candidates in the first place.80

77 Re Nash [No 2] [2017] HCA 52, per Kiefel CJ, Bell, Gageler, Keane and Edelman JJ at [45].
78 Nicholas Renton, Guide for Meetings and Organisations (Thomson Reuters, 8th ed, vol 2, 2005) gives some stylized but mathematically-rigorous proofs of preference orderings that can lead to these anomalies.
79 Victorian Electoral Commission v Municipal Electoral Tribunal (No 2) (Review and Regulation) [2017] VCAT 375; Aisha Dow, ‘City of Melbourne councillor Michael Caiafa loses seat in unprecedented decision,’ The Age (Melbourne, 14 March 2017).
80 Which is why Vardon v O’Loghlin (1907) 5 CLR 201 was defensible at the time. Confined to its immediate facts, it makes sense. Unfortunately its logic has been extended too far. Vardon would have been fine had it just specified a narrower doctrine, ie that the s15 casual vacancy provision does not apply unless and until someone has been validly elected to that position. In other words, ‘casual vacancy’ should be construed to prevent bootstrapping. It was unnecessary to go further and hold a gratuitously wide definition of ‘time chosen.’ Vardon is compatible with any reading of ‘time chosen’ where the candidate is removed at any time before taking their seat and (more importantly) due to factors that arose or accrued before, rather than after, taking their seat. The wide reading of ‘time chosen’ has the silly side-effect of nullifying an explicit constitutional clause, ie that a half-Senate election can be held ‘at any time in the 12 month before’ that class of Senators’ terms expire on 1 July in the sixth calendar year following their election (or, if chosen at a double dissolution, in the second and fifth calendar years following their election). As the ABC’s psephological pundit notes, because an
The West Australian type of countback, however, with all candidates re-competing for all seats, has merit since it can be combined with the ‘blank slate’ approach of a general or periodic election. I contend that it should kick in when – and only when – polls have closed and vote-counting has begun. Before that time, parties and candidates are behind a Rawlsian veil of ignorance about how the voting went, so there is not yet either any reliance or any risk of deliberate manipulation.

The High Court’s (and many other common-law courts’) own jurisprudence recognises that invalidity can vary greatly according to the stage it is discovered at.

What if the disqualification of a candidate reaches far back in time. The Hollie Hughes case is a particularly striking example. In theory, the disqualified MP received all their pay and emoluments under false pretences, and could legally be required to repay every cent back, from the very beginning. In practice, past debts are usually waived ex gratia by the Finance Minister, but this is an executive decision and not judicially dictated. As far as the courts are concerned, every cent from the first day is a potential debt that may be claimed back for the public purse.

But any votes they cast (and even any Acts they helped pass) while sitting as an MP are never invalidated. Common-law courts have consistently held that a legislative body’s proceedings are not invalid merely because an ineligible MP participated. Courts are particularly reluctant to hold that even obviously (or authoritatively-declared) illegal past actions can disrupt or cast doubt on the validity, not just of individual statutes, but of the entire Parliament itself – whether a breach of s24’s nexus ratio, or a breach of the s57 preconditions for a double dissolution. The court will of course unseat that MP promptly, and will order future Parliaments to keep within the nexus ratio, and will strike down particular Bills invalidly passed at a double dissolution, but it does not declare the current (let alone previous) Parliaments void retrospectively.

election ‘begins’ when writs are issued, ‘the writ for a half-Senate election cannot be issued before 1 July, and the Commonwealth Electoral Act then makes Saturday 3 August the first possible polling date for a half-Senate election.’ Antony Green, ‘The First Date for a Half-Senate Election is 3 August,’ ABC Election Blog (24 March 2013), http://blogs.abc.net.au/antonygreen/2013/03/the-first-date-for-a-half-senate-election-is-3-august.html. It is, alas, not unknown for a plain constitutional clause to be nullified by judicial interpretation (eg, ‘matters arising under any treaty,’ s75(i)) or by Westminster convention (eg, that the Governor-General could put to referendum a constitutional alteration proposed by the Senate, as s128 envisages, against the wishes of the Cabinet and the House of Representatives). But this should be avoided. In other areas, such as ‘prerogative writs cannot lie against the Crown,’ its logic has been overturned by the High Court: Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82.

81 Or, at least, all sitting members plus any defeated candidates who choose to re-nominate. Defeated candidates who have moved on need not be included.

82 Paul Karp and Katharine Murphy, ‘Barnaby Joyce and others disqualified for dual citizenship have debts waived: Debts accrued by Joyce and five other parliamentarians included salaries and staff expenses,’ The Guardian (Thursday 29 March 2018), https://www.theguardian.com/australia-news/2018/mar/29/barnaby-joyce-and-others-disqualified-for-dual-citizenship-have-debts-waived. This leniency contrasts sharply with the Commonwealth’s zealous approach to recovering tax and welfare overpayments from non-politicians, which in turn makes certain that any referendum to lighten s44 will sink like a stone on referendum day.


84 Attorney-General (NSW) (Ex rel Mackellar) v Commonwealth (1977) 139 CLR 527.

Ministerial decisions are in an intermediate position: these are only invalidated from the time it became ‘notorious’ the person might be unqualified. Before that time, they may be protected by the ‘de facto officer’ doctrine.86

So, to give a highly simplified example, a Minister who last nominated for election as an MHR or Senator on (say) 15 March 2018, who was elected and then sworn in as a parliamentarian and a Minister on 15 July 2018, who was referred by their House (or challenged by a common informer) on 15 November 2018, and who was finally declared disqualified on 15 December 2018, may have up to four different cut-offs. If the person held foreign allegiance, or some other disqualifying ground, on 15 March, that renders everything that followed unlawful. But whether and when these unlawful actions become invalid varies. The candidacy was – in theory – invalid from the very beginning, in theory, but this has few practical effects because all the other deadlines are later. The candidate’s receipt of pay, travel allowances and other financial benefits was not invalid until 15 July, when she took her seat. (She may have been sworn in and paid as a Minister before being formally sworn in as an MP). Any decisions she signed off as a Minister will certainly be invalid after 15 December but may be invalid earlier – certainly when her title in office was officially challenged on 15 November, but arguably even earlier if her disqualification had been raised in the media.87 (Although not before 15 October 2018 as she has a three-month grace period to serve as a Minister without being an MP). And any Bills or other motions passed or rejected by that House stay passed or rejected even though an unqualified person sat and voted on them – indeed, even if that Bill had been passed or rejected only by one vote.88

86 The ‘de-facto officer’ common-law doctrine ‘protects people who rely on acts done in the apparent execution of their office by an officer who appears to be ‘clothed with official authority,’ even though they may not validly hold that office. It is not aimed at protecting those who invalidly exercise power, but rather those who rely in good faith on the apparent authority of those who publicly exercise power. The doctrine is also relied on to give certainty concerning the validity of acts of persons whose appointment or election may later be challenged. Anne Twomey, ‘If High Court decides against ministers with dual citizenship, could their decisions in office be challenged?’ The Conversation (18 August 2017), https://www.thecommerson.com/if-high-court-decides-against-ministers-with-dual-citizenship-could-their-decisions-in-office-be-challenged-82688. The Constitution allows a Minister to hold office for three months while not being a member of parliament. The legal advice says that any decision made by Joyce or Nash after three months had lapsed from their appointment as ministers was open to challenge. Michelle Grattan, ‘George Brandis suggests Joyce and Nash did not really make their ministerial decisions,’ The Conversation (30 October 2017), https://www.thecommerson.com/george-brandis-suggests-joyce-and-nash-didnt-really-make-their-ministerial-decisions-86524. University of New South Wales law professor George Williams told Guardian Australia: ‘There is some uncertainty there.’ ‘It could be that people will test Ministerial decision-making in court, and there are no clear precedents,’ he said. ‘These Ministers are bearing a risk that the court might put Ministerial decisions in a different category to parliamentary votes.’ Anne Twomey, ‘Three reasons why the decisions of Joyce and Nash may be difficult to challenge,’ The Conversation (31 October 2017), http://www.thecommerson.com/three-reasons-why-the-decisions-of-joyce-and-nash-may-be-difficult-to-challenge-86540.

87 While some legal statuses, such as sub judice, only kick in once a legal proceeding is formally initiated, in other cases the courts will take account of broad publicity and social perceptions, eg apprehended bias and prejudicing juries.

88 Contrast the approach courts of disputed returns take regarding popular votes (elections and referenda), where validity depends heavily on whether the irregular votes were numerous enough to change the result. In some cases – Florida in November–December 2000, Western Australia in 2013 – a tiny proportion of votes could be decisive. By contrast, in 2009 Queensland’s Supreme Court dismissed a challenge to one State electorate where 14 voters were denied a vote. Because the seat was won by a 74-vote margin, ‘none of those 14 irregularities could have affected the outcome.’ Caltabiano v Electoral Commission of

---

Canberra Law Review (2019) 16(1) 129
So, there is precedent for the law saying that not everything done in reliance on something later found unlawful should be retrospectively unravelled. If an initial Senate count, one that includes one or more unqualified candidates, would have elected A, B, C, D, E and F, then the Court should direct that any recount triggered by disqualification of a candidate after voting has begun should not unseat any of those six candidates – unless, of course, those unseated were disqualified. Put another way, sitting MPs should never be excluded in a countback or recountback even if one is lowest in number of votes.89

Even better, Parliament should legislate to explicitly insert this interpretation in the Commonwealth Electoral Act to remove uncertainty. Doing this would certainly be within the Commonwealth’s legislative power, even in the face of resurgent judicial activism in electoral matters, because it does not reduce the voting power of any identifiable group.90 Perhaps a new s180A could be inserted immediately after the parallel provision for death of a candidate.

***


89 It is theoretically possible that, say, four incumbents and two ‘challengers’ could each poll around 15% of first preferences in a Senate recountback to replace one disqualified incumbent (where the quota is 14.28%), so that the fifth incumbent (who has not been disqualified) has only 10%. In this case the fifth incumbent should elbow aside whichever of the two newcomers had fewer votes, even though both newcomers are over the quota. But in almost all cases, the failsafe rule would not mean defeating any challenger over the quota but merely tinkering with the order of elimination, and incumbents protected from elimination by the rule would eventually reach the quota in their own right by accumulating second and later preferences.

STUDENT SECTION

This part of Canberra Law Review features work by Canberra Law School students and recent graduates.
Face to Face with the Law: Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW (2016)

Clarissa Shortland*

This article explores issues in Moutia Elzahed & Anors v Commonwealth of Australia and State of NSW (2016)¹ It addresses the clash of rights between an accused and the practice of religion and to give evidence, including the right to confrontation, whether seeing the face of a witness is vital to determining credibility, exceptions to the standardised rules of witness testimony and the debate regarding full-face veils.

In a claim that came before the NSW District Court in 2016, it was alleged that on the night of 18 September 2014, a violent police raid conducted on the home of Ms Moutia Elzahed subjected her to undue assault, battery and persistent humiliation.² These allegations were against the AFP and the NSW police department and rested primarily on Ms Elzahed’s testimony, which, as is common practice, was expected to be delivered in trial. The plaintiff asked permission to testify wearing her full-face veil.³ The legal issue was whether a witness may testify while wearing a full-face covering or whether an accused’s right to a fair trial would be jeopardised by sanctioning this request.⁴ The judge stated as follows:

I must take into account whether I would be impeded in my ability to fully assess the reliability and credibility of the evidence of the first plaintiff if I am not afforded the opportunity of being able to see her face when she gives evidence. I am well aware that the demeanour of a witness and the viewing of their face is not the only way in which credibility is assessed. In some cases the demeanour of a witness may be misleading. However, neither of those considerations can, in my view, mean that I should be completely deprived of having the assistance of seeing her face to assess her credibility.⁵

The plaintiff was offered the option to give evidence in a private room with her face uncovered. This offer was refused by Ms Elzahed on the grounds that

---

¹ Clarissa Shortland is an LLB student at the University of Canberra.
⁴ Renae Barker, ‘Niqabs in the Court Room: The Need for Judicial Sensitivity and Imagination (Religion and Ethics)’ ABC Radio 5 December 2016, http://www.abc.net.au/religion/articles/2016/12/05/4587052.htm. The burqa is the most concealing of all Islamic veils: it is a one-piece veil that covers the face and body, often leaving just a mesh screen to see through. The niqab is a veil for the face that leaves the area around the eyes clear. A hijab is used to describe the headscarves worn by Muslim women. The type most commonly worn in the West covers the head and neck but leaves the face clear.
male counsel would still view her visage. With options exhausted, the judge held 'I decline to permit her to give evidence with her face covered'.\(^6\) The accused's right to a fair trial trumped Ms Elzaheld’s request to retain her veil.\(^7\)

This case illuminates a range of issues. While many commentators and pundits were quick to rush to judgement and launch accusations of islamophobia, racism, colonialism and sexism,\(^8\) a more temperate response can nevertheless discern here something of a clash between (at the very least) courtroom protocol and religious observance. Moreover, as shall be shown during this study of \textit{Elzahed}, its ramifications extend to matters of general legal and cultural concern.

\textbf{Legal Conformity}

Despite the judge’s order in \textit{Elzahed} being subject to scrutiny,\(^9\) it was in line with previous decisions. In a Western Australian Case,\(^10\) a witness known as ‘Tasnim’, like Ms Elzahed, requested to retain her full-face veil while giving evidence.\(^11\) The prosecution argued that the witness would feel extreme stress in removing this item of clothing in public as she had not done so for over 19 years,\(^12\) and that such stress would undermine and devalue her testimony.\(^13\) The defence argued on the other hand that witnesses’ faces must be visible for credibility to be properly assessed. As there was no Australian precedent to be relied upon, the judge turned to other jurisdictions for advice on how to proceed.\(^14\)

The reasoning from the New Zealand case \textit{Police v Razamjoo}\(^15\) was extensively considered. In this case, it was asserted that as Islam does not explicitly require women in the Qur’an to wear a facial covering,\(^16\) women may not avail themselves of human rights protections for religious belief.\(^17\) It was also contended that to allow women to remain veiled during cross-

---

\(^6\) Ibid 1 [7].

\(^7\) Ibid.

\(^8\) Ibid.

\(^9\) Ghena Krayem and Helen McCue, ‘The Burqa Ban Call Only Creates Division’, \textit{ABC News} (Sydney), 2 October 2014, 1 [20].


\(^11\) \textit{Sayed v The Queen} [2012] WASCA 17.

\(^12\) David Weber, ‘Judge Orders woman to Remove Veil’, \textit{ABC NEWS} (Sydney), 19 August 2010, 1 [2]-[3].


\(^16\) [2005] DCR 408.

\(^17\) But see, \textit{The Police v Abdul Zohoor Razamjoo} [2005] NZDC CRN 30044039397-8 [110]. It was subsequently held that it is irrelevant whether Islam requires women to wear full-face veils.

examination would prevent the defence and the trier of fact from assessing facial expression and hence from establishing an important criterion of reliability. It was stressed that the circumstances of the individual case must be considered to decide if a jury needs see the witness’s face. As ‘Tasnim’ was giving evidence against a man accused of fraud, the judge ultimately concluded that the jury required the assistance of seeing her to assess her credibility. On this basis, ‘Tasnim’ was prohibited from giving evidence in her full-face veil.

In other common law countries, similar issues have been emerging. In an English case, despite a witness fearing severe intimidation while giving evidence with her face uncovered, it was held that seeing her face was of ‘cardinal importance’. In a landmark Canadian case, a victim of repeated sexual assaults was required to remove her full-face veil while testifying against her assailants. Here, the judge asserted that to allow her to testify unveiled would create a ‘real and substantial risk’ to the rights of the men accused.

**Justice Covered?**

This article will address the main issue emerging from Elzahed. This is the clash of rights between an accused to undertake a sufficient cross-examination of a witness, and the rights of a victim to practice their religion and to give evidence. First, the right to confrontation will be discussed and the exceptions to the standard rules of witness testimony will be outlined. Second, whether seeing the face of a witness is vital to determining credibility will be examined. Third, whether the exceptions to the standardised rules of witness testimony may be extended at the court’s discretion to certain Muslim women will be evaluated. This will lead to a discussion of the debate regarding full-face veils, an analysis of the decision in regard to guaranteed human rights and will lead to my recommendations for the future.

(i) The Right to Confrontation

In Elzahed an accused’s access to a fair trial was considered vital. The concept of a fair trial includes the English common law principle of the right to confront an adverse witness. This right to confrontation allows the accused to know the identity of their accuser, permits the accused to be present.

---

20 Barker, above n 15, 7.
21 Ibid 9, 2.
23 Megan O’Toole, ‘After Years and a Sharply Divided Supreme Court Decision, Judge Rules Woman Must Remove Niqab to Testify’, National Post (Toronto, 24 April 2013), 1.
24 Ibid.
during their testimony and grants the right to test their evidence through cross-examination.27

Foundational and crucial claims have been made for this right: Justice Richardson has claimed that it is ‘basic to any civilised notion of a fair trial’;28 Justice Murphy has described it as ‘a fundamental right to a fair trial;’29 and pursuant to a leading US case, it is a ‘fundamental human right’.30

The right, however, has mainly been conceived as a defendant-centric right, that is, as primarily, if not exclusively, based on ensuring fairness to the defendant.31 An important, often overlooked, aspect is that it should be also considered from the points of view of the victim, the plaintiff and the wider community.32 This extension of the fair trial principle that goes beyond the interests of the defendant33 has been enshrined and protected in numerous international law treaties and conventions.34

While the right to confrontation is viewed as fundamental to the administration of justice, nonetheless, courts and legislatures have introduced measures to curtail the right35 as a response to the growing concern over witness intimidation on national security. 36 Such measures include withholding the identities of prosecution witnesses from the accused, permitting witnesses to testify anonymously and prohibiting cross-examination that may reveal the identities of at-risk witnesses.37 This allows the so-called ‘vulnerable’ witnesses to provide testimony in a host of different ways to meet their specific needs.38 These exceptions go against the standardised rules of evidence39 and have led to the right being circumvented in numerous instances. These cases include ones involving sexual assaults, juveniles, gang murders and undercover police officers.40 The rationale behind the exceptions frequently tend towards witness protection. For example, children are often offered the option of giving evidence in private through video-link,41 to reduce trauma,42 and the New Zealand ‘Jhia murder trial’

29 Whitehorn v The Queen (1983) 152 CLR 657, 661 (Murphy J).
30 Pointer v Texas (1965), 380 US 400, 404.
33 Bowden, Henning and Plater, above n 31, 2.
34 Eastwood, above n 32, 5, quoting Patricia Eastal, Balancing the scales: Rape, Law Reform and Australian Culture (Federation Press, 1998) 206.
35 Lusty, above n 27, 2.
36 Ibid.
37 Ibid.
40 Griffiths, above n 19, 10.
permitted 22 witnesses to provide evidence anonymously as a response to the threat of gang retaliation.43

This shows that fair trial rights can be secured even in circumstances where the defence is unable to see the face of witnesses. While there is the presumption that evidence should be given in an open court, the presumption can - and has been - set aside. This makes it difficult to claim that a state interest or public policy is being served when witnesses like Ms Elzahed are forced to unveil pursuant to the fundamental right to confrontation.44

(ii) Facial Demeanour – Not Necessary?

As emphasised by the judge in Elzahed, it is essential for jurors to be able to assess the credibility of a witness.45 The question is whether an adequate assessment may be made in circumstances where the face of a witness is hidden. Concealing one’s face would appear to restrict the capacity of others to assess credibility. This was indeed the opinion of the judge in the previously mentioned New Zealand case, Police v Razamjoo.46 Here, it was held that visual indicators, even those apparently trivial, are important: ‘for example, an abrupt change in facial expression, a change from making eye contact to refusing to do so and even a look of downright hatred at counsel’.47 This furthers the argument of the judge in Elzahed, that to give evidence in a full-face veil would breach the accused’s right to confrontation and thus their right to a fair trial.48

However, the argument that credibility can be determined in part through seeing and then interpreting the facial demeanour of a witness, relies on two assumptions.49 The first is that the information gained through assessing a witness’s facial expressions and demeanour aids in an accurate interpretation of what has been verbally communicated.50 The second is that those viewing such facial expressions - jurors and judges, most importantly - can accurately and consistently interpret them. Both these assumptions are at best questionable and potentially erroneous.

