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Contents

CAUSING A STIR: UNWANTED ALIENS AND THE CAULDRON OF CRIMMIGRATION CONTROLS POST-*NZYQ*

PETER BILLINGS*

This article explains how the momentous High Court decision in NZYQ v Minister for Immigration *(2023) 280 CLR 137 ('*NZYQ*'), that triggered the release into the community of around 350 'unlawful non-citizens' for whom removal from Australia was impracticable, prompted a succession of innovative and controversial legislative responses amidst political concerns about effective migration management and community safety. The article tracks and carefully critiques political and legislative responses to* NZYQ*, and other subsequent High Court decisions in* ASF17 v Commonwealth *(2024) 98 ALJR 782 and* YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs *(2024) 99 ALJR 1, to demonstrate that crimmigration law, policy and practice is, more than ever, deeply and problematically entrenched in Australia. The article uncovers precisely who the unwanted aliens – the targets of crimmigration – are, why political uproar ensued following the* NZYQ *ruling, and how criminal and immigration law have been stitched together in novel ways to form a unique crimmigration control regime in Australia.*

I INTRODUCTION

The connections between criminal law and immigration law, and intersection of crime prevention and immigration enforcement, have a long history in Australia.[1] As these legislative, administrative and law enforcement relationships have evolved recently, amidst political unease about the risks certain migrants pose, they have been understood and critically assessed through the lens of 'crimmigration'. Arguably, Australia's most symbolic crimmigration law and enforcement practice has been the mandatory and indefinite detention of non-citizens, even where there is no prospect of their release into the Australian

* Professor of Law, TC Beirne School of Law, The University of Queensland. Thanks to Louisa Jones and Rebecca Ananian-Welsh for their generous and helpful comments on earlier drafts of this article. Also, thanks to Heidi Willis for her research assistance. Keeping abreast of crimmigration developments is challenging. This article was first drafted in mid-2024 and then revised in early 2025 to address significant legal developments. The usual disclaimer applies.

1 See, eg, Mark Finnane and Andy Kaladelfos, 'Australia's Long History of Immigration Policing and the Criminal Law' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 19. See also Mark Finnane and Andy Kaladelfos, 'British Migrants, Criminality and Deportation: Shaping the Australian Post-War Approach' (2017) 45(2) *The Journal of Imperial and Commonwealth History* 339.

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community or their removal to another country; in short, immigration detention without foreseeable end.

That approach gained constitutional legitimacy in the notorious case of *Al-Kateb v Godwin* ('*Al-Kateb*').[2] That case was overturned in November 2023 when, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'),[3] the High Court of Australia ('HCA') decided that administrative detention was only constitutionally valid when 'reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.' For the Court in *NZYQ*, detention without foreseeable end could not be seen as relevantly *justified* by its supposed (legitimate and non-punitive) immigration-related purposes (namely, removal or visa processing).

Does the post-*NZYQ* demise of indefinite immigration detention signal a turning point in Australia's crimmigration approach — heralding the adoption of a more balanced and less punitive response to certain, intractable, cases where a non-citizen's removal from Australia is hard to achieve? Since *NZYQ*, the answer has proven to be a resounding 'no'. The momentous decision in *NZYQ* lit a political fire beneath a cauldron of legal renovations — a succession of speedy and radical legislative responses by the Australian Parliament amidst political uproar about 'crimmigrants' living in the community. These contemporary reforms offer a striking illustration of how criminal and immigration laws, procedures and practices intersect and quickly evolve to form a unique 'crimmigration control' regime. One that is designed to contain a sub-group of undesired non-citizens (that includes refugees and stateless persons) whose ongoing presence in Australia is regarded, politically, as an affront to the sovereign power and right of the state to determine admission and expulsion, and thereby control community membership.[4]

This article will track and critique political and legislative responses to *NZYQ* and subsequent HCA case law to demonstrate that crimmigration law, policy and practice is, more than ever, deeply and problematically, entrenched in Australia. This overarching claim is evidenced by, inter alia: security-focused political rhetoric; legislative borrowing from other contexts (such as counterterrorism); and, broad and severe immigration (visa) conditions buttressed by criminal sanctions for non-compliance — in short, a coalescence of immigration and criminal law designed to strictly manage the '*NZYQ* cohort'.

This article begins, in Part II, with a brief background on immigration detention and an introduction to the concept of crimmigration. It then proceeds, in Part III, with a descriptive overview and succinct discussion of the importance of HCA decisions in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*'),[5] *Al-Kateb* and *NZYQ* respectively, before continuing, in Part IV, to focus upon the political response to the ruling in *NZYQ* that signalled

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2 (2004) 219 CLR 562 ('*Al-Kateb*').

3 (2023) 280 CLR 137 ('*NZYQ*').

4 See, eg, *Robtelmes v Brenan* (1906) 4 CLR 395, 400 (Griffith CJ); *Ruddock v Vadarlis* (2001) 110 FCR 491, 542–3 (Black CJ).

5 (1992) 176 CLR 1 ('*Lim*').

the end of indefinite detention for *some* non-deportable non-citizens.[6] Part V provides an explanation and analysis of the two immediate legislative rejoinders to *NZYQ* which sought to impose stringent visa conditions on freed non-citizens coupled to exorbitant criminal penalties for non-compliance, and to impose a community safety order regime modelled upon federal counterterrorism, and state serious sexual offender, laws. Part VI examines how a third tranche of laws was drafted in anticipation of another case before the HCA in *ASF17 v Commonwealth* ('*ASF17*'),[7] a case dealing with the constitutional limits on detention in circumstances where a non-citizen refused to co-operate with their removal. Part VII shows how the imposition of punishing visa conditions on the '*NZYQ* cohort' was, subsequently, deemed invalid in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*').[8] This analysis segues into an examination of Parliament's two recent, heavy-handed, attempts to regulate non-deportable non-citizens. The latest legislative salvo reworks provisions authorising stringent visa conditions for the '*NZYQ* cohort', as well as providing new rules that permit the re-detention and removal of non-citizens to third countries with which Australia has a 'reception arrangement'. The article concludes by offering critical reflections upon the assorted and disturbing aspects of crimmigration controls geared towards the immobilisation and exclusion of unwanted non-citizens and towards countering HCA rulings protective of individual liberty.