First, there are many aspects of a person’s demeanour which are non-visual yet are equally important and relevant. Such non-visual ‘clues’ may indeed interfere and counteract facial evidence. The pitch, timbre and perceived quality of the voice, for example.51 These may intrude upon, assist, augment,
contradict or otherwise modify the impression made by a simple, non-voiced expression. This explains the development of the movement seeking to implement ‘demeanour warnings’ to jury members. Such warnings, it is suggested, would be in place to caution jurors from relying on demeanour when assessing guilt.\textsuperscript{52}

The argument against the need to see witness testimony can be further demonstrated by the Parliamentary inquiries to amend the laws restricting the visually impaired from being a juror.\textsuperscript{53} At present, there is a broad restriction curtailing persons with ‘disabilities’ in Schedule 2 of the \textit{Jury Act 1977} (NSW) from being a jury member. While this encompasses the visually impaired, the law has been subject to increasing criticism in recent years. In 2006, the NSW Law Reform Commission published a report recommending amendments to the \textit{Jury Act}.\textsuperscript{54} Recommendation 1(a) stated, ‘that people who are blind...should be qualified to serve on juries, and not be prevented from doing so on the basis of that physical disability alone’.\textsuperscript{55} While these recommendations have not yet amended legislation, the campaign for reform continues.

Second, there is the assumption that facial demeanour can provide ready and reliable clues, and that observers possess the ability to properly interpret the demeanour of a witness. Extensive psychological studies however have concluded that when facial expressions, conduct and demeanour are analysed, they cannot lead to a proper determination of truthfulness from deception.\textsuperscript{56} This is because when hazarding a guess of credibility from facial demeanour, humans are both unreliable and inaccurate.\textsuperscript{57} Barely two out of three people were able in a 1968 study (since replicated) to detect from the demeanour of a witness whether he or she was telling a lie.\textsuperscript{58} The accuracy rate was even lower (at just 57%) when experienced judges were used as the participants in this experiment on truth detection.\textsuperscript{59} Policemen and correction officers, notwithstanding their experience and training, scored no better than the average layperson.\textsuperscript{60} These findings confirm that there is no such thing as ‘a

\begin{footnotes}
\item[52] Richard Taylor, \textit{At Face Value: Should a Jury Warning About the Risks of Assessing Credibility From Demeanour be Mandatory in Criminal Jury Trials?} (Honours Degree, Victoria University of Wellington, 2014) 17.
\item[54] \textit{Jury Act 1977} (NSW).
\item[56] Taylor, above n 52, 5.
\item[58] Norman Maier and Jessica Thurber, ‘Accuracy of Judgements of Deception When an Interview is Watched, Heard and Read’ (1968) 21(1) \textit{Personnel Psychology} 23, cited in Wellborn, above n 57.
\end{footnotes}
typical deceptive response, as ‘there really is no Pinocchio’s nose’ in lies and truths.

The inaccurate results from the studies arise first of all because we rely on incorrect visual cues to determine truth. For example, the perception that nervousness is an indication of a lie is wrong as findings indicate it is completely unrelated. In the second place, stereotypes are often used to determine deception which are ‘worthless but pervasive’. For example, the belief held by both professional lie catchers and lay individuals in Australia and abroad, is that most liars avert their gaze when answering a question. But a comprehensive worldwide study has concluded that gaze behaviour is in fact completely unrelated to deception, and people telling the truth ‘look away’ as often as liars. Thirdly, cultural differences play a role. For example, in Aboriginal and Chinese cultures, it is considered impolite to maintain eye contact.

It is well-known that members of a jury are seldom able to consider ‘only the facts’. They are swayed by the rhetoric of counsel, by their own prejudices and by the dynamics of the jury room post-trial discussion. Even were demeanour useful under natural circumstances to help determine credibility (which it is not), under stressful and adversarial courtroom environments it proves even more ineffective. These studies indicate that a case can be made for decisions concerning credibility to be based on accurate and unadorned transcripts of testimony rather than in the heat of battle in the courtroom.

(iii) Can Veiled Women be Exempt?

---

64 Ibid 91.
65 Ian Coyle, ‘How do Decision Makers Decide When Witnesses are Telling the Truth and What can be Done to Improve their Accuracy in Making Assessments of Witness Credibility?’ (Report to the Criminal Lawyers Association of Australia and New Zealand, 3 April 2013) 10.
68 Coyle, above n 65, 10.
71 Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy (Harvard University Press, 2000).
72 Ibid.
73 Wellborn, above n 57, 12.
There are several verses in the Qur’an that relate to the appropriate dress for Muslim women in general, but the most commonly cited verse is Súra Núr, 24:31:75 ‘[a]nd say to the believing women that they should lower their gaze and guard their modesty’.76 Whether Islam truly requires women to wear full-face veils is open to interpretation and is a point of theology shaped by centuries of cultures in different nations.77 Nevertheless as the verse targets women,78 many devout Muslims, male and female, believe that full-face veils are a symbol of modesty and respectability, and that for women to remove them is to defy God.79 Many Afghani women forced to wear full-face veils in public under the Taliban continued to wear them, even after their country’s liberation.80 This may have been because asking an Islamic woman to remove her full-face veil, whether it be worn by choice or by force, has been equated to the ‘mutilation of one’s personhood’.81 As such, it is understandable that some Muslim women fear that they would feel such a grave sense of shame, humiliation and ridicule while taking the stand without their full-face veils, that they would rather forfeit their rights to give evidence as a result.82 For this reason, the same reasoning that warrants the exceptions for vulnerable witnesses to give evidence, could be applied in certain instances to veil-wearing women.

It is probable that Ms Elzahed feared her accused (representatives of the state) - after all, she alleged that she was degraded and assaulted and that such attacks were against her religion. It is of course possible to doubt Ms Elzahed’s sincerity on this point. A cynical interpretation would be that her protestation against removing her full-face veil was motivated principally by her contempt for the Australian legal system. This contempt would, on this reading, have been part and parcel of her Islamic faith and would have been accentuated by her husband’s conviction on terrorism charges. Tempting though it may be to follow this line of analysis, there is no evidence to support either of these suppositions.

The rationale behind allowing children the right to testify in private is that they may feel more secure and safe.83 If Ms Elzahed could testify in her full-face veil, she would be protected from fear, and the quality of her testimony could have been both secure and secured.84 The approach of the North American courts is to place weight on evaluating the sincerity of one’s

77 Anthony Gray ‘Section 116 of the Australian Constitution and Dress Restrictions’ (2011) 16(2) Deakin Law Review 297.
79 Lila Abu-Lughod, ‘Muslim Women’ Eurozine (9 January 2006)
80 Ibid.
82 Kapardis, above n 60, 97.
83 See, eg, R v Teariki (1999) 16 CRNZ 540, 543. The principal reason for allowing children to give alternative mode testimony is so they feel more secure.
84 Griffiths, above n 19, 11.
religious belief. This approach should be adopted in Australia. As Ms Elzahed never removes her full-face veil in public, this strongly demonstrates her devout adherence to Islam. As for the prejudice of jurors towards Muslim women, that needs to be combated through other means than compelling such women to unveil in court.

The Debate

The full-face veil debate divides not only secular Australians, but Muslims, scholars and the governments of Muslim nations. While there are many Muslim countries that have not made veil-wearing by women obligatory in public in the presence of men, there are some that have. Those that do are associated with other laws which from the viewpoint of the West are illiberal, intolerant and a means of compelling the wearer to adhere to patriarchal codes of conduct. This being so, in Australia we tend to associate the wearing of the veil - which of course is not mandatory - as either the expression of a woman’s subjugation and oppression or as suggesting that such a woman is signalling her acceptance of values inimical to the West. As such, wearers of the full-face veil in Australia continue to bear the brunt of public and institutional opposition to their religious dress, yet at the same time, they continue to face sanction from their community, God and faith when their veils are removed in public.

Another approach to the debate is to consider that as we in Australia celebrate difference, and the richness of cultural mixture is encouraged, the wearing of different clothing, including the full-face veil, should therefore be welcomed. But as our multicultural ethos is to encourage difference, it could in contrast be argued that the full-face veil encourages uniformity, and the culture of Islam denies the value of multiculturalism.

As we have seen, these viewpoints are beset with complications. They are rarely satisfactorily resolved and solutions seem to depend on where one places one’s priorities, on the contexts in which legal judgments occur, and on the cultural values at play in any jurisdiction. These difficult issues arise at the intersection of culture, morality and the law and this has been well illustrated in the case of Elzahed, a case one might say of veiled justice.

---

85 See, Fazee v Illinois Department of Employment Security (1989) 489 US 829, 834 (White J) It was stated that it was merely necessary to prove that conduct is ‘based on a sincerely held belief’.
89 Nesrine Malik, ‘I was Forced to Wear the Veil and I Wish No Other Woman has to Suffer it’, The Daily Telegraph (London, 20 September 2013) 4.
Freedom of Religion

What is clear is that while debate continues to rage about the place of full-face veils in public in liberal European societies, in Australia, the campaign to ‘ban the burqa’ is no longer active. The concerns in Australia now revolve around full-face veils and their place on the witness stand. As demonstrated, the approach of the Australian courts has been to restrict women from testifying with their face covered. This prompts the question of whether this restriction is a violation on one’s fundamental human right to freedom of religion. This is a right guaranteed in numerous treaties Australia has ratified: Article 18 of the International Covenant on Civil and Political Rights (ICCPR) states that ‘everyone shall have the right to freedom of thought, conscience and religion ... to manifest his [sic] religion or belief in worship’. It is widely accepted that expressing a religious belief may be undertaken through wearing religious attire. As such, it may be said that full-face veils, which serve as powerful symbols of a woman’s religion, are manifestations of her beliefs.

This freedom conferred to worship or practice religion, however, is ‘subject to limited exceptions’ pursuant to Article 9 (1) of the European Convention on Human Rights. There has been no court ruling that held religious freedom can function without limitations or restraints. When Parliament’s inherent right to interfere in religious worship was confirmed in the Grace Bible Church Case, it highlighted that when law and religion intersect, the former prevails. Furthermore, Article 81 (3) of the ICCPR explicitly states that banning a religious practice may be justified on the grounds that it is necessary for the ‘fundamental rights and freedoms of others’. This provision makes it difficult to assert there may have been a breach of Ms Elzahed’s religious freedom in denying her the right to practice her religion.

The primacy of law over the right to freedom of religion may be demonstrated from rulings that found that Jehovah’s Witnesses could not prevent their children from receiving blood transfusions in the name of religion. Likewise, Rastafarians who wish to smoke marijuana in accordance with the practice of their religion, have been found not to be exempt from Australian drug laws. Nonetheless, judges do of course recognise that people from a wide variety of religions participate in court. As such there are instances where judges have utilised their discretion to allow religious belief to override courtroom protocol when they have conflicted.

91 Barker, above n 15, 3.
92 International Covenant on Civil and Political Rights Art 18.
93 Zamani and Gerber, above n 78, 4 [7].
94 European Convention on Human Rights art 9(1).
97 Ibid 385.
98 International Covenant on Civil and Political Rights art 18(3).
100 Carolyn Evans, Legal Aspects of the Protection of Religious Freedom in Australia (Comparative Constitutional Studies, Melbourne Law School, 2009) 45.
101 Ibid 67.
remove their headwear in court often do not apply to wearers of the Jewish yarmulke or the Sikh turban.102

The Future

This article has shown that the notion that witnesses need to present their faces to examiners for their ‘reliability’ to be assured is erroneous. Evidence cited shows that to the contrary, the face is a very poor ‘window on the soul' and humans are very poor readers of facial demeanour, as far as establishing truth or falsity is concerned. A case may therefore be made for the discretionary approach adopted in dealing with courtroom protocols to be implemented when determining whether women may testify in full-face veils. The sincerity of the religious belief of a witness, whether there is motive against the accused and whether there is a high likelihood of fear and shame need to be taken into consideration in determining whether a woman may testify fully-veiled.

While I believe that full-face veils should be able to be worn by vulnerable witnesses and that this will not impede the search for facts, it must be noted that society is experiencing a surge in negative stereotypes of Muslims.103 In this respect, it appears that a call for more discretion to be used when assessing whether a witness may testify fully-veiled may prove insufficient. ‘Tasnim’ and Ms Elzahed would indeed have satisfied the ‘sincerity test’ and they still were not permitted to testify. Moreover, the extreme cases outlined from our common-law counterparts, England and Canada, show that even in instances in which women genuinely fear intimidation or are repeated sexual assault victims, have still been prohibited from testifying in their full-face veils. This indicates that a broader scope of discretion would perhaps not in itself deal with the problem.

Consequently, law reform is required to amend the laws of witness testimony. The exemptions to the general rules should be extended to expand the scope of vulnerable witnesses. Ultimately, this would reduce the serious risks that would otherwise result from restricting wearers of the full-face veils from testifying. No one wishes to hinder Muslim women from coming to court. No one wishes to segregate them from society. No one wishes to create a divide between Muslim women and the secular population. The danger of intimidation and shaming a witness out of giving evidence must be given serious consideration. Fairness to all should not be an impossible equation, and fairness to the accused must not come at the expense of the victim, the witness or the community.

***

102 Ibid 34.
Imminence and States’ Right to Anticipatory Self-Defence: Responding to Contemporary Security Threats and Divergence in Legal Diplomacy

Renee Mastrolembo*

In an attempt to identify deficiencies in the current international law position, this article explores core themes surrounding states’ inherent right to anticipatory self-defence and the notion of imminent threats. The changing nature of security threats, as well as the diverging legal diplomacy of states concerning anticipatory self-defence, warrants a re-examination of the international law position. Relying on reform-oriented analysis, in particular of legal diplomacy, the article proposes a refined position and, subsequently, considers how it could be implemented.

I INTRODUCTION

States’ inherent right to self-defence is established under international law, yet both the legal content and scope of the right is subject to ongoing debate.¹ Consent of states is the foundation of modern international law.² States express their consent primarily through two mediums, those being treaties³ and, more diffusely, custom.⁴ Under the relevant treaty law concerning the use of force and self-defence, the Charter of the United Nations (the Charter),⁵ United Nations (UN) member states are prohibited from using or threatening to use force unlawfully in international relations.⁶ However, individual or collective self-defence is a recognised legal exemption to this prohibition. Article 51 of the Charter states ‘nothing in the present Charter shall impair the inherent right of individual or collective self-defence … until the Security Council has taken measures necessary to maintain international peace and security’.⁷ Whilst the Charter attempts to articulate a consensual position,

---


² SS ‘Lotus’ (France v Turkey) (Judgment) [1972] PCIJ (ser A) No 10, 18 [45]: ‘The rules of law binding upon States... emanate from their own free will.’; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits) [1986] ICJ Rep 14 [269]: ‘In international law there are no rules, other than such rules as may be accepted by the states’ (Nicaragua Case).


⁴ Ibid art 38.

⁵ Charter of the United Nations (‘The Charter’).

⁶ The Charter (n 5) art 2(4).

⁷ Ibid, art 51.
diverse interpretations regarding Article 51 and the ‘inherent’ right it seemingly enshrines have created uncertainty. Tibori-Szabó articulates three divergent interpretations or groups which have emerged over time. Firstly, a ‘restrictive group’ claims Article 51 articulates that the only exception justifying self-defence is when it is responsive or interceptive of an attack actually visited upon a state. Conversely, a ‘middle group’ recognises the justification of anticipatory self-defence where an attack against a state is imminent. A final group (which is fewer in numbers and support) contends that self-defence can be implemented in response to potential attacks that are yet to crystallise, a notion referred to as pre-emptive self-defence. Evidently, various temporal dimensions justifying self-defence exist, increasing the likelihood of legal contention when an Article 51 justification is relied upon by states.

Customary international law also recognises the right to anticipatory self-defence, particularly where the requirements of necessity and proportionality are fulfilled. These requirements mean a state can only implement force where it is necessary, and any use of force must be proportionate to an offensive attack. Further, customary law acknowledges that states do not have to passively await an actual attack. Instead, states can act under self-defence, where the threat of attack is imminent, but not merely foreseeable. That said, a definition of what amounts to an ‘imminent threat’ has not been codified in the context of a state responding to it in self-defence.

In the case of Gabčíkovo-Nagymaros Project, Hungary v Slovakia, the International Court of Justice (ICJ) held that ‘imminent’ is synonymous with ‘immediacy’ or ‘proximity’ and that it goes far beyond the concept of

---

8 See, e.g., Sadoff (n 1).
11 Interceptive self-defence is characterised by military action in response to an attack that has not actually crossed the defending state’s borders, but has commenced, meaning ostensibly irrevocable actions have been set into motion; see Dinstein (n 10) 175-76.
14 Tibori-Szabó (n 9) 6.
15 Ibid.
17 Ibid.
'possibility.” Whilst this case considered the term imminent in relation to treaty law unrelated to the Charter and use of force, it has been contended that the dictum can be applied to anticipatory self-defence. Generally, imminence with respect to self-defence is understood in terms of threats that are immediate or otherwise temporally proximate. Such threats are understood to include situations where a causal chain can lead from the status quo (no attack) to an undesired future (attack), even where the causal chain is not yet in motion. More specifically, it is recognised that anticipatory self-defence can be used against imminent threats in situations where a perceived aggressor is in its final preparations for an attack, and the defending state thwarts the attack before it commences by launching one of its own. In other words, the defending state’s action is based on its belief that the aggressor’s attack is about to be mounted, with immediacy.

Despite advances in clarifying what imminence means with respect to anticipatory self-defence, international norms in this area remain open to interpretation, and a coherent position has not emerged. This article reflects on this shortcoming in light of two inter-linked developments: a) the emergence of contemporary security threats which are changing our understanding of what imminence may amount to in the use of force; and b) the emergence of divergent positions with respect to imminence and anticipatory self-defence as expressed through the public legal diplomacy of select states.

The origins of legal diplomacy stem from complex diplomacy that took place in the post-World War II era, in which states sought to ‘make law, not war’, and in which it emerged as both a political and legal process. Ultimately, it was this form of legal negotiating balanced against states’ national and geopolitical interests, termed legal diplomacy, that led to the foundations of European Human Rights law. However, more recently the term legal diplomacy has been adopted to mean the diplomacy between states used to determine the exact meaning of international obligations, not least where these have not been clearly codified. Legal diplomacy seeks to bridge or manage differences amongst states’ interpretations of international obligations to ultimately reach consensus through diplomatic channels. The key difference between legal diplomacy and opinio juris (which shapes

---


21 Sadoff, (n 1) 530.


23 Sadoff, (n 1) 530.


26 Brian J Egan, ‘International Law, Legal Diplomacy, and the Counter-ISIL Campaign’ (Speech delivered at the American Society of International Law, Washington, 1 April 2016).
custom), is that legal diplomacy is founded in states’ interests, rather than a belief of lawfulness. Whilst parts of legal diplomacy are naturally carried out confidentially, states’ public explanations and statements make up a significant channel for the conduct of legal diplomacy. It is this aspect of legal diplomacy relied upon in this article. We contend that applying a legal diplomacy lens is particularly appropriate, given the disputed nature of imminent threats in anticipatory self-defence, along with the altruistic desire to reach a coherent legal position.

The article proceeds as follows: First, it outlines in more detail the international law position with respect to the use of force, self-defence and responding to ‘imminent’ threats. The article then considers the emergence of contemporary threats which challenge the temporal basis of imminence. It then assesses the nature and scope of the concept of legal diplomacy and its role in international law and relations. The legal diplomacy of select states with respect to anticipatory self-defence and imminent threats is also scrutinised extensively. The five permanent members of the UN Security Council (the Security Council) are the focus of this deliberation, not least because they remain the main diplomatic powers of the world given their extensive control of international relations and their veto-power in the Security Council. The article concludes with a proposal that represents a refined international law position regarding self-defence in light of imminent threats; one which accounts for both the nature of emergent security threats and the divergent positions arising from the public legal diplomacy of states.

II USE OF FORCE, SELF-DEFENCE AND IMMINENT THREATS

A Use of Force & Self-Defence

The international law governing the use of force has adapted over time. *Jus ad bellum* refers to the conditions under which states may resort to war or use armed force generally. Historically, state use of force was perceived as an attribute of statehood. *Jus ad bellum* recognised that conquest through force produced title.27 However, over time there has been a distinct shift from this perception. Today, the prohibition of force through *jus ad bellum* is a fundamental tenet of the post 1945 world order, and the use of force to obtain title is strictly prohibited.28 Article 2(4) of the Charter prevents member states from using or threatening to use force. There are certain exceptions, including acts pursuant to authorisations by the Security Council,29 acts of individual or collective self-defence,30 and humanitarian intervention under the responsibility to protect pillars.31 The prohibition of unlawful use of force by

---

29 *The Charter* (n 5) ch VII.
30 Ibid art 51.
31 Implementing the Responsibility to Protect — Report of the Secretary-General, 63rd sess, Agenda Items 44 and 107, UN Doc A/63/677 (12 January 2009).
states is considered a peremptory norm, from which no derogation is permitted.

Article 51 of the Charter stipulates that nothing in the Charter shall impair the 'inherent right' to individual or collective self-defence if an armed attack occurs. Prior to the treaty, self-defence was governed by customary law which allowed anticipatory self-defence. However, the wording of Article 51 casts doubts on whether the Charter seeks to supersede previous customary law and only permit self-defence where an armed attack actually occurs; or, alternatively, whether it permits anticipatory self-defence as an 'inherent right'. Neither the International Court of Justice (ICJ) nor the Security Council have authoritatively determined the precise meaning of Article 51, leaving international treaty law in this area subject to speculation.

Whilst international courts have reflected on the right to self-defence since 1945, they have not had jurisdiction to consider Article 51 of the Charter specifically. The Nuremberg Tribunal, instituted to try key Nazi leaders for events prior to and during World War II, noted that preventive action in foreign territory is justified in the case of an imminent threat. However, as the Charter did not exist at the time that the relevant acts were committed, this reflected the law prior to the Charter. Additionally, in the case of *Nicaragua v United States*, the threshold for an armed attack was determined to be 'the most grave forms of the use of force'. In this case, the ICJ majority judgment made a point of noting that 'the issue of the lawfulness of a response to the imminent threat of armed attack has not been raised... the Court expresses no view on the issue'. That said, in his dissenting opinion, Judge Schwelbel noted that he did 'not agree with a construction of the [Charter] which would read Article 51 as if it were worded: 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs.' For the time being, the matter as subject to treaty law remains unsettled.

Despite uncertainty arising from treaty law, it is recognised that a state's use of anticipatory self-defence against an imminent attack remains permissible under international customary law. The customary law subsequent to the Charter coming into force on 24 October 1945 can, amongst other things, be taken from post-Charter Security Council discussions, UN published

---

33 Vienna Convention (n 3) art 53.
34 The Charter (n 5) art 51.
37 International Military Tribunal Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945–1 October 1946* (IMT, 1947), vol 1, 170.
38 Nicaragua Case (n 2).
39 Ibid [91].
40 Ibid [8].
41 Ibid [173].
statements and states’ accepted conduct. In post-Charter Security Council discussions, delegates have periodically considered the importance of whether a test or threshold for anticipatory self-defence had been met, rather than the permissibility of anticipatory self-defence in and of itself.42

For example, in discussions regarding the 1962 Cuban Missile Crisis, which primarily concerned Cuba, Russia and the United States (US), there was no clear consensus which emerged against application of anticipatory self-defence. Further, states which rejected the US proposal to use force to interdict a carriage of offensive weapons en route to Cuba, under the justification of anticipatory self-defence, did not focus on rejecting the doctrine of anticipatory self-defence itself. Instead, states questioned whether the criteria for necessity, founded in the Caroline test43 (discussed further below) established under international law, were met in the circumstances.44 The Ghana delegate to a Security Council meeting on 24 October 1962 probed whether there were ‘grounds for the argument that such action is justified in exercise of the inherent right of self-defence’.45 In response, the delegate himself commented that ‘my delegation does not think so ... it cannot be argued that the threat was of such a nature as to warrant action on the scale so far taken prior to a reference to this Council’.46 Ghana’s reasoning was not rejected by other states,47 indicating overall acceptance of the notion of anticipatory self-defence.

In 1981, the Security Council refused to accept Israel’s argument that it faced an imminent attack from Iraq justifying self-defence under Article 51 of the Charter. The Security Council rejected arguments that Iraq’s construction of a nuclear weapon which would take up to five years to build, could substantiate an imminent attack for Israel.48 However, in discussions, the Security Council did not refuse the legal justification to act under anticipatory self-defence against imminent threats, stating Israel’s ‘claim goes well beyond ... an imminent threat’.49 This discussion was supported by the fact that Israel’s claim was unsubstantiated and improbable.50 The US’ invasion of Iraq in 2003, on the justification to prevent Saddam Hussein from deploying weapons of mass destruction (WMD), was veiled with the concept of anticipatory self-defence. Whilst the US and its allies’ main justification was that intervention was authorised by existing Security Council resolutions, they also detailed the need to disarm Iraq.52 Alternatively, Iraq argued that the US publicly spoke of humanitarian issues, to misguide and

43 See below Part II B.
44 Arend (n 36) 94.
45 UN SCOR, 17th sess, 1024th mtg, UN Doc S/PV.1024 (24 October 1962) [110].
46 Ibid.
47 Arend (n 36) 94.
48 UN SCOR, 36th sess, 2283rd mth, UN Doc S/PV.2283 (15 June 1981) [25]-[27].
49 Ibid [26].
50 Ibid.
distract the world of the real issue – war.\textsuperscript{52} Iraq contended that the US had intervened, ‘despite the fact that Iraq had not crossed the Atlantic to attack the United States, had no link to the 11 September attacks and had no weapons of mass destruction, [and yet,] United States forces had crossed the Atlantic to control [its] region.’\textsuperscript{53} Iraq’s focus on not being a threat to the US suggests an acceptance of force where a threat is present. Subsequent to the intervention, the then Secretary General of the UN, Kofi Annan, commented, ‘I have indicated [the intervention] was not in conformity with the UN Charter from our point of view, and from the Charter point of view it was illegal.’\textsuperscript{54} Annan’s finding hints that the intervention was not authorised by the Security Council, but it also did not substantiate the Article 51 exemption on the prohibition of force.

These discussions support the notion that, under certain conditions, the use of force against anticipated armed threats is permitted under international customary law, not least where a threat is imminent. Whilst there is limited debate into conditions or relevant thresholds to be met, the international customary law provides that states can lawfully act in anticipatory self-defence. As a result, the current provision provides a well-established broad exemption, which is not limited by certainty in scope or an evidentiary test. Simply put, the law provides anticipatory self-defence is lawful. However, it does not provide the exact elements of anticipatory self-defence in detail.

A ‘Imminent’ Threats

Whilst it is reasonably well-established, certainly as a matter of customary international law, that a state is not required to passively await an actual armed attack, interpretation of what amounts to an imminent threat of attack is varied. Importantly, state sovereignty remains the cornerstone of international law. As a result, any interpretation of imminence must be balanced against consideration of state sovereignty.\textsuperscript{55} Where a violation of state sovereignty is put at risk by another state resorting to force on the justification of self-defence, it must be legally substantiated.

The modern antecedence for anticipatory self-defence dates back to the Caroline incident of 1837, where the United Kingdom (UK) attacked a US ship named Caroline. Following that attack, the US secretary of state Daniel Webster penned the first known statement of anticipatory self-defence. Webster articulated that the test for self-defence is two-fold: first, the ‘necessity of the self-defence [must be] instant, overwhelming [and] leaving

\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid.
no choice of means, and no moment of deliberation”;\textsuperscript{56} secondly, the defensive act cannot be ‘unreasonable or excessive’,\textsuperscript{57} meaning it must be proportionate. The \textit{Caroline} test was affirmed in the obiter dicta of the \textit{Oil-platform Case} (ICJ),\textsuperscript{58} which confirmed that self-defence by a state must be necessary in light of an imminent threat, and proportionate to the threat. However, in this case, the ICJ was only provided with jurisdiction by Iran and the US to address allegations regarding a breach of a bilateral trade agreement, in particular its ‘freedom of commerce’ provision. Iran did not base its application on a breach of the general international law prohibition of force, as the US’s lack of consent to jurisdiction would have prevented the Court proceeding altogether.\textsuperscript{59} This illustrates the political nature of international law, showing that states only look to identify the correct legal position where it is in their interest to do so. As a result, the ICJ could not authoritatively affirm or amend the international law governing anticipatory self-defence.\textsuperscript{60} At present, the status of international law with respect to self-defence against imminent threats remains open to interpretation, relying on the \textit{Caroline} test from 1837.\textsuperscript{61}

In 2003, in the wake of the aforementioned Iraq invasion, then UN Secretary-General, Kofi Annan, commissioned a UN advisory group, labelled the ‘United Nations High-Level Panel on Threats, Challenges and Change’, to consider challenges to international security. As part of this process, in 2004, the panel released a report stating a ‘threatened state, according to long established international law, can take military action so long as the threatened attack is imminent, no other means would deflect it and the action is proportionate.’\textsuperscript{62} The statement did not provide a definition for ‘imminent threat’; however, it touched on the notion that it is a proximate measurement. The statement compared self-defence ‘against an imminent or proximate threat’\textsuperscript{63} to self-defence ‘against a non-imminent or non-proximate one’;\textsuperscript{64} claiming the later requires authorisation for enforcement action from the UN Security Council. The interchanging of the words imminent and proximate indicates a requirement that imminent threats are assessed as a temporal matter. The 2004 report further stated that ‘the norms governing the use of force by non-State actors have not kept pace with those pertaining to States’\textsuperscript{65} and went on to make a series of UN reform recommendations.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{56} Ashburton (n 16).
\item \textsuperscript{57} Ibid.
\item \textsuperscript{58} \textit{Oil Platforms Case (Islamic Republic of Iran v United States of America) (Merits)} [6 November 2003] ICJ (1 May 2004) [51].
\item \textsuperscript{60} Ibid 246.
\item \textsuperscript{61} George Brandis ‘The Right of Self-Defence in Imminent Armed Attack in International Law’ (Speech delivered at the University of Queensland, Brisbane, 11 April 2017).
\item \textsuperscript{62} \textit{A More Secure World: Our Shared Responsibility}, UN GAOR, 59th sess, Agenda Item 55, UN Doc A/59/565 (2 December 2004) 54 [188] (‘Our Shared Responsibility’).
\item \textsuperscript{63} Ibid 54 [189].
\item \textsuperscript{64} Ibid.
\item \textsuperscript{65} Ibid 48 [159].
\end{itemize}
\end{footnotesize}
In 2005, Annan followed up with a report explicitly confirming ‘imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign states to defend themselves’.66 In this report imminent threats were compared to ‘latent or non-imminent threats’.67 According to the Oxford English Dictionary, latent means ‘a state of existing, but not yet developed or manifest, being hidden or concealed.’68 This suggests the interpretation of imminent threats should be based on the development and manifestation of the threat, which is closely aligned with a temporal understanding. While such statements do not reflect binding law codified through, for example, treaties, they can be relied on to determine existing customary law. Ultimately, the 2004 and 2005 reports can be seen as an attempt to formalise the existing international law, and to confirm the meaning of an imminent threat as a proximately close and developed threat.

The two reports just noted were addressed in September 2005 at a World Summit attended by many UN members. Debate focussed on the issues raised in the report; however, member states concluded ‘that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security.’69 The 2004 report recommendations were not included in the Outcome Document of the 2005 World Summit and no further legal reforms were proposed to respond to changing threats, other than the negotiating and finalisation of new treaties.70 This can be seen as a short-coming in opportunity to address new threats and clarify unclear treaty law and is mostly attributable to resistance of a considerable number of UN members, whereby ‘the crack in opinio juris among States has widened, without, however, identifying one approach or the other as the majority view.’71 The implication is a baseline position in the Charter that is vague and irrelevant in particular to the current security environment.

III THE NATURE OF EMERGENT THREATS AND IMMINENCE

International threats of armed attack are evolving in nature and scope as a result of a range of factors; these include, in particular, greater access to weapons of mass destruction (WMDs), the growth of terrorist organisations, particularly Islamic State (IS), 72 and the escalation and increased sophistication of cyber warfare, amongst other technical advances. Each affects the nature of imminence in the use of force, as well as states’ ability to respond.

67 Ibid 33 [122].
68 Oxford University, Latent (17 October 2018) Oxford University Dictionary.
69 2005 World Summit Outcome, GA Res 60/1, 60th sess, 8th plen mtg, UN Doc A/RES/60/1 (2005) [79].
71 Tom Ruys, Armed Attack’ and Article 51 of the UN Charter (Cambridge University Press, 2010).
72 For the purpose of this article, IS refers to the Islamic State and the Levant, the Islamic State of Iraq and al-Sham and Da’esh.
A Weapons of Mass Destruction

Imminent threats must be considered in light of contemporary developments regarding WMDs. Whilst WMDs, being a term used to encompass chemical, biological and nuclear weapons, pre-dated the Charter, they were not considered as a prominent threat during its drafting. Chemical weapons were used during World War I. However, they were not particularly useful militarily. When nuclear bombs were dropped on Japan at the end of World War II, the world took the view that such weapons were a carefully guarded secret, not an accessible military instrument. Further, the full consequences of the atomic bombing of two cities in Japan were not fully recognised until long after 1945. For this reason, the Charter has been labelled as a ‘pre-atomic document’ which ‘fails to cope with new technology of mass destruction’. If the Charter’s drafters anticipated the future risks associated with WMDs, additional codification concerning both the inherent right to self-defence and imminent threats may have otherwise been included.

Article 51 of the Charter was first tested against WMDs during the Cuban missile crisis in October 1962, when the Soviet Union transported WMD instruments to Cuba and the United States established a naval blockade in response. The US threatened to use armed force in the event the Soviet Union delivered offensive weapons to Cuba. Notably, the US did not use the justification of self-defence under Article 51, though it was carefully weighed and consciously rejected. This was because the US recognised an imminent threat could not be construed broadly enough to cover threatening deployments or demonstrations which lacked a probable outcome. However, the Cuban Missile Crisis still took the world to the brink of a nuclear war. The uncertainty at the time illustrated the need for international legal restraints to be clarified.

Following the Cold War, states generally sought to focus their attention on disarmament, rather than building WMD capabilities. Such efforts culminated in the Chemical Weapons Convention, which came into force in 29 April 1997 and which has 193 states parties. Whilst this was effective in reducing weapons deployment by states, where WMDs are deployed by terrorist groups the international risk is heightened. For example, in April 2018, WMDs were reportedly used by IS in Douma (Syria) against civilians, with at least 60

---

73 Legal analysis generally follows this conventional definition, as neither treaty law nor customary international law contains an authoritative definition of WMD. See David P Fidler, ‘Weapons of Mass Destruction and International Law’ (2003) 8(3) American Society of International Law 1, 1.
74 Arend (n 36) 97.
76 A. Mark Weisburd, The Use of Force: The Practice of States Since World War II (Penn State University Press 1997) 216.
77 Sadoff (n 1).
78 Ibid 524.
people dying. This triggered a perilous international response, with the US, UK and France launching over one hundred missiles in retaliation. The lawfulness of the action was questioned by Russia, which argued the Syrian regime flag was flying in Douma, meaning the government forces had taken back control and intervention was not lawful. This could have led to Syria commencing armed force under the justification of self-defence which would have provoked an open war between the US and Russia, along with each of their allies. Whilst Syria, along with Iran, have been singled out as rogue states which violate their non-proliferation obligations, there has been limited success in legal deterrence. This highlights the need for clear legal obligations, where there is a complex interplay of powers, between both state and non-state actors to ensure compliance and to maintain peace.

Notably, the use of WMDs in self-defence is only justified under international law where another state has already deployed WMDs. However, as evident through IS’s use of WMDs, terrorist groups are not bound by this principle. Further, it can be difficult to determine whether a state, or terrorist group, holds WMDs, as such weapons can be ‘easily concealed, delivered covertly and used without warning’. As a result, by the time a threat is imminent, it can be extremely difficult to mount a defence that does not involve the use of WMDs.

The temporal understanding of imminent threats is too rigorous to be applied to a state faced with WMD threats, particularly one emanating from a rogue actor. Sapiroa argues it would be ‘foolish, if not suicidal, for a state that believed its fundamental security interests were at risk to wait until the first nuclear attack’. For this reason, it has been suggested the ‘catastrophic consequences of a WMD attack merit a very liberal interpretation of imminence.’ States may need to assess the impact of WMDs and damages likely to result from the absence of mitigating action, in addition to how proximate an attack is, to realistically combat threats.

B Terrorism

---

82 Stewart and Chambers (n 80).
83 Ibid.
86 NSS 2002 (n 13) 15.
89 NSS 2002 (n 13).
Terrorism presents states with a non-state enemy, which in turn raises issues for international law. Terrorist groups are not bound by \textit{jus ad bellum}, meaning their actions can be rogue and unpredictable.\textsuperscript{90} Whilst it is now recognised that states can implement armed force against terrorist groups under the justification of self-defence,\textsuperscript{91} if implemented without sufficient justification such force could be interpreted as a direct attack on the territory of the sovereign state in which the defensive armed attack occurs.

In particular, the rise of IS presents a dangerous contemporary threat to international security, one which has been labelled an ‘existential threat.’\textsuperscript{92} In 2014, IS rapidly overtook more than thirty percent of Syria and Iraq, capturing billions of dollars’ worth of assets in the process.\textsuperscript{93} The rise of IS has fundamentally altered the concept of terrorism, creating an unprecedented challenge to the international community.\textsuperscript{94} Historically, terrorism has seen non-state groups carry out serious, but relatively contained periodic attacks. However, IS has been successful in capturing and holding state territory through the use of sustained and extreme violence.\textsuperscript{95} Whilst the US has claimed IS has been defeated and vowed to withdraw all troops from Syria, several US troops were killed in attacks in Syria claimed by IS in the aftermath of such pronouncements. This supports the argument that a hasty withdrawal by US will only reinvigorate IS, which is still very much holding territory in Syria.\textsuperscript{96} The Security Council has deemed IS a threat to international security,\textsuperscript{97} raising a legitimate expectation for the international community to legally response to the threat.

Terrorist groups should not be underestimated just because they are non-state actors. IS advocates for the commission of terrorist attacks worldwide. So far, IS has claimed attacks involving armed force in Europe, South East Asia, Africa and North America.\textsuperscript{98} Further, thousands of foreign fighters have joined the movement, which aims to establish a caliphate in western Iraq, eastern Syria and Libya.\textsuperscript{99} The 2017, attacks in Manchester and London (UK), were planned by a loose network of individuals alleged to have acted on behalf

\textsuperscript{90} Janne Halland Matlary, ‘Cannon Before Canon: The Dynamics of Ad Bellum Rule Change’ in Anthony F Lang and Amanda Russell Beattie \textit{War, Torture and Terrorism: Rethinking the Rules of International Security} (Routledge 1\textsuperscript{st} Ed 2009), 75.
\textsuperscript{91} \textit{Resolution 1368}, SC Res 1368, UN SCOR, 56th sess, 4370th mtg, UN Doc S/RES/1368 (12 September 2001).
\textsuperscript{93} Matthew G Olsen, ‘National Counterterrorism Centre Director Remarks’ (Speech delivered at the Brooking Institution, Washington, 3 September 2014).
\textsuperscript{94} Emil Aslan Souleimanov and Katarina Petrylova, ‘Russia’s Policy Toward the Islamic State’ (2015) 22(3) \textit{Middle East Policy} 66, 69-70.
\textsuperscript{97} \textit{Resolution 2255}, SC Res 2255, UN SCOR, sess, 70\textsuperscript{th} sess, 7590\textsuperscript{th} mtg, UN Doc S/RES/2255 (22 December 2015).
\textsuperscript{98} Kenny (n 95) 120.
\textsuperscript{99} Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters, UN SCOR 7272\textsuperscript{nd} mtg coverage, UN Doc SC/11580 (24 September 2014).
of IS. However, technology made the exact role of the individuals and the role of IS difficult to trace. Given the inability of states to readily track a terrorist group’s technological trail, identifying an imminent threat before it occurs is a challenge.