II Background on Immigration Detention in Australia

The intermingling of criminal law and immigration law, and intersection of crime prevention and immigration enforcement, is well established in Australia. The state's use of criminal law in the service of migration control has a prolonged history. For example, from 1901 to 1994,[9] unapproved entry and presence in Australia was criminalised, with federal offences that were punishable by a court

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6 The subsequent decision in *ASF17 v Commonwealth* (2024) 98 ALJR 782 ('*ASF17*') revealed that for some uncooperative immigration detainees, indefinite detention remains a legal possibility. Relatedly, see *CZA19 v Commonwealth* (2025) 99 ALJR 650 ('*CZA19*'), where the High Court of Australia affirmed the validity of detention pending consideration of a visa application within a reasonable time. A 'reasonable time' may be a prolonged period; many months or several years, depending on the complexity of the visa matter.

7 *ASF17* (n 6).

8 (2024) 99 ALJR 1 ('*YBFZ*').

9 The *Migration Amendment Act 1992* (Cth) introduced mandatory detention of designated boat arrivals. The *Migration Reform Act 1992* (Cth), which commenced on 1 November 1993, introduced mandatory detention of *all* unlawful non-citizens.

ordered sentence of imprisonment and/or by liability to deportation.[10] Additionally, from 1920, deportation could compound criminal punishment with respect to an immigrant who, within three years of arriving in Australia, was convicted of an offence punishable by imprisonment for one year or longer.[11] Subsequently, the administrative 'removal' of non-citizens of 'bad character' (including, but not limited to, felonious non-citizens) has accelerated since the late 1990s, and markedly so in the last decade.[12]

The system of regulating unlawful aliens (qua 'non-citizen')[13] introduced by the *Migration Reform Act 1992* (Cth) deliberately decriminalised certain aspects of immigration control, preferring administrative regulation to promote the enforcement of immigration law. Accordingly, non-citizens seeking entry without prior permission, or those in Australia without a valid visa, are not liable to criminal punishment in the traditional sense, as retribution for wrongdoing: their unlawful entry or presence. Instead, they are subject to an administrative detention regime, legally identified as non-punitive, and vulnerable to removal.

Thus, non-citizens entering without a valid visa (eg unauthorised maritime arrivals) or within Australia without a valid visa (eg visa has expired or been cancelled) are liable to immigration detention due to their presence and unlawful status. The primary, legal, justification for *pre-admission* detention correlates to administrative processes permitting or enabling an entry (visa) application to be received, investigated and determined. For *pre-expulsion* detention, the principal rationale is to effectively facilitate the removal or deportation of unlawful non-citizens by making them available for expulsion.[14] Additionally, detention has, in fact, served other political purposes (general deterrence)[15] and ancillary purposes

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10 The legislative history is outlined in *Al-Kateb* (n 2) 598 [86] (Gummow J), 632 [201]–[202] (Hayne J). Persons falling within the class of 'prohibited immigrant' were criminalised under the *Immigration Restriction Act 1901* (Cth) s 7, and liable to imprisonment. This continued via the *Migration Act 1958* (Cth) s 27 ('*Migration Act*'), and eventually s 77.

11 *Immigration Act 1920* (Cth) s 7, inserting s 8A into the Principal Act: *Immigration Act 1901-1912* (Cth).

12 See, eg, Michael Grewcock, 'Reinventing "The Stain": Bad Character and Criminal Deportation in Contemporary Australia' in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2015) 121. Khanh Hoang, 'The Rise of Crimmigration in Australia: Importing Laws and Exporting Lives' in Kerry Carrington et al (eds), *The Palgrave Handbook of Criminology and the Global South* (Palgrave Macmillan, 2018) 797.

13 The word 'alien' in the *Australian Constitution* s 51(xix) had become synonymous with the word 'non-citizen', however the constitutional concept of alienage is distinct from the statutory concept of 'non-citizen', though they largely coincide: *Love v Commonwealth* (2020) 270 CLR 152.

14 See *NZYQ* (n 3) 154–5 [31]–[33], 158–9 [46], 160 [50] (The Court); *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219, 231 [25] (French CJ, Hayne, Crennan, Kiefel and Keane JJ).

15 Particularly general deterrence with respect to maritime arrivals seeking asylum. See Sharon Pickering and Leanne Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39(4) *Law and Social Inquiry* 1006. There is no evidence that detention centres reduce inflows of migrants or increase safety in local communities: see Sharry Aiken and Stephanie J Silverman, 'Decarceral Futures: Bridging Immigration and Prison Justice towards an Abolitionist Future' (2021) 25(2) *Citizenship Studies* 141, 145.

— segregation[16] and community protection[17] — that are objects of criminal punishment. Evidently, successive governments have used immigration detention laws and institutions as a risk management tool: by confining people, who are or might be dangerous, pending identity and health checks and security clearance, and by incapacitating flight risks and certain, risky, non-citizens whose presence in the Australian community is unwanted.

Notoriously, the policy and legal scheme of *mandatory* immigration detention has applied regardless of the characteristics of the detainee. The scheme has been indifferent to whether detention is strictly necessary and justifiable (or proportionate) in individual circumstances.[18] Detention is *indefinite* because 'there is no fixed chronological end point' and 'the person whose liberty is lost has no way of ascertaining when she or he might regain her or his freedom'.[19] Detention in custody of this kind infringes 'basic rights' known to the common law,[20] and has punishing and harmful impacts for detainees,[21] with social harms reverberating beyond those detained.[22] Though legally categorised as administrative and 'non-punitive',[23] immigration detention has a security focus and parallels the criminal justice system in key respects. As border criminologists, sociologists and socio-legal scholars have explained, it entails physical segregation routinely experienced as punishing by non-citizens, and its penal character is discernible through the architectural and surveillance features of detention centres and the security practices used (by private corporations) to

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16 *Commonwealth v AJL20* (2021) 273 CLR 43, 64 [25], 65 [28], 70 [44] (Kiefel CJ, Gageler, Keane and Steward JJ) ('*AJL20*'). The Court identified segregation as a legitimate purpose for detention pending receipt, investigation and determination of a visa application.