Recent technological advances, driven by globalisation, facilitate the instant exchange of information, people and money across the globe, which is of benefit to terrorist groups. Social media forums have been recognised as fertile grounds for recruiting and assembling extremists, which has been exploited particularly well by IS. The internet provides an unregulated medium for terrorism. Online radicalisation can enable a person to develop an intent to commit an act of terrorism within a few weeks. The internet also reduces the logistical obstacles of planning an attack. Previously, planning and sourcing weapons could take months for terrorists. Now, through online video sharing platforms such as YouTube terrorists can quickly prepare for an armed attack from their home. Evidently the technology available to terrorist groups now allows armed attacks to eventuate quickly.

This temporal reduction to the causal chain in eventuating a threat reduces the opportunity to detect a temporally imminent threat. If temporally imminent threats cannot be detected in time, states leave themselves open to armed attacked with no justification to protect themselves prior to the attack.

C Cyber Warfare

Adding to the growing threat of WMD and terrorism, a cyber-operation could amount to armed force, evoking the right to self-defence under Article 51 of the Charter. Where cyber-attacks, being attacks launched by computer networks or systems, result in death or physical destruction of sufficient scale, it is broadly agreed that the element of ‘armed attack’ is satisfied. An international cyber incident has not yet been unambiguously legally recognised as an armed attack, with no state claiming to be a victim of cyber armed force. However, as the following sections illustrate, technology is becoming more available for use by states and terrorist groups to orchestrate armed attacks. Additionally, cyber-operations can be set up to take place

101 Wright (n 32).
102 Brownlie (n 28).
103 Wright (n 32).
106 See, eg, Charles J. Dunlap Jr., ‘Perspectives for Cyber Strategists on Law for Cyberwar’ (2011) 5 Strategic Studies Quarterly 81, 85: ‘(Of course, a cyber technique can qualify as an armed attack’) and Matthew C. Waxman, ‘Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)’ (2011) 36 Yale Journal International Law 421, 431: ‘(T)here is considerable momentum among ... that some cyber-attacks . . . could constitute an ‘armed attack,’ at least insofar as those terms should be interpreted to cover attacks with features and consequences closely resembling conventional military attacks or kinetic force.’).
instantly, with the click of a button. This again, questions the effectiveness of imminent threats being assessed solely based upon timing.

International cyber warfare has become increasingly likely, with cyber-attacks proliferating in different forms. In April and May 2007, Estonia was the first state to be subject to cyber violence, in the form of large-scale distributed denial of service (DDoS) attacks,\(^{108}\) lasting over three weeks.\(^{109}\) This, amongst other things, seriously impaired the daily operations of government communications to Estonians, emergency services and Estonian businesses.\(^{110}\) Estonia’s parliament commented that ‘look[ing] at a nuclear explosion and the explosion that happened in our country in May, [we] see the same thing’\(^{111}\) and, in an address to the United Nations, warned that governments must develop ‘concrete technical and legal measures for countering cyber-attacks.’\(^ {112}\) This illustrates the destructive power inherent to cyber warfare.

In 2010 Stuxnet, a highly destructive computer worm, took control of Iranian computers involved in Iran’s nuclear program, destroying the centrifuges on which the computers operated. Stuxnet has been variously attributed to the US and Iraq; however, neither state has formally claimed responsibility.\(^ {113}\) It is estimated that Stuxnet completely halted Iran’s uranium enrichment operations, setting the country’s nuclear arms development program several years back.\(^ {114}\) Stuxnet was a ‘closer case’\(^ {115}\) for classification as an armed attack, as it resulted in actual physical damage. However, it was still classified as a DDoS. This may be attributed to the fact that Iran downplayed the events, with the President at the time commenting that Stuxnet was only ‘able to cause minor problems to some of [the] centrifuges.’\(^ {116}\) Iran had policy incentives to downplay the extent to which its nuclear program was compromised. It also may have wished to preserve its ability to launch similar attacks without substantiated armed force.\(^ {117}\)

---

\(^{108}\) A distributed denial of services is substantiated by viruses which overwhelm servers to systematically visit designated sites, meaning the server cannot perform its normal services. See, Hathaway and Crotoof (n 105) 837.


\(^{112}\) Toomas Hendrik Ilves, Address by the President of Estonia, UN GAOR, 62nd sess, (25 September 2007).


\(^{114}\) Thomas N Chen, Army War College Strategic Studies Institute Cyberterrorism After Stuxnet (2014).

\(^{115}\) Schmitt (n 104) 58.


More recently, between 2014 to 2016, Ukraine became victim to a series of large-scale cyber-attacks targeting the Ukraine Army’s Rocket Forces and Artillery. The virus took control of Ukraine artillery and posted the content onto online military forums. It is reported that the attack infected 80% of the Ukraine army’s artillery pieces, which had to be destroyed.\textsuperscript{118} This significantly reduced Ukraine’s ability to defend itself against an armed attack. Further, on 23 December 2015, malware was used against Ukraine’s power grid, leaving 200,000 of its inhabitants temporarily without power. The attack, which was also able to turn back-up sources offline, hit at the end of winter, leaving 20 per cent of the capital without electricity, lights and, in some cases, heat. This shows the shift from cyber attacks seeking to disrupt systems, to cyber-attacks seeking to harm targets by causing physical damage to, or corruption of, a system or significant infrastructure.\textsuperscript{119}

Technology will continue to develop, advancing the threat of armed force through cyber and similar mediums. This threat is increasingly recognised around the world. In 2018, the World Economic Forum labelled cyber-attacks as the third most likely global risk.\textsuperscript{120} Dinstein has argued that ‘[s]hat looked at the end of the twentieth century to be a sci-fi fantasy is increasingly becoming a realistic script in the twenty-first century.’\textsuperscript{121} US military leaders have warned of the need to defend against ‘cyber Pearl Harbour’ or ‘cyber 9/11’. In terms of use of cyber weapons, under US domestic policy, only the President can order a cyberattack.\textsuperscript{122} Likewise, in regards to use of WMD, only the President can order a WMD attack. This illustrates the seriousness of cyber warfare as it juxtaposes the potential consequence to that of a WMD attack.

The growth of cyber threats in recent years led to the production of the Tallinn Manual, which is a research compilation by a prominent group of cyber experts on the application of international law to cyber warfare. In assessing whether a cyber-threat could be detected as an imminent threat substantiating the use of self-defence, the Tallinn Manual uses an example of a logic bomb. A logic bomb is a malicious computer code that can be virtually inserted into a computer system. Once activated, a logic bomb can take full control of the device, meaning the system could in effect be used to cause an armed attack. This Tallinn Manual scenario states that where a logic bomb is inserted into a computer system ready for activation, the time of activation cannot be precisely determined. If a strict temporal test of imminent threats was to be applied, a state would be restrained from acting under self-defence until the logic bomb was activated. By this time, it would likely be too late to gain

\textsuperscript{119} Ibid.  
control of the system. Again, this illustrates the shortfalls in a temporal assessment of imminent threats.\(^{123}\)

It has been suggested, alternatively, that imminent threats could be substantiated as a test of the imminent last feasible opportunity to take effective self-defence action. In the context of a logic bomb, given that a state must immediately act to stop the kind of attack, this approach would allow a state to act before the logic bomb is activated.\(^{124}\) The last feasible opportunity test considers whether a failure to act at a certain moment in time could reasonably be expected to result in the state being unable to defend itself effectively when an armed attack actually commences.\(^{125}\) That said, as intriguing as this position may appear, there is currently no scope in the existing legal position to apply this test, further illustrating why the applicable legal framework needs to evolve in light of rapid technological developments.

IV LEGAL DIPLOMACY, SELF-DEFENCE AND IMMINENCE

Emerging security threats do not represent the only challenge in an environment where states’ ability to legally respond to imminent threats of attack is uncertain. Further risk stems from the differing understandings of their legal responsibilities expressed by states in their legal diplomacy. Legal diplomacy, which includes states’ public expressions of their interpretation of international obligations, can help shape the application of international legal obligations, particularly where their content is far from determinative. We rely on a legal diplomacy lens here because analysis based on it can be utilised to overcome perceived gaps and diversions in the law.\(^{126}\) Further, using a legal diplomacy lens provides insights into the types of amendments to obligations that states may be willing to consent to. Differing interpretations of international obligations (not only in relation to self-defence) are inevitable. However, legal diplomacy can be consulted to identify and sometimes to overcome difference.

More specifically, we investigated the public legal diplomacy pertaining to imminence and self-defence (Article 51 matters) of the five permanent members of the Security Council states, because doing so allowed us to chart a way forward which respects the positions held by those five states which, arguably, hold significant diplomatic power in global politics and international relations and without whom change with respect to Article 51 matters cannot be achieved.

We outline their respective positions in the following sections.

A Expansive Interpretation - France

France's legal diplomacy must be considered in light of implications arising from translation. In English, Article 51 invokes the inherent right of self-

\(^{123}\) Schmitt (n 104) 351.
\(^{124}\) Ibid, 352.
\(^{125}\) Ibid.
\(^{126}\) Ibid.
defence if an armed attack occurs. This wording creates scope for some ambiguity regarding whether the attack must have commenced or is instead imminent, being consistent with the Caroline test. In this vein, the French translation of Article 51 states ‘dans le cas où un Membre des Nations Unies est l’objet d’une agression armée’, which can be understood to allow a state to be the subject of an armed attack before the attack has taken place, rather than only if the attack is actually occurring or underway.\footnote{127}{David Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum’ (2013) 24(1) The European Journal of International Law 235, 242.} Whilst the ambiguity regarding Article 51 has been somewhat addressed through international customary law, this translation is important to consider, as it means France’s interpretation is fundamentally bound to be more expansive. Consistent with this foundation, France has a strong tendency to rely on the use of force as a solution to threats.\footnote{128}{Josef Mrazek, ‘The Right to Use Force in Self-Defence’ (2011) 2 Czech Yearbook of Public & Private International Law 33, 33. For example, France implemented armed force against Vietnam 1946, Egypt 1956, Republic of Zaire (Congo) 1978 and Chad 1978-1983. See Antonia Tanca Foreign Armed Intervention in Internal Conflict (Martinus Nijhoff, 1993).} In support, its legal diplomacy evidences engagement with the use of self-defence extensively. A 2013 Defence and National Security White Paper commissioned by the then French President, François Hollande, pointed to the relative inadequacy of international global governance, referencing Article 51 and its failure to address cyber-attacks or terrorism.\footnote{129}{The Government of the French Republic, Parl Paper, France, Defence and National Security White Paper (2013) 31.} The paper further noted that confirmation of the international law position ‘emerges all too slowly in crisis situations.’\footnote{130}{Ibid.} Additionally, France’s recent Strategic Review on Cyber Defence, published February 2018, outlines a clear intention to be proactive against cyber threats.\footnote{131}{The Government of the French Republic, Louis Gautier, Strategic Review on Cyber Defence (2018).} The review states ‘France cannot exclude the use of self-defence, in exceptional circumstances, against an armed attack that has not yet been unleashed’.\footnote{132}{Ibid 89.} Such statements illustrate France is willing to apply an expansive definition of self-defence to overcome what it considers to be short-falls in the current state of international law regarding self-defence against imminent threats.

Further, legal diplomacy in defence of France’s use of force applies the legal test for imminent threats loosely. For example, in 2015, Hollande relied on the justification of self-defence in response to Islamic State (IS) terror threats to justify the continued bombing of IS facilities in Syria,\footnote{133}{François Delattre Identical letters dated 8 September 2015 from the Permanent Representative of France to the United Nations addressed to the Secretary-General and the President of the Security Council UN SCOR, UN Doc S/2015/745 (9 September 2015).} despite the fact IS had not yet committed an armed attack directly against France.\footnote{134}{Barcelona Centre for International Affairs, Diego Muro, Why did ISIS attack France? (2015).} In the same year, a French Representative to the Security Council stated that ‘collective action could now be based on Article 51 of the United Nations Charter’, whilst
sponsoring Resolution 2249. Resolution 2249, called for states to act against IS, whilst complying with all their obligations under international law. France’s statement was made despite the fact Resolution 2249 makes no reference to Article 51 of the Charter, or self-defence generally. This can be seen as an attempt to tie Resolution 2249 to a broad understanding of imminent threats, promoting the idea that IS poses what should be considered an imminent threat without any evidence or lawful reasoning.

B Restrictive Interpretation - China

China’s interpretation of imminent threats and anticipatory self-defence is conversely relatively strict. China’s legal diplomacy can be extracted from officially stated legal positions in the context of self-defence specifically, and on the law of *jus ad bellum* in general. China’s legal diplomacy adopts a strict reading of the Charter’s limitations on the use of force that brooks no exception for state-led humanitarian intervention, and narrowly construes the exception for self-defence. This position is clearly at odds with France’s legal diplomacy. Commenting further on China’s position, Mincai contends it is China’s view that merely planning an armed attack does not itself create an imminent threat. This casts doubt on any right to self-defence before an armed attack has occurred and was illustrated in 1993, when China was the only permanent member of the Security Council to speak against the US’s claims to anticipatory self-defence in Iraq in Security Council discussions. It shows that even though states will continue to promote the justification of anticipatory self-defence, China will likely meet such justifications with condemnation.

As noted above, in 2005, the UN published a High-Level Panel report which confirmed that ‘imminent threats are fully covered by Article 51’. In response, China issued a position paper asserting that Article 51 should not be interpreted broadly, stating ‘Article 51 should neither be amended nor reinterpreted’. The position paper goes on to reference the Charter, stating it permits force where the Security Council has provided authorisation or under ‘the exception of self-defence under armed attack’. ‘Whether an urgent threat exists should be determined and handled with prudence by the Security Council’.

---

141 *In Larger Freedom* (n 66) 33 [124].
Council’. This can be understood as China stating that it is the Security Council which should assess imminent threats, rather than states self-assessing and responding to imminent threats.

China’s position is evidently founded in long-standing historical principle. In 1939, Mao Zedong, the leader of the Chinese communist revolution and founding father of the People’s Republic of China, stated; ‘If people do not attack me, I won’t attack them. If people attack me, I will certainly attack them. They attack me first, I attack them later’.

This statement was targeted at Zedong’s political rivals. However, the People’s Liberation Army, referring to China’s armed forces as a group, has adopted the slogan as a more general guiding principle. This principle is echoed through China’s Five Principles of Peaceful Co-existence (FPPCs) as outlined in the Chinese Constitution. The FPPCs, first stated in 1953, emphasise:

1. mutual respect for sovereignty and territorial integrity;
2. mutual non-aggression;
3. non-interference in each other’s internal affairs;
4. equality and mutual benefit; and
5. peaceful coexistence in developing diplomatic relations and economic and cultural exchanges with other countries.

These principles indicate a clear hostility towards interference through armed force for any reason.

C Use of Force by China and France in Practice

Despite differences notables in the legal diplomacy of France and China, both states have similarly applied the use of force under laxed interpretations of international law. In attempts to justify France’s assistance in air-strikes in Syria in April 2018, the French President, Emmanuel Macron, released a statement which spoke against the ‘the trivialization of chemical weapons.’ This statement attempted to legitimise the attack for the purpose of ‘collective security’; however, did not offer a clear legal justification. The language used failed to provide a clear argument linking collective security and the legal basis of self-defence. Instead the language hinted at the notion of armed reprisal which is not considered lawful under international law. Even if

143 Ibid.
145 Ku (n 138) 11.
146 Constitution of the People’s Republic of China, Preamble.
147 Ibid.
150 1979 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, GA Res 2625, UN GAOR, 25th sess, UN Doc A/8028 (1970) 123: (‘States have a duty to refrain from acts of reprisal involving the use of force.’).
France considered the action to be consistent with the justification of self-defence, states must articulate their legal views and provide a justification, as was held in the case of *Nicaragua v United States*. The reason for this is to allow other states to respond, so if a novel rule or exception to an existing rule is contended it can be consented to by states. Without such articulation, acts cannot be considered lawful. As such, France’s legal diplomacy following the use of force can be seen as an attempt to distort the international law, promoting an interpretation that is inconsistent with established custom.

Similarly, China’s legal diplomacy following the use of force is questionable. China claims that it ‘has been compelled to use force, and it has used its rights under the rules of self-defence in the UN Charter each time’ against India in 1962, the Soviet Union in 1969 and Vietnam in 1978. However, the use of force in these instances does not align with a strict interpretation of imminent threats. China defended its actions by applying factually weak territorial arguments, instead of relying on the justification of anticipatory self-defence, to avoid policy inconsistency.

More recently, China’s Foreign Minister, Wang Yi, has claimed that the military build-up in the South China Sea is a ‘resort to self-preservation and self-defence of its territorial integrity’, and should not be confused as acts of militarisation. This was subsequent to a note sent to the UN in May 2009 in which China claimed islands in the south China Sea and adjacent waters within the area bounded by nine short lines which have subsequently become known as the nine-dash line. The note asserted ‘China has indisputable sovereignty over the islands and the adjacent waters and enjoys sovereign rights and jurisdiction over the relevant waters’. However, it is contended these claims are an ‘unclear denotation of a claimed maritime zone or region, and are not legally authoritative’. Further, ‘China has never controlled the sea-lanes or impaired the freedom of navigation in the South China Sea.’

Whilst China purports to rely on strict provisions regarding self-defence, in practice its actions are more similar to states that apply an expansive definition of imminent threats as China extends its territorial claims to enable the justification of strict self-defence.

### D Extending the Temporal Dimension of Imminence – United Kingdom

---

151 *Nicaragua Case* (n 2) [207].
152 Ibid.
153 Ku (n 138) 13.
154 Ibid.
156 Charissa Yong, ‘China’s militarisation of South China Sea done in self-defence: Foreign Minister Wang Yi’ *The Straits Times* (Singapore, 4 August 2018).
157 Ibid.
158 *Notification to the UN from China*, CML/18/2009 (7 May 2009) (Note Verbale).
159 Rodolfo C Severino, ‘ASEAN and the South China Sea’ (2010) 6(2) *Security Challenges* 38, 38.
Recent legal diplomacy from the UK clearly rejects a solely temporal
determination of imminent threats. This is attributed to the fact that its
government considers the highest priority to be the safety and security of their
people.\(^{161}\) On 11 January 2017, the UK Attorney-General, Jeremy Wright,
presented a speech outlining the UK’s position regarding how ‘imminence’
should be interpreted in assessing a state’s use of force under the principle of
self-defence.\(^{162}\) It reflects a clear acceptance of anticipatory self-defence and
refers to the ‘Bethlehem Principles,’ which are a set of factors for determining
imminence as outlined by Daniel Bethlehem, former principal legal advisor to
the UK Foreign and Commonwealth Office. The Bethlehem Principles call for
assessment of five different factors when determining imminent threats.

These factors are:

1. the nature and immediacy of the threat;
2. the probability of an attack;
3. whether the anticipated attack is part of a concerted pattern of
   continuing armed activity;
4. the likely scale of the attack and the injury, loss, or damage likely to
   result therefrom in the absence of mitigating action; and
5. the likelihood that there will be other opportunities to undertake
   effective action in self-defence that may be expected to cause less
   serious collateral injury, loss, or damage.\(^{163}\)

These factors provide a more expansive framework for determining
imminence than just a temporal understanding. With reference to the security
threats outlined in the above section, factor three seeks to cover ongoing
terrorist attacks, factor four covers weapons of mass destruction, and the
factor five covers cyber warfare. These factors, not least factor five, support a
shift away from assessing imminence as a matter of when an armed attack will
occur, towards imminence being a matter of when defensive action must be
taken for it to have a reasonable chance of success.\(^{164}\) This seemingly applies
the legal principle expansively, arguably stretching the imminence doctrine
beyond its intended purpose under the Caroline test. Whilst this may be
justified, there has been no formal legal consent from states to amend the
position.

The UK has sought to reaffirm the established rules of international law
regarding self-defence whilst shaping understanding of the applicable
framework to apply to new threats. Wright confirmed in 2017 that whilst the
fundamental principles of law remain the same, the way law is applied does

---

\(^{161}\) See, Her Majesty’s Government, Prime Minister David Cameron, National Security

\(^{162}\) Wright (n 32).

\(^{163}\) Daniel Bethlehem, ‘Principles Relevant to the Scope of a State’s Right of Self-Defense
Against an Imminent or Actual Armed Attack by Non-State Actors’ (2012) 106 American
Journal of International Law 769, 771.

\(^{164}\) Adil Ahmed Haque, ‘The United Kingdom’s Modern Law of Self-Defence Part 1’ on Ryan
Goodman and Steven Vladeck, Just Security (12 January 2017)
not stand still. The meaning of imminence has changed in the context of modern threats compared to the 1830s, when the customary international law Caroline test was formulated. The Caroline test implies that a threat is ‘instant, overwhelming, leaving no choice of means, and no moment of deliberation’. The Bethlehem Principles are starkly more expansive; however, arguably this shift ‘is only [to be] expected, given both passage of time and changes in the nature of armed conflict’. Notably, the UK has articulated clearly that it does not support acts of self-defence for threats which have not crystallised but which might materialise in the future. This distinguishes its position from the doctrine of pre-emptive self-defence, which has been labelled a ‘destabilising and dangerously permissive approach’.

Nevertheless, the UK’s position has not been without some criticism. Hakimi has argued that without explanation of how the factors ‘relate to one another, or how much weight any particular one carries’, the position may be open to abuse by states. Factor three, in particular, reflects the pin-prick doctrine which permits defensive uses of force in response to a continuing pattern of attacks. This ultimately means multiple small-scale attacks could be considered collectively as armed force, for the purpose of justifying defensive armed force. This could result in self-defence being justified as responsive to numerous small attacks, rather than preventative of future attacks. It is for this reason that greater transparency over how the factors will be considered is required to ensure an adequate threshold or standard is reached before self-defence is implemented. Another strong criticism has been that the UK position fails to identify an adequate burden of proof, meaning a required evidentiary standard. Whilst the position deeply assesses different evidentiary issues to be considered when implementing armed force against an imminent attack, it does not consider what standard of evidence is required. The lack of an evidentiary burden promotes a subjective test, which may further dilute the already hazy international law restraint.

---

165 Wright (n 32).
166 Ashburton (n 16).
167 Wright (n 32).
168 Ibid.
169 Brandis (n 61).
172 Hakimi (n 170).
175 Ibid.
This issue has recently been considered in light of the *DCR v Uganda* case, which has been censured for failing to set out an evidentiary standard for legal assessment when considering the international law governing self-defence. The decision has been criticised for not only ‘fail[ing] to clarify the existing situation with regard to evidentiary standards... [further] in several passages, [but] it contradicted the standard that appeared to have been tentatively developing in the preceding jurisprudence of the Court: a standard that was employed in other parts of the same judgment’. The existence and attribution of an imminent armed attack is a question of fact, and one that should be subject to proof. However, the evidentiary standard applicable remains unclear, like many other international obligations. Without a level of required evidence it is easy for states to purport to justify the use of force on a range of different factors, without any real evidence.

Finally, the UK’s position should be limited by a secondary test that prevents pre-emptive self-defence. Whilst the UK contends it would not follow the principle of pre-emptive self-defence, this should be formalised in their suggested test and factors to be considered. Without such a limitation, whilst there is a material difference between the description of the UK’s position, in comparison to pre-emptive self-defence, there may be no real difference when applying the doctrines. This would mean that even though states claim to be acting in anticipatory self-defence, they are really acting against threats that have not crystallised, and more importantly, may never crystallise.

A Extending the Temporal Dimension of Imminence – United States

The United States has historically played a leading role in broadening interpretations of imminence with respect to self-defence, including claims to the right to exercise pre-emptive self-defence. Some claims have been made in veiled terms, whilst others have been more explicit. The series of US National Security Strategies (NSS), amounting to documents periodically prepared by the US President’s administration on security issues, and public statements by both the US presidents and legal advisors since 9/11 provide insight into state policies which seemingly support self-defence which veers towards the pre-emptive..

---

178 Ibid 163-164.
181 Haque (n 164).
182 Ibid.
183 Sadoff (n 1) 574.
185 NSS 2002 (n 13).
The administration of former President George Bush established the foundation of the US’s arguably rather open approach to self-defence in the post 9/11 era. In Bush’s 2002 NSS, he promulgated the US’s stance, claiming the US ‘will, if necessary, act pre-emptively’ in self-defence against ‘potential adversaries.’ The 2002 NSS went on to confirm the US will ‘eliminate a specific threat’ ‘even if uncertainty remains as to the time and place of the enemy’s attack’ and even ‘before [such threats] are fully formed.’ The 2006 NSS again confirmed the US ‘will, if necessary, act pre-emptively in exercising our inherent right of self-defence.’ Undoubtedly this latter statement conflicts with the generally accepted international law approach to imminence in self-defence.

Former President Obama’s administration later sought to restrict the position advanced by Bush. However, President Trump’s public statements have more recently sought to continue extending the interpretation of imminence. President Obama restricted the US’s legal diplomacy in the 2010 NSS, confirming the US will continue to comply with existing international law. However, he failed to directly address self-defence in the ‘Use of Force’ section. In the most recent 2017 NSS, President Trump also neglected to address self-defence and imminence. These omissions may be interpreted as an abandonment of the pre-emption doctrine. However, they could also mean the position was deliberately left open so interpretations of imminence can be extended. On 1 April 2016, Brian Egan, a US legal advisor, outlined President Obama’s interpretation on imminence. Egan noted an armed attack may be imminent ‘provided that there is a reasonable and objective basis for concluding that an armed attack is imminent’ despite ‘the absence of specific evidence of where an attack will take place or the precise nature of an attack’.

In the meantime, President Trump has actively promoted the US’s legal diplomacy through his statements and administration documents. For example, President Trump has explicitly canvassed the prospect of armed war with North Korea, Iran, Russia and China. Trump hinted at pre-emptive self-defence against North Korea if diplomacy failed, stating the US is ‘ready, willing and able’ to ‘totally destroy North Korea’. This would stretch

---

186 Ibid.
187 Ibid 16.
188 Ibid 15.
189 Ibid v.
194 Brian J Egan, ‘International Law, Legal Diplomacy, and the Counter-ISIL Campaign’ (Speech delivered at the American Society of International Law, Washington, 1 April 2016).
196 Donald Trump, ‘Statement by H.E. Mr. Donald Trump, President of The United States Of America at the 72nd Regular Session of The United Nations General Assembly’ (Speech delivered to the United Nations Headquarters, New York, 19 September 2017).
imminence to a situation where North Korea has not yet mounted any form of attack against the US. In February 2018, the Trump Administration released Trump’s Nuclear Posture Review (henceforth the NPR). The NPR states that the purpose of the US nuclear capabilities includes the ‘hedging against prospective and unanticipated risks’ and to ensure the US can ‘respond to possible shocks of a changing threat environment’. These vague principles support the extension of imminence beyond any temporal-based legal reasoning.

**Extending the Temporal Dimension of Imminence – Russia**

Russia’s recent legal diplomacy, revealed in particular through President Vladimir Putin’s public statements, show a distinct pivot from anticipatory self-defence to pre-emptive self-defence. That said Putin’s comments regarding self-defence under Article 51 of the Charter are at times contradictory. Nevertheless, they have confirmed Russia’s view that states have a right to self-defence pre-emptively. In 2003, Russia denounced the US’s attack in Iraq, claiming it was pre-emptive and lamented the ‘replacement of the international law with the law of the jungle’. However in September 2004, following the seizure of a Russian school by Chechen militants, Putin confirmed Russia was ‘seriously preparing to act preventively against terrorists’. This was followed by a public statement from the then Russian Defence Minister indicating Russia has the ‘right of pre-emptive strikes against terrorists anywhere in the world’. This clarifies Russia’s changing view of imminence, as a result of its security interests.

This pre-emptive logic is continuing to be applied, albeit in a veiled articulation. In 2015, Putin commented that Russia intervened in Syria ‘preventatively, to fight and destroy militants and terrorists on the territories that they already occupied, not wait for them to come to our house’. This stretches imminence to a potential prospective rather than current imminent threat. Further, Putin suggested to the Russian Parliament that Russia’s Crimea intervention in 2014 was an act of self-defence. Whilst self-defence was not directly articulated, Putin framed the requirements stating Russia had to respond to ‘the threat to the lives of citizens of the Russian Federation, our compatriots, the personnel of the military contingent of the Armed Forces of the Russian Federation deployed in the territory of Ukraine.’

---

198 Ibid xiv.
199 Ibid.
202 Ibid.
references were made by representatives of Russia during debates on the intervention in the UN organs. However, Putin subsequently reversed this position, and instead claimed Russia had acted for humanitarian purposes.

**Risk of Abuse and International Instability**

Whilst it may be necessary to broaden the interpretation of imminence past a temporal understanding in light of existing legal diplomacy, there is a fine distinction between anticipatory self-defence and pre-emptive self-defence. The legal diplomacy of the US and Russia reveals the current state of international law regarding the use of self-defence against imminent threats is open to abuse by states, to the extent that pre-emptive self-defence. This promotes violence and risks the fundamental international law principle of maintaining international peace. If pre-emptive self-defence was to be implemented, international tension would escalate immensely. This threat is amplified where allied states are concerned, as the threat of open armed war could become a reality. The reason for this is that any loose interpretations of international law could easily be perceived by a state as offensive use of force. If one state was to implement self-defence pre-emptively, being an illegal use of force, any subsequent armed force against that state would be lawful under the responsive self-defence justification. This could spark ongoing lawful self-defence attacks, with certain states allying together against others.

The US and Russia have never relied on pre-emptive self-defence as a justification for the use of force internationally, even though they have domestically articulated it. This may be because whilst state-specific policy tends to extend beyond international law constraints, states are not willing to promote their legal exceptionalism on the international stage. However, if either state was to implement pre-emptive self-defence in practice, the UN would have limited ability to condemn the violation given both states hold veto power on the Security Council. Use of veto power would be further justified by the UK’s position, which if loosely applied, would also allow pre-emptive self-defence in practice. Whilst use of the veto power carries strong diplomatic implications, the current state of international law regarding self-defence against imminent threats is open to exploitation. This is because use of the veto power, following pre-emptive self-defence would be challenged less seriously, given other states promote similar interpretations of imminent threats.

205 UN SCOR, 69th sess, 7124th mtg, UN Doc S/PV.7124 (1 March 2014) 3: (Churkin commented Russia deployed armed forces ‘with respect to the extraordinary situation in Ukraine and threats against the lives of Russian citizens’).

206 Bikova (n 204) 45.

207 Pre-emptive self-defence refers to the use of force preventively, to defend against latent or non-imminent threats; whilst, anticipatory self-defence refers to threats that have materialised but are yet to happen. See Our Shared Responsibility (n 62).


Russia and the US’s open encouragement of pre-emptive self-defence, in particular, can be seen as a Kriegraison attempt to undermine Article 51 of the Charter. The doctrine of Kriegraison contends that necessity knows no law.\textsuperscript{211} Whilst this position is recognised in domestic criminal law regarding the use of self-defence by humans, its implementation in the case of war is distinguished.\textsuperscript{212} Emphasis on the importance of necessity, through the broadening of imminence, which postulates that it is necessary for states to respond to threats that have not crystallised,\textsuperscript{213} is reminiscent of Germany’s military doctrine of necessity during World War I.\textsuperscript{214} This doctrine was strongly disputed in \textit{US v List} (the \textit{Hostage case})\textsuperscript{215} which stated that, whilst the defendant’s ‘considered military necessity, a matter to be determined by them, a complete justification of their acts, we do not concur in the view that the rules of warfare are anything less than they purport to be. Military necessity or expediency does not justify a violation of positive rules.’\textsuperscript{216} The US and Russia’s legal diplomacy should be recognised as an application of a legally discredited doctrine. This aspect of Russia and the US’s legal diplomacy can be attributed to their hegemonic nature. Hegemony refers to the belief by a state that its military power makes it a dominant state, above the usual constraints imposed by international law and within international relations. This position may be well sustained, particularly in terms of the US’s nuclear power. However, reliance on this doctrine in expanding the interpretation of imminent threats has been criticised. This ‘one-sided approach to the global balance of power’ has been labelled ‘the core of international instability’,\textsuperscript{217} undermining the strategic stability and security of a number of other states. In contrast, Professor Koh has commented that in light of contemporary threats, the international community must respond ‘in the spirit of the laws... applying principles, not merely power.’\textsuperscript{218} Pre-emptive self-defence is legally flawed as it applies a retroactive consideration of lawfulness, excluding any possibility of an ex post facto judgment of lawfulness.\textsuperscript{219} Pre-emptive self-defence is a step away from lawful reasoning, threatening international peace.

\section*{I. CHARTING A WAY FORWARD}

\begin{footnotesize}
\begin{footnotes}{10}{10}{10}
\footnote{Y Sandoz et al (eds), \textit{Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12th August 1949} (International Committee of the Red Cross, 1987) [1386].}
\footnote{Catherine Connolly ‘Necessity Knows no Law’: The Resurrection of Kriegsraison through the US Targeted Killing Programme’ (2017) 22(3) \textit{Journal of Conflict & Security Law} 463, 473.}
\footnote{Ibid 463.}
\footnote{Isabel Hull, \textit{A Scrap of Paper: Breaking and Making International Law during the Great War} (Cornell University Press, 2016) 25-26.}
\footnote{\textit{Hostage Case} (\textit{United States v List} (Wilhelm) and ors) (1948) 8 LRTWC 34.}
\footnote{Ibid 1255-1256.}
\end{footnotes}
\end{footnotesize}
Prevailing uncertainty surrounding the current state of international law regarding self-defence against imminent threats under both the Charter and customary international law undermines the international rule of law. Relying on the above analysis, in this section we propose a re-articulated international law position which attempts to resolve the shortfalls in the current law. We also propose formal and informal mechanisms to implement the proposed changes and suggest the most viable one. Ultimately, any change to an international law requires consent. Accordingly, we provide justification as to why a change is in the long-term interests of states, in particular of the five permanent members of the Security Council, along with the rest of the international community.

A Proposed Refined Position on Self-Defence and ‘Imminent Threats’

It is evident the current state of international law regarding self-defence against imminent threats presents serious shortcomings. Firstly, the emergence of new threats has created a need to move beyond a temporal understanding of imminent threats (above III). However, under current international law, if a state was to take an abiding approach and avoid the use of illegal force until a threat is temporally imminent, there are limited prospects of addressing the kind of threats states now actually face. Secondly, existing legal diplomacy illustrates diverse interpretations, with some states attempting to legally justify their position of imminent threats, even where it arguably extends beyond a lawful justification (above IV). This has seen an emergence of reasoning said to be ‘illegal but justifiable’.220 Such reasoning brings into question the viability of the international regulatory framework.

The following Table provides an overview of the issues presently surrounding the current state of international law regarding self-defence against imminent threats, and proposes a solution of how this position should be refined:

B Table of Proposed Redefined Position

<table>
<thead>
<tr>
<th>CURRENTLY</th>
<th>ISSUE 1: Contemporary international threats – Weapons of Mass Destruction (WMD), Terrorism, Cyber-attacks</th>
<th>ISSUE 2: Diverse legal diplomacy – France, China, UK, US and Russia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anticipatory self-defence:</td>
<td>Threatened states can act in self-defence, pursuant to Article 51 of the Charter, where a threat is imminent.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>In imminent Threats: In imminent threats are ‘instant, overwhelming, leaving no choice of means and no moment of deliberation,’222 they are proximate223 and non-latent.224</td>
<td></td>
</tr>
</tbody>
</table>

221 Ashburton (n 16).
222 Ibid.
223 Our Shared Responsibility (n 62) 54 [189].
224 In Larger Freedom (n 66) 33 [124].
WMD - can be detonated quickly, catastrophic consequence, limited success in legal deterrence where used by terrorist groups

Terrorism - growing rate, patterns of continued violence, armed attacks can eventuate quickly as a result of globalisation

Cyber-attacks - technological developments enable cyber-attacks to equate to armed attacks; difficult to detect as can be activated without warning

Accordingly, an extension of the current international law position is required as new threats are difficult to identify on a solely proximate assessment of imminence.

Analysis of existing legal diplomacy reveals:

**Significant Divergence**
- the lack of clarity regarding the current international law
- the requirement for a consistent position, rather than an unwritten exception used by certain states

**A Push to Extend the Meaning of Imminence**
- requirement for states to be clear and transparent in their legal reasoning
- the need for an adequate threshold/evidentiary standard of proof
- the risk of exploitation and pre-emptive self-defence under the current international law
- the risk of pre-emptive self-defence escalating international tension and sparking open armed war

**NEW POSITION**

**Anticipatory self-defence:** Threatened states can act in self-defence, pursuant to Article 51 of the Charter, where beyond reasonable doubt, it is the last feasible opportunity to act against an imminent threat AND the threatened state is demonstrably not acting pre-emptively against a threat which has not crystallised.

**Imminent threats:** Relying on the Bethlehem Principles, imminent threats are to be determined upon assessment of the following:

(a) the nature and immediacy of the threat;
(b) the probability of an attack;
(c) whether the anticipated attack is part of a concerted pattern of continuing armed activity; and
(d) the likely scale of the attack and the injury, loss, or damage likely to result therefrom in the absence of a mitigating action.

**C Formulation and Application of New Position**

The proposed refined position (PRP) is simultaneously reflective of realities which have emerged from legal diplomacy alongside its criticism. The UK position, as should be apparent, forms the basis of the PRP, as it not only offers an effective constraint in light of contemporary security threats, but also prevents pre-emptive self-defence. The PRP includes consideration of the five factors detailed in the Bethlehem Principles, which address the interlinked threats of WMD, terrorism and cyber-attacks. However, the PRP is further refined to emphasise assessment of the last feasible window of opportunity to respond to a threat. This prevents states from acting under self-defence excessively, which is considerably of the utmost importance. The other four

---

225 Bethlehem (n 163) 771.
Bethlehem factors are still included in the PRP, being considered auxiliary for the purpose of determining an imminent threat.

The PRP significantly contrasts the aspect of the current international law which relies on ‘no moment for deliberation’. Whilst this seemingly expands the exception, meaning force could be used more often, this is balanced against the evidentiary requirement. Even though modern threats require action earlier, this does not mean standards should be lax. Notably, it has been commented that whilst threats, such as cyber threats, can be detonated more quickly, detection technology has also improved, allowing states to detect potential threats. This means it will be possible to meet the standard required when deliberating whether or not to use force. The criminal evidentiary test of ‘beyond reasonable doubt’ is used, instead of the civil test of ‘on the balance of probabilities’ given the criminal nature of armed attack.

In applying this position, it is likely that states will not share their evidentiary evidence until after the attack. This is reasonable considering it could risk their national security interests. However, there is no reason this information should not be required if the use of self-defence under Article 51 of the Charter is questioned through international court proceedings or by the Security Council. Notably, this is not a substantive change. Under the current position, states are required to still explain their justification of self-defence, subsequent to the attack. Requiring evidence beyond reasonable doubt simply implements a standard, instead of leaving states unaware of evidentiary requirements.

**D The Challenge of Implementation**

Whilst we conclude that a refined position concerning imminent threats in self-defence is required (as well as possible), the mechanism for implementing our PRP must be considered. *The Statute of the International Court of Justice* specifies which primary materials should be used to determine international law, those being:

1. international conventions;
2. international customs, as evidence through general practice accepted as law;
3. the general principles of law as recognised by civilised nations;
4. ... judicial decisions and the teachings of the most highly qualified publicists of the various nations.