17 The investigation of visa applications entails (inter alia) the administration of public interest criteria pertaining to national security risks and character: see, eg, *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 ('*M47/2012*'). Thus, detention is used to prevent entry into the community pending security vetting and individual character assessments. Moreover, non-citizens refused entry or facing visa cancellation, on adverse security or character grounds, are typically detained prior to their exclusion from Australia on a precautionary basis, to incapacitate those who pose a danger to the community protection: see *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 348 [49]–[50] (Kiefel CJ, Bell, Keane and Edelman JJ) ('*Falzon*').

18 See *Al-Kateb* (n 2) 574–5 [12] (Gleeson CJ) describing the blunt application of immigration detention.

19 *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463, 495 [123] (Kenny and Mortimer JJ).

20 *YBFZ* (n 8) 11 [14] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

21 *Falzon* (n 17) 359 (Nettle J). See Trine Filges, Edith Montgomery and Marianne Kastrup, 'The Impact of Detention on the Health of Asylum Seekers: A Systematic Review' (2018) 28(4) *Research on Social Work Practice* 399.

22 Michelle Peterie (ed), *Immigration Detention and Social Harm: The Collateral Impacts of Migrant Incarceration* (Routledge, 2024). See also Lorena Rivas, 'A Safe Haven? Women's Experiences of Violence in Australian Immigration Detention' (2024) 26(3) *Punishment and Society* 547.

23 *Falzon* (n 17) 343 [29] (Kiefel CJ, Bell, Keane and Edelman JJ), 360 [96] (Nettle J), citing *Lim* (n 5). Equally, deportation is not regarded as punishment, or as 'additional punishment' following conviction for prior offending and imprisonment, notwithstanding it may be burdensome for people: *Falzon* (n 17) 347 [47] (Kiefel CJ, Bell, Keane and Edelman JJ), 358 [93] (Nettle J).

police detainees.[24] In these and other respects immigration detention is akin to prison[25] and should be recognised as such.[26] Equally, immigration detention is not subject to the same level of independent monitoring and judicial supervision that characterises the criminal justice system.[27]

A federal government-commissioned report, in 2020, discredited the immigration detention regime for unlawful non-citizens.[28] The report examined the regulatory framework governing immigration detention and found that the system was dysfunctional and failing to meet two key principles: that immigration status should be resolved as quickly as possible; and that people should be managed in the community pending status resolution, unless they pose a risk to the community. The report highlighted a significant number of detainees who remained in long-term detention[29] — a recurring concern.[30] Indeed, mandatory immigration detention laws and government policy have triggered a serious problem: an increasing number of complex 'intractable' cases involving lengthy, indefinite, detention for non-citizens (including refugees and stateless persons

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[24] See, eg, Mary Bosworth and Sarah Turnbull, 'Immigration, Detention, and the Expansion of Penal Power in the United Kingdom' in Keramet Reiter and Alexa Koening (eds), *Extreme Punishment: Comparative Studies in Detention, Incarceration and Solitary Confinement* (Palgrave Macmillan, 2015) 50; Michelle Peterie, 'Deprivation, Frustration and Trauma: Immigration Detention Centres as Prisons' (2018) 37(3) *Refugee Survey Quarterly* 279; Louise Boon-Kuo, 'The Private Harms of Detention: Why Serco's Violence is not Criminalised' (2024) 36(2) *Current Issues in Criminal Justice* 219.

[25] See Louise Boon-Kuo, 'Do Mobile Phone Bans Show that Immigration Detention is Becoming More Like Prison?' (2023) 32(1) *Griffith Law Review* 62. A key difference, however, is that the rehabilitation of the detainee is not a goal of immigration detention and so there are typically no infrastructure or rehabilitation programs available. Another key difference is that a prison sentence is, generally, set for a specified term not an indefinite period.

[26] Cf Giuseppe Campesi, 'Genealogies of Immigration Detention: Migration Control and the Shifting Boundaries between the "Penal" and the "Preventive" State' (2020) 29(4) *Social and Legal Studies* 527.

[27] Aside from implied constitutional constraints, the courts have a limited capacity to review the administration (duration and conditions) of detention. The Immigration Ombudsman's statutory review powers are limited to making *non-binding* recommendations to the Minister about the status of people held longer than two years, an unacceptably long period before detention is subject to external oversight: *Migration Act* (n 10) ss 486N–486O. Equally, the Australian Human Rights Commission investigates complaints and reports on immigration detention facilities to promote compliance with international human rights standards but lacks coercive remedial powers vis-a-vis the executive.

[28] Robert Cornall, *Report to the Secretary for Home Affairs and the Commissioner of the Australian Border Force* (Independent Detention Case Review, March 2020) <https://www.homeaffairs.gov.au/foi/files/2023/fa-230300029-document-released.PDF>. The Report noted that there was no effective strategy to remove long-term detainees who had no pathway to a visa: at 8.

[29] Ibid 49. Detainees who have been held in detention for more than a total of 730 days or two years are categorised as long-term detainees. The Cornall Report recommended, inter alia, issuing short-term visas with appropriate conditions (and ongoing supervision) to low or medium risk detainees, and consideration of whether high-risk non-citizens be kept in gaol upon completion of their prison sentence pending removal: at 10.

[30] See, eg, Joint Standing Committee on Migration, Parliament of Australia, *Immigration Detention in Australia: A New Beginning* (Report, December 2008); Office of the Commonwealth Ombudsman, *2022–23 Annual Report* (Report, October 2023) 16.

owed protection obligations under international law) who 'fail' to satisfy visa preconditions on criminal or adverse character grounds but face removal barriers for legal, medical or other valid reasons.[31] The mandatory indefinite detention of unlawful non-citizens whose cases reach an impasse breaches human rights,[32] but was deemed constitutionally valid until the HCA ruling in *NZYQ*.[33]

A *Crimmigration as a Conceptual Framework*

The momentous decision in *NZYQ* and its immediate consequences initiated political pandemonium and a succession of speedy legislative responses by the Australian Parliament. These contemporary reforms offer a striking illustration of how criminal and immigration laws, procedures and practices intersect to form a unique 'crimmigration control' regime. There is no accepted definition of crimmigration, but it is widely accepted and appreciated as providing a 'powerful and systematic' conceptual framework for the critical examination of how states utilise criminal law and punishment for immigration enforcement purposes, and how states use immigration law and its enforcement for criminal justice purposes.[34]

Legal scholar, Juliet Stumpf, coined the neologism and mapped the geography of crimmigration in the United States as she examined the merger between immigration law and criminal law,[35] critically describing and theorising the legal, procedural and institutional confluences of those two public law domains. Stumpf's legal scholarship has encouraged and informed an extensive body of crimmigration law literature in the US, Canada, Europe and Australia, notably, which has progressively revealed that the crimmigration landscape (institutions, laws and policies) looks decidedly different across nations. As Ben Bowling and Sophie Westenra neatly explained, crimmigration law 'represents the distinct laws and legal procedures that states employ as a means of exerting

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31 See also Department of Home Affairs (Cth), *Alternatives to Held Detention: Phase 1 Program Report* (Report, 1 July 2022) <https://www.homeaffairs.gov.au/foi/files/2023/fa-230200887-document-released.PDF>.

32 See generally Matthew T Stubbs, 'Arbitrary Detention in Australia: Detention of Unlawful Non-Citizens under the Migration Act 1958 (Cth)' (2006) 25 *Australian Year Book of International Law* 273.

33 *NZYQ* (n 3). See Anne Twomey (ed), 'NZYQ v Minister for Immigration and Its Legislative Progeny' (2024) 98(2) *Australian Law Journal* 103.

34 Leanne Weber and Jude McCulloch, 'Penal Power and Border Control: Which Thesis? Sovereignty, governmentality or the pre-emptive state?' (2019) 21(4) *Punishment and Society* 496, 500.

35 Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime and Sovereign Power' (2006) 56(2) *American University Law Review* 367; Juliet Stumpf, 'Crimmigration: Encountering the Leviathan' in Sharon Pickering and Julie Ham (eds), *The Routledge Handbook on Crime and International Migration* (Routledge, 2015) 237. See also Jennifer M Chacón, 'Managing Migration through Crime' (2009) 109 *Columbia Law Review Sidebar* 135; César Cuauhtémoc García Hernández, 'Creating Crimmigration' [2013] (6) *Brigham Young University Law Review* 1457; César Cuauhtémoc García Hernández, 'Deconstructing Crimmigration' (2018) 52 *University of California Davis Law Review* 197.

control over a sector of our global society'.[36] It is primarily, but not exclusively, a response to non-citizens who are perceived as a threat to community safety, national security, and/or the efficacy of immigration controls. The crimmigration literature is accompanied by the border criminology literature which offers wider, critical, perspectives on the immigration-penality nexus;[37] critically exploring the admixture of legal, political, cultural and social drivers fostering the convergence of crime prevention and effective border controls.[38]

Crimmigration has been described, in Australia, as the 'complex intersections between criminal law, immigration law and punishment',[39] and as 'the interlacing of criminal and immigration laws, processes, and enforcement practices'.[40] Crimmigration is best understood as bi-directional: it entails the criminalisation of immigration (or transfer of criminal law into the immigration realm) through the creation or intensification of criminal sanctions for particular immigration violations;[41] and, conversely, it involves the governing of felonious, risky, or otherwise rejected, non-citizens through immigration laws and procedures, including via broad visa cancellation provisions and administrative detention-removal powers.[42] In Australia, the 'intertwined regime of "crimmigration" law'[43] is also evidenced via immigration officers' police-like powers,[44] citizenship revocation laws, and in the realm of criminal sentencing, with several apex — state

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36 Ben Bowling and Sophie Westenra, 'The "Crimmigration Control System"' (2015) 77 (Winter) *British Society of Criminology Newsletters* 14 <https://britsoccrim.org/documents/Bowling2015.pdf>.

37 See, eg, Mary Bosworth and Mhairi Guild, 'Governing through Migration Control: Security and Citizenship in Britain' (2008) 48(6) *British Journal of Criminology* 703; Mary Bosworth et al (eds), *Handbook on Border Criminology* (Edward Elgar, 2024).

38 See also José A Brandariz, 'Criminalization or Instrumentalism? New Trends in the Field of Border Criminology' (2022) 26(2) *Theoretical Criminology* 285.

39 Grewcock (n 12) 123.

40 Peter Billings, 'Introduction' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics and Society* (Springer, 2019) 4.

41 Eg mandatory minimum sentences for a range of people smuggling offences, or for the use of false and misleading information relating to the entry of a non-citizen: see *Migration Act* (n 10) div 12 sub-div A (people smuggling and related offences); and five years' imprisonment for escape from immigration detention: *Migration Act* (n 10) s 197A.

42 *Migration Act* (n 10) pt 2 div 7 (detention of unlawful citizens); s 501 (refusal or cancellation of visa on character grounds). The character test provides (inter alia) that a non-citizen with a 'substantial criminal record' does not pass the test and must have their visa cancelled. See Peter Billings and Khanh Hoang, 'Characters of Concern, or Concerning Character Tests? Regulating Risk through Visa Cancellation, Containment and Removal from Australia' in Peter Billings (ed), *Crimmigration in Australia: Law, Politics and Society* (Springer, 2019) 119.