In light of this, the only way in which the international law can be altered through codification is by amending the relevant Charter provision or creating a subsequent treaty.

---

226 Ashburton (n 16).
229 *Statute of the International Court of Justice*.
230 Ibid art 38.
Amending the Charter provision or creating a new treaty is highly unlikely. Even though the Charter includes a mechanism for amendments, the consent threshold required is high. It is ‘extremely difficult to attain the necessary express agreement of states on such [vital problems] and it requires sometimes decades’.231 Any amendment must be adopted by two thirds of the members of the General Assembly, and subsequently ratified by two thirds of the members of the UN, including all permanent five members of the Security Council.232 Since the Charter came into force, this has only occurred five times in relation to procedural matters,233 which illustrates the power is rarely used and unlikely to be used to effect anything amounting to significant change.

The creation of a subsequent treaty is even more unlikely. A new treaty, being a substantial mechanism for change, would ultimately risk the veto power of the Security Council permanent five, as it could have a revolutionary flow-on effect. If a new treaty was considered, it would be necessary to reduce the veto power given the obstructing role it has played in addressing ongoing conflicts under the current treaty, being the Charter. Accordingly, there would be limited success in obtaining consent from the permanent five. As noted by James and Nahory, ‘[t]he P-5 are content with the present arrangement and oppose any changes that might dilute or challenge their power or expand their ‘club’.’234 This illustrates change through codification is not a viable solution.

Alternatively, the Security Council itself could use its position to amend and clarify the state of the current international law through a Security Council resolution. This option was used to effect change following 9/11.235 Notably, the resolutions concerned then relied on the Security Council’s power under Chapter XII of the Charter, meaning they were binding on all member states.236 That said, whilst Chapter XII of the Charter allows the Security Council to address individual threats, it does not give the Security Council the power to amend concepts of international law.237

The Security Council can make resolutions not pursuant to Chapter XII. Such resolutions would not be binding on states, being only recommendations.238 However, they would be of normative value. Resolutions ‘can, in certain circumstances, provide evidence important for establishing changing or

232 The Charter (n 5) art 108.
236 The Charter (n 5) art 25.
238 The Charter (n 5) arts 10 and 14.
establishing custom. Further, the benefit of using a Security Council resolution, instead of codified means, is that any challenges to the position (which are bound to occur over time in practice) can be overcome through a series of additional resolutions, meaning the position can be continually assessed and improved. Additionally, clarification and guidance through a Resolution would likely lead to an uptake of the PRP by states in practice, as states could not rely on loose justifications based on ambiguous interpretations. This state practice could subsequently amend the customary international law position.

E Justification for Redefining ‘Imminent Threats’

Whilst the state of the current international law position is open for exploitation, particularly by the permanent five themselves, the Security Council should not be devalued. It remains the authoritative global body tasked with conflict resolution and discussion pertaining to acceptable standards for the use of force. Without it, there would be no comparable platform to drive global efforts at peace. Further, the very existence of international law, in spite of its limitations, not least concerning enforcement, still serves as a stabilising factor in the face of global threats. Therefore it is within the international community’s interests to redefine the international law on self-defence in order to avoid a serious conflict which risks the current international regulatory framework.

Ultimately the PRP would reduce the ability of permanent five to use the veto power to protect themselves when relying on Article 51 of the Charter unlawfully. Clarity means the permanent five could not exploit the current state of international law regarding self-defence for their own gain. However, the PRP would ultimately protect the veto power in some respects as it reduces the likelihood of large-scale conflict resulting from an ineffective constraint against pre-emptive self-defence. Such a conflict would likely be attributed as a failure of the Security Council and could jeopardise the protected status of the permanent five and possibly the international rule of law itself. However, uptake by the permanent five remains unlikely as states rarely risk their short-term interest for a future risk due to their tendency to prioritise current issues in international relations. This illustrates an insurmountable inability to overcome transaction costs and persuade the

---

permanent five of the long-term benefits of amending the international law position.

F Conclusion

In conclusion, the international law on self-defence in light of imminent threats should be amended through a Security Council resolution that articulates the PRP. It is in the interests of the international community to have an effective clear constraint which contains contemporary threats. Additionally, it is in the permanent five’s long-term interests, and undoubtedly part of their remit, to articulate a clear position which removes any possibility of pre-emptive self-defence to ensure the maintenance of international peace and security. Whilst the permanent five may be reluctant to alter the position, sound reasoning illustrates that the current state of international law regarding self-defence against imminent threats is ineffective and insufficient. A clearer position, which is effective in the contemporary international environment is necessary to promote international peace and security.

***

Does the Common Law and Equity Provide an Adequate Framework for Digital Assets in Australia?

Joshua Mills*

This article explores the implications of a range of digital assets through a contemporary common law approach. It establishes the property status of digital assets by analysing historical concepts, in particular the juxtaposition between Blackstonian and Hohfeldian concepts of property. In establishing the potential of digital assets to be considered property it suggests new legal avenues for digital asset owners through application of traditional legal principles, causes of action and remedies regarding personal property. The article considers the potential of tort law and equity to provide an adequate legal framework striking a balance between digital asset owners, information technology service providers and third parties. It concludes with recommendations to encourage academic exploration of common law applications and endorses of legal mechanisms such as a tort of privacy, information fiduciaries and recognition of personal property rights in digital assets.

I INTRODUCTION

This article explores Australian law regarding ‘Digital Assets’, intangibles that are an artefact of digital technology and evolving social practice in our time but may be understood through reference to past law and principles.

The invention of the World Wide Web in 1989 by Tim Berners-Lee is a critical point in modern history and is recognised as a defining feature of the
Information Age.1 A time period characterised by the shift from traditional industrial age technology to information technology e.g. computers, smartphones, high speed digital communications, and general digitalisation of traditionally tangible assets. The Information Age spans a time period beginning around 1968 and as of 2019, on-going. The Age presents new legal issues, as the interaction between law and the digital landscape creates unique challenges. With traditional legal conduct occurring via this medium (often slowly addressed through statute law reform) it is crucial to consider whether Australian law is capable of providing an adequate legal framework for the protection and management of intangible yet valuable assets/property.

In stating the goals of this article it is not intended to dismiss or diminish the many complex legal queries raised by digital, web-based information technologies, such as criminal conduct, privacy, jurisdictional issues, trademark, etc. This article demonstrates that evolution of legal principles into the digital sphere has the potential to mirror traditionally established areas of law; indeed many of the issues discussed indicate such a trajectory, with wills and estates, and property law in the process of such a transition.2 That being said the focus of this article is on the personal property rights of individuals to various types of digital assets and the flow on effects of recognising the personal property status of digital assets. This article will seek to avoid analysis of issues beyond that, as they are deserving of their own comprehensive works.

A What are Digital Assets?

The umbrella term ‘Digital Assets’ is commonly utilised to collectively describe the plethora of assets, property and legal interests which exist and are facilitated by information technologies. The concept of digital assets has no standard legal definition and can vary widely, although a substantial definition within the Australian jurisdiction is provided the New South Wales Law Reform Commission’s (NSWLRC) ‘Access to Digital Assets upon Death or Incapacity’ consultancy paper. Which states digital assets as ‘any item of text or media that has been formatted into a binary source and over which a person may have some form of rights’.3 For the purposes of this article the definition of the NSWLRC paper will be relied upon, as it encompasses both current and future forms of digital assets. It is important to proceed with a broad definition due to the rapid evolution and trends in information technologies. Although the future of such technologies is uncertain, the current interpretation and legal status on digital assets remain a proverbial digital wild west,4 placing digital asset users at such a risk demands the attention of the law.5

---

3 New South Wales Law Reform Commission, Access to Digital Assets upon Death or Incapacity, Consultation Paper No 20, 2.4.
5 Financial Action Task Force (FATF), Guidance for a Risk-Based Approach to Virtual Assets and Virtual Asset Service Providers (2019). This publication by FATF develops and promotes...
This article asks whether the common law and equity are capable of providing an adequate framework for digital assets? It answers that question by identifying key issues, principles and current/potential responses in several fields of law, such as property, equity and tort law. The following pages draw on theoretical scholarship but are primarily founded on engagement with historic case and statute law. That foundation reflects the reality that law reform in Australia, when addressing new social practices or technologies, is evolutionary rather than revolutionary: we are pragmatists who adapt existing law and discard what is no longer functionally or philosophically relevant.

This article will examine digital assets and the legal issues they raise regarding the proprietary rights and interests of individuals. The article begins with an analysis of the conceptualisation of property, with a particular focus on the contrasting concepts of Sir William Blackstone and Wesley Hohfeld. Secondly the article will draw on traditional legal principles from multiple fields of law, and analyse how such principles could be utilised or transcribed to the digital landscape. Ultimately concluding that traditional common law principles are uniquely positioned to address the challenges of digital assets, but given the stagnation of the courts, must be enabled by a flexible statutory enactment, or to borrow the words of former High Court Justice Dyson Heydon AC QC, ‘Rigidity can bring strength, but it can also bring brittleness. And the abstract can be the enemy of the practical.’

B Scope of Digital Assets

The scope of digital assets is broad and fluctuating as technologies advance and trends emerge, at the time of writing the potential digital assets of a person encompasses everything from emails, photos, media, domain names, metadata, blogs, and online accounts, even SMS/MMS text messaging, that are stored via a binary format in computers/phones/devices/hard drives/cloud policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. Recommendations by FATF are recognised as the global anti-money laundering and counter-terrorist financing standard. The publication specifically addresses the potential criminal applications of Virtual Assets (primarily crypto-currencies) and establishes recommendations for the regulation of Virtual Assets across the globe but addressing not only the Virtual Asset Service Providers, but also any other official registered/licenced entities which engage with Virtual Asset activities e.g. financial institutions such as banks or security broker-dealers and like entities. The intergovernmental body of FATF highlights the necessity of clear and comprehensive regulation of Virtual Assets and by extension Digital Assets. The publication makes numerous recommendations to address criminal operations via Virtual Assets, such as, R1 – Risk Assessment Strategy, R2 – International Cooperation, R3-8 – Virtual Assets in the commission of certain crimes to be considered ‘property’ regardless of its value, R15 – Management and Mitigation of Virtual Asset Risks, and R30 – Regardless of jurisdictional classifications of property Virtual Assets identified or suspected of involvement in certain crimes are to be considered property within that jurisdiction’s legal framework. In the absence of such systems criminal operations have been, and will continue to exploit both Virtual and Digital Assets to the detriment of global jurisdictions.

Examples include social media accounts like Facebook, Twitter and Instagram, video game items or virtual personas, cryptocurrencies like Bitcoin, cloud storage systems, online accounts with licensing agreements such as Netflix, music streaming services, iTunes, even SMS and MMS messaging. Many of these examples are commonly interpreted as digital assets belonging to individuals, however none of them are ‘owned’ in the traditional sense, e.g. these assets are not characteristic of traditional property and do not possess the established bundle of rights of traditional or tangible property. These examples are often at the other end of the ownership spectrum, with substantial rights afforded to the host/service provider via end user licence agreements (EULA’s) or service agreements, with little to no rights to the asset afforded to the individual. The trajectory of digital assets is discernible from its inclusion in wills and estates, and emerging businesses dealing exclusively with digital assets, for example video game boosting (paying for a skilled player to improve a certain statistical measurement reflecting the accounts skill/esteem) services or social media management businesses. The reality is that the digital assets of individuals and businesses are increasingly a valuable asset in the Information Age and are an essential component of the digital economy. Digital assets are undoubtedly a critical component of modern economies, but current laws on digital assets often do not reflect this reality.

II DIGITAL ASSETS AND AUSTRALIAN PROPERTY LAW

A logical starting point for addressing the legal issues raised by digital assets is to first assess whether such assets are capable of classification as property, in particular property over which an individual has clear enforceable exclusive rights.

As of writing it remains unclear whether digital assets are considered property in the same sense as legislation which governs the disposal of property, such as the Succession Act 2006 (NSW), which in section 3 provides no clear definition of property but provides that property ‘includes any valuable benefit’. Accordingly encompassing intangible property such as copyright. Although many digital assets would fall under this definition, there are some which would be excluded via service agreements. An example would be Qantas frequent flyer points, which are non-transferable and cancelled upon the death of the user. From this example it is critical to assess whether digital assets either broadly, or specifically on a case by case basis, can be classified as property. To address this issue this article will closely examine common law

9 New South Wales Law Reform Commission, above n 3.
10 Howden, above n 8.
11 Van Niekerk, above n 7.
12 Yanner v Eaton (1999) 201 CLR 351; Minister of State for the Army v Dalziel (1944) 68 CLR 261, 284 (Rich J).
14 New South Wales Law Reform Commission, above n 3.
15 Succession Act 2006 (NSW), s 3.
16 Ibid.
17 QANTAS, Frequent Flyer ‘Terms and Conditions’, (11/03/19) cl 8.3.
18 For example, James Maree, Punit Jagasia, James Arvanitakis, ‘Citizen or Consumer? Contrasting Australia and Europe’s data protections policies’ (2019) 8 Internet Policy Review 2. One of the most substantial international developments in recent years in relation to digital data (a foundational component of digital assets) is the European Union General Data Protection Regulation (GDPR).
principles and concepts of property in an attempt to clarify current uncertainties in the law regarding digital assets.

A Property Rights in Digital Assets

The concept of property is often elusive,19 with no definitive definition or exhaustive process by which the limitations of property might be observed, although it is generally described as a bundle of rights entitled to a bona fide person over an object or thing.20 Much of the false thinking about property stems from the misconception that property is itself a resource,21 rather than a legal relationship with a thing or object.22 Property connotes a legal relationship between persons and objects or things, which waxes and wanes with societal influences. In other words, an object or thing is property when the legal relations of the individual and third parties recognise the legal rights one may or may not have over an object or thing. For this reason property is not inflexible or stationary and has been described as ‘the relations between persons in relation to things’,23 necessarily the concept of property requires some degree of ambiguity in order for new things/objects to fall in or out of such a concept. The concept of property has been regarded this way for some time, as Jeremy Bentham observed,

Property and the law are born together; take away laws and property ceases... Doubtless it is unwise to be dogmatic about the indicia of proprietary interest.24

The Australian courts have recognised and adopted some criteria to assist in determining and attributing property rights, but in heeding warnings like Bentham’s, the courts often recognise such criteria as guideposts rather than fixed rules or indicia. These criteria are described by Blackburn J in Milirrpum v Nabalco,25 and in the English case National Provincial Bank Limited v Ainsworth,26 as the right to use or enjoy, the right to exclude others and the right to alienate.27 In articulating this bundle of property rights Blackburn J clarifies that each of these rights is not a requirement of property nor that each of them may be varied or inapplicable, which suggests that these rights are merely a guidepost to whether an object or thing is capable of a proprietary

Protection Regulation (GDPR). The GDPR has been identified as rights-based protection model, which enshrines the rights of citizens to autonomous control and access of their digital data. Critically the GDPR features rights such as, the right to access data (to use or enjoy), right to data transfer (alienation), and even the right to erasure (to exclude). Given the extent of rights granted by the GDPR through a property/privacy law nexus, academic observers have described the GDPR ‘as granting quasi-property rights’; See also, Barbara Prainsack, ‘Logged out: Ownership, exclusion and public value in the digital data and information commons’ (2019) 6 Big Data and Society 1; Ira S. Rubinstein, ‘Big Data: The End of Privacy or a New Beginning?’ (2013) 3 International Data Privacy Law 2, 74-87.

20 Ibid.
25 (1971) 17 FLR 141, 171.
27 Milirrpum v Nabalco (1971) 17 FLR 141, 171.
interest. 28 Applying these rights to digital assets may yield persuasive evidence which supports a variety of digital assets being property in the traditional legal sense.

Firstly, the right to use or enjoy. Often the answer to this question hinges on the specific terms of the agreement between user and provider, which feature common requirements in order to maintain the intended purpose of the service. Aside from these requirements it has been noted that ‘it was not necessary that the dominion of the owner be absolute or fixed’, in order for proprietary interest to exist. 29 This is a key observation in favour of many digital assets being understood in terms of property rights as the presence of third-party hosts/providers does not wholly extinguish the property rights of users.

Secondly is the right to exclude others, which is a right in personam or private right of the owner exercisable against the general public and State. 30 A property right may differ in form or function depending on the type of property, often looking to the statutory framework and common law regarding a particular type of property. An example of such a process is clearly demonstrated in the High Court judgement Yanner v Eaton, 31 that considered the proprietary interest of wild animals under the Fauna Conservation Act 1974 (Qld). This process is noteworthy as the absence of a statutory framework for digital assets jeopardises the proprietary status and interests of digital asset users. This has led to uncertainty regarding property rights, specifically in applying rights to particular types of digital assets and if any variation of those rights is necessary. 32

Thirdly is the right to alienate, also referred to as a right to assign or transfer the ownership and associated rights from one individual to another. This is a characteristic right of property, in order for an individual to alienate property, that individual must possess the highest degree of authority and control over the object to be alienated. However such a right is recognised by Mason J in R v Toohey; Ex parte Meneling Station Pty Ltd, 33 as a non-essential component of property, similar to other rights mentioned there are circumstances under common law and statute which render a proprietary interest inalienable. 34 However there are some digital assets which understandably may be inalienable such as the previous example of Qantas frequent flyer points, or intrinsically personal and private digital assets such as Cloud Storage accounts. Other digital assets of significant value may not only be practical to alienate, but also of significant public benefit such as a Bitcoin donations to charities. 35

---

28 Ibid.
29 Willy v St George Partnership Banking Ltd [1999] FCA 33, 30-3 (Finkelstein J).
30 Milirrpum v Nabalco (1971) 17 FLR 141, 171; Australian Constitution s 51(3xxi).
31 Yanner v Eaton (1999) 201 CLR 351.
33 R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327, 342-3.
34 Re Potter (decd) [1970] VR 352; Local Government Act 1993 (NSW) s 45.
B Tangibility of Digital Assets, is it Property?

The conceptualisation of property has had many forms throughout legal history from Locke (1632-1704) to Bentham (1748-1832) and beyond, with the two most notable being attributed to Sir William Blackstone and Wesley Hohfeld which together strike a fascinating juxtaposition. The former’s concept of property is one of physicality, property is an assignable legal right which may be attached to an object in such a way that the owners physical dominion over the object is absolute, so as to exclude all others.36 Blackstone’s concept of property was founded on Roman law. It was the dominant view in Anglo-Saxon jurisprudence for roughly 144 years, until the publication of Wesley Hohfeld’s ‘Some Fundamental Legal Conceptions as Applied to Judicial Reasoning’ (1913),37 which has been recognised as the most comprehensive and compelling work on proprietory legal rights and liberties and the legal relations they create.38

Hohfeld’s concept of property is distinct from Blackstone’s, defining property as a legal creation concerned with the ‘relations between persons in relation to things’,39 which rejected Blackstone’s conceptual basis of property as a characteristic assigned to things or objects. In the nineteenth century the English courts had grappled with the issues created by Blackstone’s concept of property, where no tangible thing or object existed with which to affix the legal rights and interests. At the time the question was whether Trade Marks and Trade Secrets,40 which had no physical form with which to tie legal relations to, were capable of proprietary status and thus entitled to the legal rights and protections of property law. The gradual acceptance of intangible property by English courts and ultimately the western world over the course of the nineteenth century may have been the catalyst for the ensuing property paradigm shift.41 In that paradigm the Blackstone conceptualisation of property was superseded by Hohfeld’s, which has played a key role in redefining the scope of property as a concept, as it aggregated and solidified a shift in jurisprudence, and paved the way for the proliferation of intangible property interests and rights.

The ripple effects of this paradigm shift are observable in the Information Age,42 as the debate over the proprietary status of new intangibles ramps up the global jurisprudence teeters on the edge of recognising another form of intangible property, collectively known as digital assets. As established in preceding pages it is within the scope of the current concept of property to recognise digital assets as a new form of intangible property, entitled to same legal rights and protections as traditional intangibles and tangible property.