43 David Alan Sklansky, 'Crime, Immigration, and Ad Hoc Instrumentalism' (2012) 15(2) *New Criminal Law Review* 157.

44 Leanne Weber, *Policing Non-Citizens* (Routledge, 2013) on the role of police and other social agencies in policing non-citizens and enforcing immigration law.

and territory — courts deeming a non-citizen's prospective deportation and collateral consequences relevant, mitigating, factors when sentencing offenders.[45]

In this article, the concept of crimmigration is drawn upon to help critically examine new intersections of criminal law/justice and immigration law/enforcement, directed to the purpose of controlling, containing and excluding a small cohort of non-deportable non-citizens in Australia. Inspired by Stumpf and Katja Aas,[46] among others, this article demonstrates how and explores why criminal law and immigration law interlink in novel ways. Drawing on David Sklansky, this article shows how different legal rules and procedures have been employed by the state instrumentally and interchangeably,[47] in mutually reinforcing ways. Legislators have employed civil and criminal law, including the threat of imprisonment, as a substitute means to effectively manage the perceived problem of community infiltration by dangerous non-citizens. This was responsive to *NZYQ*, the HCA ruling that depleted the executive's capacity to, effectively, deploy immigration detention as a form of preventive detention to segregate 'crimmigrants' from the wider community. The government's rapid and repeated legislative attempts to strictly govern non-deportable non-citizens it could no longer, legally, detain provides a vivid demonstration of modern crimmigration.

Adding to the literature on crimmigration law and border criminology in Australia,[48] the goal of this article is to describe and critically examine the politico-legal aftermath of *NZYQ*, drawing on the concept of 'crimmigration' as a theoretical framework of analysis. By examining the sequence of law reforms directed to the management and exclusion of non-citizens, and the political rhetoric around those reforms, this article reveals the targets of novel forms of crimmigration law and enforcement. It explores how these laws and processes operate and impact non-citizens and explains the causes of these recent developments.

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45 Ellen Moore, 'Sentencing "Crimmigrants": How Migration Law Creates a Different Criminal Law for Non-Citizens' (2020) 43(4) *University of New South Wales Law Journal* 1271; Louisa Jones, 'Punishment within Australia's Visa Cancellation Regime: Exposing the Discord between Migration Law and Criminal Law' (2025) 50(3) *Alternative Law Journal* 212.

46 Katja Franko Aas, 'Bordered Penality: Precarious Membership and Abnormal Justice' (2014) 16(5) *Punishment and Society* 520.

47 Sklansky (n 43).

48 See, eg, Peter Billings, 'Regulating Crimmigrants through the "Character Test": Exploring the Consequences of Mandatory Visa Cancellation for the Fundamental Rights of Non-Citizens in Australia' (2019) 71(1) *Crime, Law and Social Change* 1 ('Regulating Crimmigrants'); Leanne Weber and Rebecca Powell, 'Crime, Pre-Crime and Sub-Crime: Deportation of "Risky Non-Citizens" as "Enemy Crimmigration"' in John Pratt and Jordan Anderson (eds), *Criminal Justice, Risk and the Revolt against Uncertainty* (Palgrave Macmillan, 2020) 245; Mary E Crock and Kate Bones, 'The Creeping Cruelty of Australian Crimmigration Law' (2022) 44(2) *Sydney Law Review* 169.

III FROM *LIM* TO *AL-KATEB* TO *NZYQ*

This Part focuses on the identification and development of constitutional limits on immigration detention that arise from Ch III of the *Australian Constitution*. Those limits provide the context (and sometimes the catalyst) for the crimmigration reforms discussed in Parts IV to VI below.

That no person shall be imprisoned except pursuant to lawful authority is a 'fundamental and long-established principle'.[49] There can be no deprivation of individual liberty by mere executive action, absent valid statutory authority or judicial mandate.[50] Moreover, involuntary detention must not infringe the *Constitution*, including the strict separation of federal judicial power derived from Ch III.[51] Immigration detention must be subject to judicial oversight to enforce express and implied constitutional limits and ensure that executive action adheres to legislative criteria — criteria that cannot be too vaguely formulated so as to avoid scrutiny.[52]

The power of the federal Parliament to authorise or require the executive government to detain a non-citizen (absent a judicial order) is granted by the naturalisation and aliens power in s 51(xix) of the *Constitution*. This power to legislate with respect to aliens encompasses detention laws applicable to non-citizens who are unlawful — without an effective visa. Detention powers correlate to legislative authority conferred on the executive to remove a non-citizen or to permit their entry.[53] Crucially, 'the amplitude of the legislative power conferred by s 51(xix) is qualified by the implications of Ch III of the *Constitution*',[54] which focuses attention on the nature of federal judicial power and the separation of powers. A prominent limit on immigration detention powers arose from *Lim* in 1994.

In *Lim*, the HCA had to decide whether laws authorising the mandatory detention of two designated groups of asylum seekers were invalid for infringing the separation of powers. The impugned law provided for detention in custody — for a period capped at 273 days after making an entry application — until the unlawful non-citizens had been removed from Australia or granted an entry permit. The Court upheld the provisions and, in doing so, formulated a broad 'immunity'[55] from involuntary detention by the executive, other than by order of a court following a judicial finding of criminal guilt. The Court declared that immigration detention is one of a few exceptions to the general constitutional principle that detention is punitive in character and, therefore, only within

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49 *NZYQ* (n 3) 153 [27] (The Court).

50 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 528 (Deane J); *Lim* (n 5) 19 (Brennan, Deane and Dawson JJ).

51 This strict separation is grounded in the 'two limbs of *Boilermakers*', referring to the Court's decision in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254. These rules generally limit federal courts to judicial powers (and ancillary or incidental non-judicial powers) and withhold federal judicial power from non-courts.

52 *AJL20* (n 16).

53 *Lim* (n 5) 10 (Mason CJ), 32 (Brennan, Deane and Dawson JJ).

54 *AJL20* (n 16) 63 [22] (Kiefel CJ, Gageler, Keane and Steward JJ).

55 *Lim* (n 5) 28 (Brennan, Deane and Dawson JJ).

judicial power to impose. However, the executive detention of an alien must be limited to a period that is reasonably capable of being seen as necessary for limited non-punitive purposes.[56] Accordingly, the connection between the non-punitive purpose and duration of detention was relevant to the Court's ruling about the validity of laws extant at the time.[57] The test for assessing the constitutional validity of detention laws required the identification of a legitimate non-punitive purpose and then an assessment of whether the law is reasonably necessary to achieve that purpose.

The strength of the Court's reasoning in *Lim* was undermined by several unsuccessful attempts to invoke its protection.[58] The most important case came a decade after *Lim*, in *Al-Kateb*. A majority of the HCA determined that — as a matter of statutory construction and constitutional interpretation — it was lawful for a stateless Palestinian man to be detained indefinitely if there was even a faint possibility that his removal might become practicable in the future. The primary focus of the Court's inquiry was on the purpose of the detention, which was found to be non-punitive because it was incidental to entry and removal proceedings. Therefore, detention was valid.[59] Neither the extended length of detention itself nor its impacts on the detainee were sufficient to alter the character of detention and render it punitive. Simply stated, a 'law that authorises detention will not offend the separation of powers doctrine as long as its purpose is non-punitive'.[60]

For the majority in *Al-Kateb*, the Ch III question was not answered with respect to whether the statutory *end* was capable of realisation in the reasonably foreseeable future, nor whether the legal *means* used to pursue the relevant end exceeded what was reasonably capable of being seen as necessary to effect the non-punitive purpose. As Heydon J later observed: 'From the day [*Al-Kateb*] was handed down, it became a very well-known decision. It also became a widely criticised decision because of its impact on liberty.'[61] Indeed, as Hohmann argued, the *Al-Kateb* judgment was

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56 Ibid 33 (Brennan, Deane and Dawson JJ).

57 As McHugh J explained in *Re Woolley; Ex parte Applicants M276/2003* (2004) 225 CLR 1, 36 [88] ('*Re Woolley*'). The presence of restraints on detention including statutory terms fixing time limits on the period of detention (273 days) after making an entry application, and a legislative requirement to remove a designated person 'as soon as practicable' after the refusal of an entry application and finalisation of appeals, were important factors in *Lim* that ensured detention powers were reasonably necessary for non-punitive purposes: *Lim* (n 5) 10 (Mason CJ), 33 (Brennan, Deane and Dawson JJ), 46 (Toohey J).

58 See, eg, *Kruger v Commonwealth* (1997) 190 CLR 1, 109–10 (Gaudron J); *Behrooz v Department of Immigration & Multicultural & Indigenous Affairs* (2004) 219 CLR 486, 498–9 [19]–[20] (Gleeson CJ) ('*Behrooz*'); *Al-Kateb* (n 2) 648–9 [257]–[258] (Hayne J); *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, 94–5 [25]–[27] (Kiefel CJ, Bell, Keane and Steward JJ) ('*Benbrika [No 1]*').

59 See *Al-Kateb* (n 2) 584–5 [45]–[46], 595 [74] (McHugh J), 638–40 [225]–[231] (Hayne J), 658–62 [290]–[300] (Callinan J), 662–3 [303] (Heydon J).

60 *Re Woolley* (n 57) 32 [77] (McHugh J).

61 *M47/2012* (n 17) 128–9 [334] (Heydon J), a case in which the High Court of Australia declined to revisit and overrule *Al-Kateb* (n 2).

> a prime example of constitutional interpretation devoid of considerations of the key triumphs of constitutional democracies: liberty of the individual and protection against the abuse of executive power not least among them.[62]

The effect of *Al-Kateb* was harsh, described as 'segregation by incarceration … for an indefinite period, perhaps for life'.[63] Its impacts were compounded by other cases at the time that confirmed that immigration detention could be validly imposed on children as well as adults,[64] despite non-compliance with Australia's international obligations and it involving harsh conditions.[65] That situation persisted for twenty years during which time the legislature took no steps to correct it and the HCA found it unnecessary, or declined, to revisit *Al-Kateb* on three occasions.[66] However, in *NZYQ* the HCA re-opened and, unanimously, overturned the constitutional ruling in *Al-Kateb*.[67]

NZYQ concerned a stateless Rohingya man who had raped a child and had his visa revoked on adverse character grounds.[68] In the absence of a third country willing to receive him, he remained liable to executive detention for an unlimited period. In its reasons[69] the HCA adverted to *Lim* which they regarded as containing several authoritative background statements of principle. The Court affirmed that, no person may be detained by the executive absent statutory authority or judicial mandate. The Court reiterated the principle that involuntary deprivation of liberty *ordinarily* constitutes punishment, and its imposition is an incident of

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62 Jessie M Hohmann, 'The Thin End of the Wedge: Executive Detention of Non-Citizens & the Australian Constitution' (2006) 9 *Yearbook of New Zealand Jurisprudence* 91, 112. See also Dan Meagher, 'The "Tragic" High Court Decisions in Al-Kateb and Al Khafaji: The Triumph of the "Plain Fact" Interpretative Approach and Constitutional Form over Substance' (2005) 7(4) *Constitutional Law and Policy Review* 69.

63 Michael Head, 'Detention without Trial: A Threat to Democratic Rights' (2005) 9 *University of Western Sydney Law Review* 33, 34.

64 *Re Woolley* (n 57).

65 *Behrooz* (n 58).

66 *M47/2012* (n 17); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 ('*M76/2013*'); *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285 ('*M47/2018*').

67 The High Court of Australia ('HCA') agreed in *NZYQ* (n 3) 150–2 [19]–[23] (The Court) with the majority's reasoning in *Al-Kateb* (n 2), on the statutory construction issue, citing cumulative considerations that pointed away from re-opening that matter: (i) legislative reliance and implicit legislative endorsement of *Al-Kateb* since 2004; and, (ii) the recent case of *AJL20* where a majority endorsed *Al-Kateb* on the statutory construction point: see *AJL20* (n 16) 66 [33]–[34] (Kiefel CJ, Gageler, Keane and Steward JJ).

68 A stateless refugee, NZYQ was found to be a danger to the community and had his protection visa refused under *Migration Act* (n 10) s 36(1C) because of his conviction and sentence for child sexual offences.