36 Australian Law Reform Commission, above n 33, 460-2.
37 Wesley Hohfeld, ‘Some Fundamental Legal Conceptions as Applied to Judicial Reasoning’ (1913) 23 Yale Law Journal 16.
40 Singleton v Bolton (1783) 99 ER 661; Morison v Moat (1851) 68 ER 492.
41 Wily v St George Partnership Banking Ltd [1999] FCA 33, 31-5 (Finkelstein J); Wesley Hohfeld, above n 38.
42 Manuel Castells, Above n 2.
There is even persuasive evidence to suggest some particular digital assets are already recognised as personal property, one such example is that of social media accounts with anecdotal and substantive evidence. Firstly, the treatment of Facebook profiles following the death of the user is characteristic of personal property in a number of ways. Facebook offers users several options for the management of their account in the event of their death, aside from immediate deletion the two main options offered to users is to memorialise the account or assign a legacy contact who can manage the deceased’s account on their behalf.43 The availability of such services suggests Facebook profiles are entitled to the right of alienation, that is, the right to assign or transfer ones legal interest in a Facebook profile to another party. As established in this article there is no formulaic concept of property,44 no exhaustive statutory definition, nor is there a particular set of legal rights which establish it.45 From a Hohfeldian perspective, Facebook profiles, and by extension other social media systems, which possess legal relations, are more likely than not to satisfy proprietary status in society and the courts. Secondly, the increasing utilisation of social media data in litigation proceedings, often as adduced evidence,46 gives further weight to social media profiles as important and valuable personal property. Counter-arguments to the notion of social media as property often focus on the unprecedented new technology while neglecting the underlying conduct remains substantially the same as traditional mediums, of which the common law is all too familiar.47

In the ‘Illusion of Newness: The Importance of History in Understanding the Law-Technology Interface’ Lyria Bennett Moses recognises a tendency of legal scholarship and policy makers to overlook historical precedent in favour of technology specific problem solving.48 Given the medium which new legal issues arise is unprecedented, as is the case with digital assets; however this does not necessarily mean the manifested legal problems are new or deserving of a neophobic response. The common law has grappled with intangible property rights for some time, a popular case demonstrating the dissemination of property rights, both tangible and intangible, is found In re Dickens; Dickens v Hawksley.49 The case considered the property rights of Charles Dicken’s heirs, with his sister-in-law inheriting the tangible property of his works and manuscripts, while his children inherited the intangible copyright in those works.50 This case serves as a demonstration of law recognising and separating rights regarding intangible and tangible property, something which is neither unique nor native to social media systems, but has a rich history of precedent from which rights and obligations can be drawn.

III TORT LAW AND DIGITAL ASSETS

43 Facebook, Memorialised Accounts https://www.facebook.com/help/1506822589577997.
44 Milirrpum v Nabalco (1971) 17 FLR 141, 171.
45 Ibid.
46 Crosby v Kelly [2013] FCA 1343, 2; X v Twitter Inc [2017] NSWSC 1300.
48 Lyria Bennett Moses; Nicola Gollan, above n 48.
49 In re Dickens; Dickens v Hawksley [1935] Ch 267.
50 Ibid; Lyria Bennett Moses; Nicola Gollan, above n 48.
Having established the potential for digital assets to be recognised by law as personal property, this article also considers the ramifications which may flow on from this proposition. Property is a longstanding cornerstone of western legal systems, accruing over centuries a unique position within the common law, with several legal disciplines developing unique principles and rules for the management and protection of property. One such area of law which has developed in this way is tort law, or the law of obligations, which serve to protect the rights of individuals in land, goods and the person. Although there is little case law on tortious digital assets, this section will seek to analyse the underlying principles of established torts and infer these principles application to digital assets.

The scope of torts is intentionally ambiguous, a reoccurring theme when examining common law principles such as those regarding property, as such torts have been described simply as ‘an act or omission by the defendant, constituting an infringement of a legally recognised interest of the plaintiff giving rise to a right of civil action’. While this definition and others are not exact or exhaustive it does suggest some key aspects which must be satisfied in order for a claim under tort to be successful. The key aspects of this definition which must be satisfied to invoke the aide of torts are; an act or omission either intentionally or negligently, the interference of that act or omission, with the legally recognised interest of the plaintiff.

Although the first two aspects are easily satisfied by many digital asset issues, for example the former would apply where an online account is hacked or jeopardised on unsecure systems, and the latter where online accounts are banned/suspended as a result of third party access. The third aspect presents a unique difficulty for digital assets, as they are currently not recognised in Australia as a legal interest of individuals but as this article has already discussed this may change/be in the process of changing.

**A Torts to Goods**

The nature of digital assets attracts primarily the torts in respect of goods, which is distinct from both torts to person and torts to property, as torts to goods apply to the personal property of individuals and any interference with the lawful owners possession of an object or thing by a third party. Torts to goods primarily concern the three torts of trespass, conversion, and detinue,

52 See, eg, Spence M. Howden ‘Text Messages as Property: Why You Don’t Own Your Text Messages, but It’d Be A Lot Cooler If You Did’ (2019) 76 *Washington and Lee Law Review* 1073, 1081-1088. Howden identifies a common theme amongst digital assets; that the generation of SMS and MMS messaging (or almost any digital asset) is a by-product of a contractual service agreement and as a result is incapable of being legally ‘owned’ in the same sense as traditional forms of property. The opposing view to this reasoning is the dominant argument of this article, that digital assets, including SMS and MMS messages are more than mere contractual by-products but are intangible personal property in their own right. And as a result are should be afforded the legal protections and rights discussed in this article.
53 Bernadette Richards, Melissa De Zwart, Karinne Ludlow, above n 51, 4.
55 Bernadette Richards, Melissa De Zwart, Karinne Ludlow, above n 51, 4-5.
with occasional variation in remedies or damages in certain circumstances.56 This section of the article will analyse each of these three torts to goods and assess their application to digital asset issues.

The common law has held that trespass to goods generally requires ‘an act of the defendant which, whether intentionally or negligently, directly interferes with the possession of the good which the plaintiff enjoys at the time of the act.’57 A key aspect of this definition of trespass to goods is possession, which requires the plaintiff to establish their possession over a good in order to satisfy the plaintiff’s standing to sue. This requirement of possession presents a unique challenge when attempting to apply principles of torts to goods to a variety of digital assets, as an intangible asset the actual possession of digital assets is often held by the service providers in trans-jurisdictional servers.

There are identifiable exceptions which may circumvent the possession requirement, firstly there are cases suggesting rare exceptions to the possession requirement, such as trespassory acts to goods belonging to a deceased estate prior to the dispensing of goods to successors,58 or trustees suing for trespass to goods possessed by a beneficiary.59 The cases of Burnard v Haggis,60 and Dunwich Corp v Sterry,61 are important exceptions to the possession requirement as they recognise the legal interests of individuals who do not hold possessor entitles to a good, yet were able to sue for trespass. For digital assets this may mean that an individual without possession of the digital assets may be able to sue for trespass to goods provided the plaintiff can demonstrate an alternative legal interest.

Conversion is another tort to goods that may have applications to digital assets; it has some overlap with both trespass and detinue but remains a distinct tort to goods. Unlike trespass, conversion does not require actual or implied possession of the good to establish a cause of action in tort. In Penfolds Wines,62 torts to goods were considered in detail by the High Court, with Latham CJ aggregating many definitions of conversion in an attempt to capture the essence of conversion, identifying

the grievance in conversion is the unauthorised assumption of the powers of the true owner. Actually dealing with another’s goods as owner, for however short a time and however limited a purpose, is therefore conversion.63

The common law has recognised constructive or immediate possession as fulfilling the possession requirement,64 and that a proprietary interest is sufficient in order for conversion to be accepted as a valid cause of action by the courts.65 This is a critical observation in favour of conversion’s application

56 Ibid, 84.
57 Ibid, 87; Penfolds Wines Pty Ltd v Elliot (1946) 74 CLR 204.
58 Burnard v Haggis (1863) 14 CB (NS) 4-5.
59 Dunwich Corp v Sterry (1831) 109 ER 995.
60 Bernadette Richards, Melissa De Zwart, Karinne Ludlow, above n 52, 110.
61 Ibid.
62 See, Penfolds Wines Pty Ltd v Elliot (1946) 74 CLR 204.
63 Ibid, Latham CJ.
64 Ibid, Latham CJ; Johnson v Diprose (1893) 1 Q.B. 512, 516.
65 Hunter BNZ Finance Pty Ltd v Mahoney [1990] VR 41; Bernadette Richards, Melissa De Zwart, Karinne Ludlow, above n 52, 97-98.
to digital assets, as a proprietary interest such as the interest established in Part Two is sufficient to enable a cause of action under conversion.

The third and final tort to goods identified by this article as possessing potential applications to digital assets is detinue, which shares some similarities with conversion in respect of unreasonable refusal to return goods to the plaintiff who has a proprietary interest or immediate possession entitlement over the good which is stronger than the defendants. But the tort of detinue is also broader in scope and the remedies it provides than conversion, and critically arises against a defendant who no longer has possession of the good at the time of the plaintiffs demand for return.

Detinue arises in three ways which are distinct from conversion. These are, when the defendant has lost possession of a good prior to the conversion of it, where the defendant has deviated from the terms of the agreement and in the course of the deviation the goods have been lost or destroyed, and where the goods have been lost or destroyed by the defendant's negligence. The tort of detinue with its reduced emphasis on possession, broad scope and distinct remedies would be capable of providing a cause of action for digital asset owners in common circumstances where their digital assets are withheld, lost or destroyed.

In conclusion, the application of current torts to digital assets is questionable, perhaps due to the historical origin of many property torts rooted in the Blackstone conceptualisation of property. With a physicalist concept of property many of the principles of conventional property torts are limited or centralised to tangible property, ultimately lacking the Hohfeldian concept of property on which property rights in digital assets relies.

This section has analysed some rare exceptions to physicalist principles which suggest the application of conventional property torts to digital assets while not impossible, would require significant and undesirable alterations. In recognition of this issue the common law jurisprudence has suggested a new tort for the invasion of privacy, this suggestion will be discussed in detail below.

B The Privacy Tort and Digital Assets

Having established some significant issues with the application of conventional property torts to digital assets in the Australian jurisdiction is it unsurprising to find other jurisdictions have developed and applied a new tort for the invasion of privacy. Such an invasion might involve abuse of digital assets. Many other common law nations have developed and implemented some form of common law civil action for serious invasions of privacy, with the US, UK, Canada and New Zealand developing their own unique approach.

66 Bernadette Richards, Melissa De Zwart, Karinne Ludlow, above n 52, 111-2.
67 Ibid.
68 See, eg, JF Goulding v Victorian Railways (1932) 48 CLR 157.
69 See, eg, Lilley v Doubleday (1881) 7 QBD 510.
70 Houghland v RR Low (Luxury Coaches) [1962] 1 QB 694; Bernadette Richards, Melissa De Zwart, Karinne Ludlow, above n 52, 111-2.
Although Australia does have some protections for privacy which apply in limited ways to digital assets, there remains no common law cause of action for breaches of privacy. In *ABC v Lenah Game Meats*, the High Court was asked to consider whether the common law of Australia recognises a tort of privacy as a valid cause of action. Ultimately the specifics of the case led to the High Court restraining itself from a decisive position on the existence of a tort to privacy. But the case does provide an authoritative aggregation of arguments for and against the creation of a tort to privacy and remains the preeminent High Court case on the subject. Many of the individual judgements recognise international developments of common law causes of action for breaches of privacy, while also identifying *Victoria Park Racing & Recreation Grounds Co v Taylor* [1937] HCA 45 as the authority restraining similar developments in Australian law.

The Australian High Court judgment *Victoria Park Racing v Taylor* has played a pivotal role in the development of Australian common law regarding property and property rights, but has also suppressed the development of privacy protections within the Australian jurisdiction. Since the 1937 decision Australia’s common law has lagged behind other common law nations, this is generally due to the Justices of the Court correctly observing that at the time there existed no common law right to privacy. In *ABC v Lenah Game Meats* the High Court identified some key misconceptions about *Victoria Park Racing* which has subsequently led to reconsideration of a common law tort to privacy, with some lower courts recognising the existence of such a tort.

Firstly, in *Victoria Park Racing*, and also in *ABC v Lenah Game Meats* the judgements considered whether a common law tort to privacy existed and if so, did that right apply to corporate entities. Critically neither case considered the existence of an individual person’s protection of privacy via a common law mechanism such as a tort to privacy. It was even identified in *ABC v Lenah Game Meats*, that public policy interests in corporate

---

72 See, eg, *Privacy Act 1988* (Cth), pt III.
73 See especially, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63.
75 See especially, *Victoria Park Racing & Recreation Grounds Co Pty Ltd v Taylor* [1937] HCA 45.
76 Ibid.
78 Above n 76.
80 Above n 76.
81 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [111], [126-32] (Gummow and Haney JJ).
transparency, freedom of political communication,82 or qualified privilege information are incongruent with the concept of corporate privacy.83

Secondly, another misconception regarding Victoria Park Racing was that it decisively extinguished or precluded a tort to privacy.84 Instead, it has been observed the judgement rejected the proposition that under the head of nuisance the law recognised a right to privacy as a valid cause of action. And that the proposition of a tort to privacy was still open to deliberation in future proceedings; 85 such a position is supported by Murphy J identifying ‘developing torts such as unjustified invasion of privacy’ in Church of Scientology v Woodward.86 While the Australian jurisprudence would undoubtedly contribute its own unique characteristics to the development of a tort to privacy, it would not do so without careful consideration of international common law jurisdictions. It is therefore important to analyse these international developments to understand the potential form, function and scope of a tort to privacy in Australia.

Although the Australian jurisprudence has been hesitant to recognise a common law protection of privacy many international common law nations have surged ahead with a variety of unique legal mechanisms for the protection of individual privacy. Perhaps even more uniquely many international developments are a direct result of common law evolution, whereby judicial innovation has resulted in substantive change instead of statute led initiatives.87 For the purpose of relevance analysing the variety of torts to privacy across other jurisdictions will be supplemented by analysis of the authoritative UK case that considered the application of the tort to privacy to a digital asset. In Vidal-Hall v Google,88 Tugendhat J considered the application of a tort to privacy to a metadata collection process. The plaintiff submitted that the defendant (Google) had committed a tortuous act in collecting the metadata of the plaintiff and utilising that data to sell targeted and personalised advertisements to the plaintiff, claiming damages for distress. The case built upon and solidified previous UK judgements which affirmed the existence of a tort of misuse of private information such as OBG Ltd v Allan and Douglas v Hello!.89

Tugendhat J differentiated the tort to misuse of private information from other legal causes of action, namely a breach of trust and confidence under equity, which his honour held as characteristic of confidential information and thus distinct from private information.90 The judgement also recognises common law protections of privacy, including the tort to privacy, are not well settled in law and continue to rapidly develop.91 Although not binding on Australia the UK’s common law developments have provided the jurisdiction with a starting point from which to build a sturdy

---

82 Ibid, [217] (Kirby J).
84 Ibid, [105-111] (Gummow and Hanye JJ).
87 Above n 78.
common law framework for the management and protection of digital assets. A benefit of Australia’s stagnation regarding digital assets is a wealth of international models, both statutory and common law, which can be drawn upon and analysed to provide the best possible legal framework for digital assets. But as this article continues to demonstrate the Australian legislature and judiciary need to take action before the detriments of delay outweigh the benefits.

IV EQUITY AND DIGITAL ASSETS

The legal entity of equity provides an alternative avenue for the protection and management of digital assets, one which is not constrained by property conceptualisation or fixated on the tangibility of goods/property.

A The State of Australian Equity

Equity is an elusive legal concept originating in the English Court of Chancery, the conceptualisation of equity has been described as measuring the chancellor’s foot,92 with foot being the conscience of the Chancellor. Modern equity concerns itself with the rigidity and harshness of the common law and will seek to aid those whose trust and confidence leave them vulnerable to the common law pursuant to principles of conscience, fairness, equality and discretion.93 Despite criticisms equity has grown over time, developing its own unique principles and remedies, ultimately becoming a distinct and important area of law. Today equity is a profoundly powerful and flexible legal instrument of common law systems such as England, Australian, New Zealand and Canada.94 Within the Australian jurisprudence there are few areas of law that generate as much passion and reverence as equity, demonstrable through generations of High Court Justice’s handling of equity with delicacy and enthusiasm.95

B Equitable Interest in Digital Assets

The application of equitable principles and remedies to proprietary rights in digital assets relies on the specific digital asset satisfying at least one of the four kinds of equitable interest, these are:

Equitable Proprietary Interests in specific property;

---

92 Frederick Pollock (ed), The Table Talk of John Selden (Quaritch, 1927) 43.
Mere Equities in specific property;
Equitable Proprietary Interests in respect of, but not in, specific property; and
Personal Equities, being equitable interests that are neither interests in, nor interests related to, specific property.96

Of the identified equitable interests i) and ii) generally concern themselves with interests in real property, i) is the strongest or most substantial equitable interest, illustrations of such interests are the interests of a beneficiary under a trust,97 the interest of a mortgagor in the mortgaged property,98 or the interest of a personal representative who has a lien on the assets of a deceased estate to satisfy his right of indemnity against those assets.99 While it remains a possibility for digital assets to be under i), it is unlikely to be an appropriate recognition of equitable proprietary interests in digital assets due to the intangibility and technicalities of digital assets. Similarly a mere equity in specific property generally concerns itself with equitable interests in real property, which the leading case on mere equities demonstrated in, Latec v Hotel Terrigal.100

The two remaining kinds of equitable interest concerns themselves with both real property and personal property, as this article has identified many digital assets are partially or wholly characteristic of personal property. The equitable interest in iii) is commonly illustrated by cases where a beneficiary to an administered estate of a deceased person, does not obtain a proprietary interest in any of the assets that comprise that estate.101 In other words the beneficiary of a deceased estate does not receive a proprietary interest in the assets of the deceased, but merely an equitable interest in the proper administration of the estate by the legal representative or administrator.102

Given the emergence of digital estate planning in recent years,103 such an equitable interest would effectively deal with the administration of deceased’s digital assets according to their will. The Administration Acts do not specifically address the rights and powers of administrators to manage, access or otherwise administer the digital assets of deceased estates.104 The combination of the equitable interest iii) and the statutory uncertainty of the Administration Acts regarding digital assets results in a substantially detrimental impact on the fiduciary obligations of estate administrators. Potentially causing significant delay, incurring additional costs for court orders to access digital assets, or improper/incomplete administration of the

96 Denis Ong, Ong on Equity (Federation Press, 2011) 1; Phillips v Phillips (1862) 45 ER 1164, 1167.
98 Casbourne v Scarfe (1737) 26 ER 377.
100 Latec Investments Ltd v Hotel Terrigal Pty Ltd (In Liq) [1965] HCA 17.
101 Dennis Ong, above n 97, 13; Commissioner of Stamp Duties (Qld) v Livingston [1965] AC 694; Official Receiver in Bankruptcy v Schultz (1990) 170 CLR 306.
102 Kennon v Spry [2008] HCA 56.
103 David Toole, above n 3.
104 Probate and Administration Act 1898 (NSW); Administration Act 1903 (WA); Administration and Probate Act 1929 (ACT).
estate, all of which would constitute a breach of the legal representatives’ fiduciary duties as administrators of estates.105

The fourth and final kind of equitable interest recognised by the courts is that of personal equities.106 In National Provincial Bank Ltd v Ainsworth Lord Wilberforce observed four property characteristics that must be satisfied in order for an equitable proprietary right or interest in an asset to be found.107 These being; it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.108 While some forms of digital assets could clearly satisfy Lord Wilberforce’s characteristics, e.g. the collection and safe storage of digital documents, files, data, or media in cloud storage systems. Others would appropriately fail, and may only be recognised as personal equities such as virtual assets/items or online accounts/avatars which accumulate value through interaction with virtual communities. By their nature virtual assets often lack definability, identification by third parties, assumption by the third parties, and permanence or stability.

V EQUITABLE REMEDIES AND DIGITAL ASSETS

Although this article concedes there is limited authority to support the application of equity to digital assets as an inevitable development, it will attempt to analyse, infer and demonstrate through analogous reasoning the possible applications of equitable remedies to digital assets. This article will seek to demonstrate that equitable principles should deal with digital assets, are capable of dealing with the unique difficulties presented by digital assets, and in the absence of more appropriate or flexible remedies must deal with digital assets.

The equitable principles (often encapsulated in maxims) which underpin and permeate all facets of equity are essential to the continuing development of equity, such principles are expressed clearly and creatively in the remedies equity can provide. In the following section this article will seeks to analyse the applications of equitable remedies to digital assets, and in doing so demonstrate the potential of equity to provide a strong yet flexible framework for the protection and management of digital assets.

A Applications of Fiduciary Relationships to Digital Assets

A powerful pillar of equity is the concept of fiduciary relationships; such relationships prescribe duties and obligations upon the involved parties and generally require one of the parties to subordinate its own interests to the interests of the other party.109 There are two criteria which must be met in order for a fiduciary relationship to found and enforceable by Australian courts, these were identified in Hospital Products by the NSW Court of Appeal, and endorsed by the High Court as:

A fiduciary is someone who, either expressly or impliedly, undertakes to act in a matter in the interests of another person; and

105 Bird v Bird [2013] NSWCA 262; Barnes v Addy (1874) LR 9 Ch App 244.
106 Dennis Ong, above n 97, 17-9.
108 Ibid.
109 See especially, Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41, 123; Furs Limited v Tonkies (1936) 54 CLR 583, 590.
who, either expressly or impliedly, undertakes not to act in his/her own interests in the matter to which the first mentioned undertaking relates.110

The crux of fiduciary relationships has been identified as one of implicit dependency,111 which is the underlying equitable principle of fiduciary relationships. That in a relationship where one party is dependent upon or places trust in the other party, and that other party assents, recognises or otherwise acknowledges the position of dependence or trust. Such a relationship attracts the protection and remedies of equity, distinct and separate from principles of common law.112 In Hospital Products the High Court also identified the existing categories of fiduciary relationships,113 critically the judgement also reinforced and solidified the notion, ‘there is no reason to suppose that these categories are closed’.114

With the categories of fiduciaries recognised and supported by Australian precedent as open, the discussion of new categories of fiduciary relationships is essential to the healthy evolution of Australian equity. As this article has identified the legal issues posed by digital assets are broad in scope, encompassing property rights and subsequently property law, tort law, privacy law and even equity. In contemplation of this leading US legal scholar Jack M. Balkin has developed and coined the term ‘Information Fiduciary’.115 The concept of an information fiduciary according to Balkin, recognises the special relationship between technology companies and their customers/end-users.116 Many online service providers and cloud computing companies collect, aggregate, analyse, use, sell and distribute the personal information of their customers/users.117

Balkin contends that this relationship possesses the characteristics of a fiduciary relationship, with the customer/user in a position of vulnerability, dependence, and trust while technology companies are in the position of power, influence and control. Through analogous reasoning Balkin compares the relationship between online service providers and their customers/users to traditionally recognised fiduciary relationships. He observes that fiduciaries often perform professional services or otherwise manage money or property on behalf of their client, principal, beneficiary, etc. a consequence of which is the fiduciaries exposure and access to personal information, which has the potential to be misused to the detriment of user interests. Such a relationship is not only characteristic of recognised categories of fiduciaries, but synonymous with the foundational principles of equity, and demands the protections and remedies it offers.

110 Ibid, 206; Dennis Ong, above n 97, 48.
111 Johnson v Buttress (1936) 56 CLR 113, 134-5; Breen v Williams (1996) 186 CLR 71, 82.
112 Dennis Ong, above n 97, 60-4.
114 Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41, 68, 96; Tate v Williamson (1866) LR 2 Ch App 55, 61.
116 Ibid.
Importantly, such a position is already gaining traction in Australian courts, Pembroke J in X v Twitter recognised an equitable obligation arising where a third party comes into possession of and is put on notice of confidential information illegally obtained, that party is liable to be restrained from publishing the information.\cite{118} While not going as far to say the obligation arose from a fiduciary obligation, the case demonstrates the realistic applications of equity to digital assets.

The creation of an Information Fiduciary category would attract traditional duties and obligations of fiduciary relationships. Of the many duties owed and defences available to fiduciary relationships there are a few of particular relevance to digital assets. Where a fiduciary has breached their duty, and the plaintiff (the person to whom the fiduciary duty has been so breached) has suffered harm as a result of the breach, then the plaintiff is entitled to recover compensation for the loss from the delinquent fiduciary.\cite{119} Such a compensatory scheme would have wide applications for digital assets, where a digital asset is lost, shared, destroyed, or otherwise interfered with contrary to the best interests of the asset owner, that owner could seek remedy against the fiduciary breach under equity.

\section*{B Remedies of Equity}

Equitable remedies are perhaps the greatest testament to the power and principles of equity; they offer plaintiffs a variety of flexible remedies pursuant to principles of conscience, fairness, equality and discretion.\cite{120} While there are an extensive range of equitable remedies, some are broad in scope such as injunctions; others are tailored to specifically redress a particular action, an example could be tracing which has been observed as a legal process, but also retains some characteristics of a proprietary remedy.\cite{121} Given the myriad of equitable remedies it is necessary to identify the remedies which are most relevant and applicable to address the issues posed by digital assets. This article identifies the equitable remedies of injunction, equitable estoppel, constructive trust, and account of profits as possessing relevant and viable applications to digital assets. In this section these equitable remedies will be analysed in order to determine their potential applications to digital assets.

\subsection*{Injunctions}

In \textit{CSR Limited v Cigna Insurance Australia Limited}, Dawson, Toohey, Gauldron, McHugh, Gummow and Kirby JJ observed:\cite{122}

\begin{quote}
It should be borne in mind that the term ‘injunction’ in the parlance of equity has no fixed definition and that it is legal usage which decides which court orders are to be identified as injunctions.
\end{quote}

As a result the use of an injunction as an equitable remedy has a broad, perhaps fluctuating scope which has also been described by Gaudron J in \textit{ABC v Lenah Game Meats} as, ‘any order by which a court commands a person to

\begin{flushleft}
\begin{itemize}
\item \cite{118} Dennis Ong, above n 97, 17-19; \textit{Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)} (1984) 156 CLR 414, 438.
\item \cite{119} \textit{Nocton v Lord Ashburton} [1914] AC 932; \textit{Maguire v Makaronis} (1997) 188 CLR 449.
\item \cite{120} Anthony Mason, ‘The place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 Law Quarterly Review 238, 239.
\item \cite{121} \textit{Attorney-General (Hong Kong) v Reid} [1994] 1 AC 324.
\item \cite{122} \textit{CSR Limited v Cigna Insurance Australia Limited} (1997) 189 CLR 345, 390.
\end{itemize}
\end{flushleft}
do, or refrain from doing, some particular act.’ Naturally not all court orders are injunctions, for example, court orders authorised by legislation but not by equity would not be an injunction, but the observation of Gaudron J in *Lenah Game Meats* serves as a testament to the flexibility of equitable remedies.

Injunctions would be useful for redressing all manner of digital asset issues, with an extreme case demonstrated in the NSWSC case of *X v Twitter Inc* [2017] NSWSC 1300, in which a world-wide injunction was ordered by the court to prevent all publication and distribution of the plaintiffs confidential information on the defendant’s website.

Injunctions would also be able to address other digital asset issues by affording plaintiffs options for the restoration of suspended/banned accounts, or restricting the collection, use, distribution and sale of metadata. Unlike other legal mechanisms this thesis has discussed, injunctions are not bound by common law rules nor does it establish guaranteed rights. As an equitable jurisdiction of the courts injunctions are a discretionary remedy, which supplements the common law only where the common law is inadequate.

**Estoppel**

Another equitable remedy which may prove useful to the protection and management of digital assets, and comprise a common law and equity framework for digital assets is equitable estoppel. Estoppel is a collection of common law and equitable protections against detriment flowing from one party’s change of position. Although there are three distinct forms of estoppel, these being; estoppel by conduct, promissory estoppel and proprietary estoppel, there is a consistent trend in recent decisions indicating the emergence of a single, overarching doctrine of estoppel which straddles both the common law and equity. However the subsets of the doctrine of estoppel remain a useful tool for analysing the applications of the doctrine, for the purposes of this thesis the most relevant of these to consider is proprietary estoppel. Which is a collective term used to describe circumstances where the operation of estoppel results in the acquisition of an interest in property, this may be in real property, chattels, chooses in action, or for the purposes of this thesis digital assets.

**Constructive Trust**

There are a number of unique equitable remedies developed specifically for breaches of fiduciary relationships that are worth considering in light of Balkin’s ‘Information Fiduciary’ thesis. One such equitable remedy arising from a fiduciary relationship which would be both relevant and reasonable to apply to some forms of digital assets is the constructive trust. Which is a

---

123 *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* (2001) 208 CLR 199, 231 [60].
124 Dennis Ong, above n 97, 124.
125 See especially, *X v Twitter Inc* [2017] NSWSC 1300.
126 *Chancery Amendment Act 1858* (UK); *Bristol City Council v Lovell* [1998] 1 WLR 446, 453; *Cardile v Led Builders Pty Ltd* (1999) 198 CLR 380, 396.
127 *Thompson v Palmer* (1933) 49 CLR 507, 547.
flexible and distinct equitable remedy, often arising in fiduciary relationships where one party is deemed by the court to be a trustee of property, while the other party is deemed the beneficiary. Constructive trusts are particularly useful at preserving the property interests of individuals in situations where the restoration or return of the asset is impossible, impractical or undesirable.

This is demonstrable by a number of cases which utilise constructive trusts over assets or profits derived from breaches of fiduciary duties, such as *Boardman v Phipps*,129 and *Furs Limited v Tomkies*.130 As an alternative to equitable compensation and equitable damages constructive trusts present a flexible remedy which preserves the proprietary rights and interests of digital asset owners. Where a fiduciary breach has procured profits, the courts have held the plaintiff is entitled to either monetary compensation or to be made the beneficiary of a constructive trust of those profits.131 An interesting application of this remedy is demonstrated by considering the previously discussed topic of information fiduciary. If the category of information fiduciary proposed by Jack Balkin were accepted and recognised by the courts,132 circumstances where an information fiduciary breaches its duties and in doing so gains a profitable asset, would be subject to the protections and remedies of equity.133 This would arise in many forms of digital assets, such as online service providers who collect, use, distribute and sell the metadata generated by users. This would recognise both the personal and proprietary interests of users in digital assets,134 while establishing online service providers as constructive trustees. Alternatively constructive trusts have also been utilised where parties take part in a joint venture, under which promises or assumptions may have been made and relied upon to the detriment of an involved party.135

**Account of Profits**

Where a fiduciary has made profits from a breach of a fiduciary duty, the person to whom the fiduciary duty is owed (the plaintiff) is entitled to claim those profits from the delinquent fiduciary.136 The courts have described such a remedy as an account of unauthorised profits, resulting in an equitable debt owed by the fiduciary to the plaintiff.137 The equitable remedy is distinctly a personal remedy,138 as it does not convey proprietary rights to the plaintiff, as is the case with a constructive trust. The courts have had great difficulty in articulating the exact indicia of an account of profits and a constructive trust, although it appears from the observations of Mason J in *Hospital Products* that the nature of the benefit, profit or asset obtained through a fiduciary

---

129 *Boardman v Phipps* [1967] 2 AC 46.
130 *Furs Limited v Tomkies* (1936) 54 CLR 583.
133 *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324.
134 Ibid; *Brady v Stapleton* (1952) 88 CLR 322.
135 *Baumgartner v Baumgartner* [1987] HCA 59.
136 Dennis Ong, above n 97, 160.
137 *Regal (Hastings) Ltd v Gulliver* [1942] UKHL 1, [9] (Lord Russell of Killowen).
breach may be a determinative factor.\textsuperscript{139} An account of profits resulting in an equitable debt would be utilised in much the same way as a constructive trust, but rather than establishing a proprietary interest the remedy would simply require the fiduciary owe a debt to the plaintiff minus their due allowance for the fiduciaries ‘expenses, skills, expertise, efforts, capital and resources’.\textsuperscript{140}

\section*{VI CONCLUSION}

In conclusion, this article has sought to demonstrate the capacity of the common law and equitable principles to provide an adequate framework for the protection and management of digital assets. In doing so this article has provided a proprietary conceptualisation of digital assets pursuant to the Hohfeldian concept of property,\textsuperscript{141} which is consistent with modern jurisprudence. Subsequently, the flow on effects of a recognised property interest in digital assets have been analysed, and pertains broadly to property law, tort law and equity. Each of these fields of law offered unique and adaptable legal mechanisms, which through analogous reasoning, could provide a degree of certainty and stability to the wild west of digital assets.\textsuperscript{142} As a result the article presents a number of unique legal avenues which may be useful to the regulation of digital assets in the future, these avenues can be summarised as the following: the recognition of proprietary rights and interests in digital assets, property torts and a tort to privacy, and equity developing to be inclusive of digital assets.

\textbf{Statutory Recognition of Proprietary Interests in Digital Assets}

The observance and recognition of digital assets as property is the key to opening the avenues of tort and equity, without the critical work of Wesley Hohfeld the assertions and arguments of this article would crumble. Hohfeld reconceptualised property so as to include intangible or incorporeal assets, an absurdity under the previous Blackstonian regime of property.\textsuperscript{143} The Hohfeldian concept of property is encapsulated as ‘the relations between persons in relation to things’,\textsuperscript{144} naturally as the relationship between persons and things change over time, so too does scope of property in the eyes of the law. With this article clearly establishing the proprietary status of intangible or incorporeal assets through both principle and example, all that remains is an authoritative declaration by the judiciary or legislature to recognise digital assets as property. Whether such a declaration is made by the former or the latter is unclear and inconsequential, although as this article has demonstrated, instances of judicial innovation have been effective at spurring legislative reform.\textsuperscript{145} As a result digital assets would be afforded the rights

\textsuperscript{139} Hospital Products Limited v United States Surgical Corporation (1984) 156 CLR 41, 110.
\textsuperscript{140} Ibid, 570.
\textsuperscript{141} Wesley Hohfeld, ‘Some Fundamental Legal Conceptions as Applied to Judicial Reasoning’ (1913) 23 Yale Law Journal 16; Wesley Hohfeld, 'The Relations between Equity and Law' (1913) 11(8) Michigan Law Review 537, 566.
\textsuperscript{142} Above n 5.
\textsuperscript{145} Above n 77; Mabo and Others v Queensland (No. 2) [1992] HCA 23.
and remedies of the law, as is appropriate for an asset of such prolific value in the information age.

**Tort Law and Digital Assets**

As a logical flow on effect from recognising digital assets as property is the adaptation and application of the principles and precedents of traditional property torts. This article grappled with some of the challenges such a process would pose, and in doing so considered the three torts of trespass, conversion, and detinue. While the legal principles and common law underpinning some of these torts present barriers to direct transcription of these torts to digital assets, such as the possession requirement for trespass to goods. Other torts such as conversion do not possess such stringent or tangible requirements, but merely a demonstrable proprietary interest or right in the asset in order for the courts to accept a cause of action under conversion.146 Similarly the tort of detinue may arise in circumstances where the asset/property is unreasonably withheld, lost or destroyed, and would provide digital asset owners with a valuable remedial mechanism for the return of the property or alternatively damages equal to the value of the asset.147 The application of property torts to digital assets is clearest where the asset is considered economically valuable, such as, cryptocurrencies,148 metadata and certain digital goods.

This article also considered the developing tort to privacy, which is more accurately described as a tort to misuse of private information.149 While much of the common law development of a tort to privacy is contained in the jurisdiction of the United Kingdom, the development of a tort to privacy has received some recognition in the Australian judiciary.150 The High Court case of *ABC v Lenah Game Meats* considers in detail the development of a tort to privacy in Australia, including the source and constraints of the Australian jurisprudence on a tort to privacy.151 The court observed but ultimately refrained from developing the tort to privacy, citing such an action as inappropriate given the circumstances of the case.152 While respecting the decision in *ABC v Lenah Game Meats*,153 this article critiqued the constraining case of *Victoria Park Racing v Taylor*,154 identifying a distinction between a tort to privacy in relation to corporations and to individuals. The part concludes and endorses the development of a tort to privacy in Australia akin to the UK tort to privacy described by Tugendhat J in *Videl-Hall v Google*.155

---

146 *Hunter BNZ Finance Pty Ltd v Mahoney* [1990] VR 41; Bernadette Richards, Melissa De Zwart, Karinne Ludlow, above n 52, 97-98.
147 Above n 77.
150 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [185-190].
151 *Victoria Park Racing & Recreation Grounds Co Pty Ltd v Taylor* [1937] HCA 45.
152 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63, [189].
153 Ibid.
154 *Victoria Park Racing & Recreation Grounds Co Pty Ltd v Taylor* [1937] HCA 45.
Common Law and Equity Developing to Include Digital Assets

As a flexible and profoundly powerful legal entity equity is not bound by precedent or archaic corporeal concepts in the same ways as property law and torts. The underlying principles of equity are rooted in the conscience of the decision maker, and seek to address the inadequacies of the common law pursuant to principles of fairness, equality and discretion. The cases of Breen v Williams and Garcia v National Australia Bank presented the High Court with the opportunity to develop equity through reformation or minor modifications, in both cases the majority of the High Court refrained from doing so. Together the cases have contributed to a stagnation of equity in Australian jurisprudence. The recognised categories of fiduciary relationships were also considered, with the substantial criticisms of former High Court Justice Dyson Heydon regarding modern fiduciary liability highlighting the unique problems of equity which may be detrimental to equity’s applications to digital assets.

Despite this equity presents a unique field of law that is capable of recognising both proprietary and equitable interests in digital assets through its flexible system of equitable priorities. Given the rate of new digital assets emerging in increasingly diverse forms, an equally flexible and agile field of law such as equity would be necessary to adequately protect and manage digital assets in the future. This article has sought to demonstrate this by analysing the applications of existing equitable remedies to digital assets, such as injunction, equitable estoppel, constructive trust, and account of profits. While these existing equitable remedies would undoubtedly prove useful to the protection and management of digital assets, it is consistent with the foundational principles of equity that existing remedies may be altered or adapted to best address a wrong, harm or loss. The creation of a new category of fiduciary relationship is also consistent with the principles and purpose of modern equity, the article considers the proposal of Jack Balkin to recognise an ‘Information Fiduciary’ under equity. The concept of an information fiduciary recognises the fiduciary characteristics of many digital assets, where the user is placed in a position of vulnerability, dependence and trust, and the service provider is in a position of power, influence and control.

Recommendations

This article has sought to demonstrate the potential of the common law and equity to provide an adequate framework for digital assets through analysis of property law, tort law and equity. The overarching recommendation which is discernible from both the structure and argument of this article is the recognition of digital assets as personal property consistent with the Hohfeldian concept of property.

---

Such a notion is based on the authority and analysis highlighted in preceding parts, and is essential to applying property law, tort law and equity to digital assets. Additionally each field of law has presents its own unique challenges and barriers to the application of common law precedent and principles of equity to digital assets. It is in light of those challenges this article endorses four ancillary recommendations which deserve further consideration and analysis beyond the limitations of this article. These are:

- Statutory Recognition of Proprietary Interests in Digital Assets,
- Equitable Interests in Digital Assets,
- Digital assets as intangible personal property for the purposes of tort law, and
- Fiduciary Categories & the Information Fiduciary Concept.

As with any law reform orientated arguments the exact or most appropriate legal avenues are unknown, with recommendations drawn from deduction, reasoning and research. This article contends that a purely statutory approach would provide an inadequate legal framework for digital assets. The article has demonstrated that common law precedent and the principles of equity are capable of providing an adequate framework, should apply to digital assets through evolutionary applications and therefore must be adapted and applied to digital assets. Doing so would ensure the best possible legal framework for the regulation, management and protection of digital assets in Australia.