69 The HCA offered a single, 'unanimous', constitutional judgment in overruling *Al-Kateb* (n 2), though the style of joint judgment was noteworthy because it identified individual judicial positions. See Stephen McDonald, 'NZYQ: A New Style of Unanimous Judgment for the High Court of Australia' *Australian Public Law* (Blog Post, 31 January 2024) <https://www.auspublaw.org/blog/2024/1/nzyq-a-new-style-of-unanimous-judgment-for-the-high-court-of-australia>. The divergence of judicial opinion, and the reasons for that split, subsequently became clearer in the separate judgment of Edelman J in *ASF17* (n 6) 799 [85]–[89].

judicial authority to judge and punish criminal guilt.[70] Hence, a law authorising involuntary detention is characterised as penal or punitive, by default, unless justified otherwise. This translates to the separation of powers being contravened unless a law authorising executive detention is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.[71]

In *NZYQ*, the Court rejected the possibility that segregation from the community — separation of an alien from the community by means of detention — was a legitimate independent purpose for detention because it conflicted with *Lim*.[72] Unmoored from the administration of entry ('visa processing') or removal procedures, separation from the community is not a legitimate purpose for detention.[73] Furthermore, *NZYQ* offered no support for the view, articulated in *Al-Kateb*, that deterrence was a legitimate purpose,[74] nor that community protection is a, standalone, legitimate purpose for immigration detention. The Solicitor-General did not frame the government's argument, in *NZYQ*, in terms of a 'predictive protective framework' for legitimising detention.[75] Likely because there was no express legislative basis for justifying detention with reference to this community-protective end.[76] There are but two legitimate and non-punitive purposes capable of making detention of an alien constitutionally permissible if the detention is otherwise sanctioned by statute: (i) to facilitate visa processing and (ii) to facilitate removal by ensuring that an unlawful non-citizen will be available for removal when that becomes practicable.[77]

In *NZYQ*, the HCA unanimously decided that the constitutional holding in *Al-Kateb* was 'an incomplete and, accordingly, inaccurate statement' of principle.[78] Collectively, the Court disagreed with the proposition that as long as the purpose of detention is to make the alien available for removal or prevent them entering

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70 *NZYQ* (n 3) 153 [27] (The Court).

71 Ibid 154–5 [30]–[31]. For a succinct analysis of the constitutional dimensions of the case. see Emily Hammond, 'Continuity and Consistency in the Application of Fundamental Constitutional Principle: NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs (2023) 97 ALJR 1005; [2023] HCA 37' (2024) 35(1) *Public Law Review* 8.

72 *NZYQ* (n 3) 159 [48] (The Court).

73 Ibid 159–60 [49] (The Court). Also, see, *CZA19* (n 6) 660 [38] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 668 [76] (Gordon J).

74 *Al-Kateb* (n 2) 659 [291] (Callinan J).

75 Transcript of Proceedings, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 154.

76 Community protection mabe be viewed as a legitimate non-punitive purpose, that is incidental to the two over-arching legitimate purposes (entry and removal) identified in *Lim* (n 5) and affirmed in *NZYQ* (n 3) and *CZA19* (n 6).

77 In *CZA19* (n 6) the HCA explained that detention legitimately facilitates visa processing because it makes an unlawful non-citizen available for inquiries into their identity, nationality, criminal history, security profile and health, and allows conditions to be imposed or other steps to be taken to mitigate any risks that are identified as a result, before the non-citizen enters the community (at 661-662 [46] (Gageler CJ, Gleeson, Jagot, Beech-Jones JJ), 668 [75] (Gordon J), 670-671 [89]-[90] 674 [108] (Edelman J).

78 *NZYQ* (n 3) 158 [43] (The Court).

Australia, the detention is non-punitive in character, even if removal appears unlikely in the foreseeable future.[79] For six members of the HCA, NZYQ's detention was invalid because there was no *legitimate* non-punitive purpose capable of practical achievement in the reasonably foreseeable future.[80] The absence of a real prospect of achieving removal within this limited period, 'refuted' the existence of the legitimate purpose for detention.[81] Restoring the application of *Lim* to situations where a person's removal prospects were slight, their Honours declared that:

> The *Lim* principle would be devoid of substance were it enough to justify [executive] detention … that the detention be designed to achieve an identified legislative objective that there is no real prospect of achieving in the reasonably foreseeable future.[82]

By contrast, Edelman J did not base the detention law's invalidity on the *illegitimacy* of the avowed non-punitive purpose, but upon the *disproportionality* between the law's legitimate non-punitive ends ('removal') and its means of implementation. His honour maintained that if there is no prospect of removal in the reasonably foreseeable future, then it is not 'necessary to detain them to ensure that they are available for removal when practicable'.[83]

Consequently, what had begun as lawful immigration detention in 2018 became unauthorised, on constitutional grounds, several years later, producing the immediate release of NZYQ and others from detention. The Court claimed this restored the authority of *Lim* principles and *Al-Kateb* was abandoned as an 'outlier in the stream of authority'.[84]

NZYQ was a historic decision for several reasons. First, the HCA overruled one aspect of the 'tragic' case of *Al-Kateb*,[85] a twenty-year precedent that had permitted an illiberal regime perpetuating the prolonged and indefinite deprivation of liberty of, often, stateless people and refugees — refused a visa on character grounds — who could not be removed to any other country. Second, the HCA restated and reaffirmed certain constitutional principles, first articulated in *Lim*,[86] constraining the application of executive detention. Third, *NZYQ* better aligned (albeit imperfectly) the operation of the immigration detention regime with international

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79 Ibid; cf *Al-Kateb* (n 2) 584 [45] (McHugh J), 640 [231] (Hayne J), 658–9 [290] (Callinan J), 662–3 [303] (Heydon J).

80 *NZYQ* (n 3) 158 [44], 158–9 [46] (The Court).

81 Ibid 158–9 [46] (The Court). Note similar sentiments were expressed in dissenting judgments in *Al-Kateb* (n 2). Gleeson CJ opined that the purpose of s 196 rested on the assumption that removal was capable of fulfilment: *Al-Kateb* (n 2) 578 [22]. See also *Al-Kateb* (n 2) 608 [122], 613–14 [140] (Gummow J).

82 *NZYQ* (n 3) 158 [45] (The Court).

83 Ibid 160–2 [51]–[54] (The Court).

84 Ibid 156 [35] (The Court).

85 *Al-Kateb* (n 2) 581 [31] (McHugh J).

86 *Lim* (n 5).

laws protective of individual liberty.[87] Fourth, due to the ruling, unlawful non-citizens whose removal was impracticable — most, if not all, with criminal histories — were freed from immigration detention and entered the wider community. This created an inconvenient regulatory gap in the federal government's response to and containment of certain 'risky' non-deportable non-citizens. The balance of this article is focused upon why and how that gap was legislatively filled, which has proven highly politically charged, practically difficult, and legally controversial.

IV The Political Aftermath of *NZYQ*

Who, then, were the detainees affected by the HCA's ruling in *NZYQ*? Progressively, the decision led to the release of 358 people,[88] among them were non-citizens with serious criminal histories.[89] Some of the cohort had convictions for grave offences (including murder, rape, and other violent offences) and, thus, failed the 'character test' inducing visa refusal or cancellation. Others had no criminal convictions in Australia but were regarded as a future security threat by the Australian Security and Intelligence Organisation ('ASIO'). A small number of non-citizens were neither of character concern nor a security threat, their prolonged detention was, largely, attributable to the time taken by administrative and judicial decision-making.[90]

Complicating the deportation of people in the '*NZYQ* cohort' were legal rules precluding the removal of those the subject of a 'protection finding',[91] and, because some people were stateless or from disputed territories, faced practical

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87 See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report: Report 5 of 2021* (Report, 29 April 2021) 16–18, quoting the United Nations Human Rights Committee with respect to the unlawfulness and arbitrariness of Australia's mandatory detention scheme. See also Human Rights Committee, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2233/2013*, 116th sess, UN Doc CCPR/C/116/D/2233/2013 (2 May 2016, adopted 22 March 2016) ('*FJ et al v Australia*') ruling that the mandatory and indefinite nature of immigration detention violated the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9 ('*ICCPR*').

88 Commonwealth, Legal and Constitutional Affairs Legislation Committee, *Senate Estimates*, 8 October 2025, 112 (Senator Chandler).

89 *YBFZ* (n 8) 16 [37] (Gageler CJ, Gordon, Gleeson and Jagot JJ). The released detainees included seven convicted murders, 37 sexual offenders and 72 violent offenders: Department of Home Affairs, Submission to Senate Standing Committees on Legal and Constitutional Affairs, *Information Provided in response to a request from Senator James Paterson and Senator the Hon Michaelia Cash in relation to High Court decision in NZYQ* (12 February 2024) <https://www.aph.gov.au/-/media/Estimates/legcon/add2324/Home_Affairs/6_Dept_Home_Affairs___Info_request_from_Sen_Paterson_and_Cash_regarding_NZYQ.pdf>.

90 *AZC20 v Secretary, Department of Home Affairs (No 2)* [2023] FCA 1497 [2] (Kennett J) ('*AZC20*').

91 Removal was legally precluded due to Australia's *non-refoulement* obligations: see *Migration Act* (n 10) s 197C(3).

obstacles,[92] and/or health issues impeded their removal. Consequently, many of the cohort had been administratively detained for prolonged periods, often exceeding the duration of any prison sentence imposed that had triggered immigration enforcement — the longest period of immigration detention being thirteen years for a person with no convictions.[93] This institutionalisation of 'double punishment' for deportable non-citizens is an unfortunate hallmark of modern crimmigration practice in Australia.[94]

NZYQ reaffirmed the centrality of individual liberty to the constitutional framework, and the invalidity of executive detention in exceptional circumstances. While these are commendable objectives, the dominant political and media reaction to *NZYQ* was strongly adverse. Politicians and media called for immediate action to re-detain, or seriously constrain the liberty of, 'hardened criminals', released post-*NZYQ*.[95] The *NZYQ* ruling was welcomed by legal scholars, human rights institutions and advocates[96] but it left politicians aghast, with many expressing significant concerns about releasing into the community a cohort of non-citizens, most of whom were proven offenders. Although the number of people freed from detention after the *NZYQ* ruling was relatively small,[97] a political and media furore ensued. Propelling many of the demands for greater security over the management of the former detainees was a popular belief that the non-deportable non-citizens should simply not be freed from detention, regardless of the HCA's decision. Media headlines presented an undifferentiated image of former immigration detainees as highly dangerous and deserving of stringent restrictions on their liberty and freedoms. As Loughnan and Murray observed, 'criminalising narratives … have flourished since the High Court decision'. [98]

The parliamentary debates on the legislative response to *NZYQ* reveal a political yearning to, collectively, re-detain the '*NZYQ* cohort' based on their legal status and prior offending, without any genuine consideration of relevant

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92 Eg where a country does not accept involuntary returnees.

93 Matthew Doran, 'Document Reveals Snapshot of Crimes of Immigration Detainees Implicated by High Court Ruling', *ABC News* (online, 21 November 2023) <https://www.abc.net.au/news/2023-11-21/immigration-detainee-crimes-revealed-in-high-court-snapshot/103132018>.

94 See, eg, Michael Grewcock, 'Conviction, Detention and Removal: The Multiple Punishment of Offenders under Section 501 Migration Act' (Research Paper No 2009-49, Faculty of Law, University of New South Wales, 2 December 2009). Grewcock argued that although, formally, detention-deportation is not imposed as punishment, it has several punitive consequences.

95 The decision in *NZYQ* centred on one person but affected a broader cohort of non-deportable detainees.

96 See, eg, Australian Human Rights Commission, 'Commission Commends High Court Ruling on Indefinite Immigration Detention' (Media Release, 9 November 2023) <https://humanrights.gov.au/about/news/media-releases/commission-commends-high-court-ruling-indefinite-immigration-detention>.

97 Especially by comparison with the (approximately) 65, 000 prisoners released annually. See Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2023* (Catalogue No 4512.0, 14 March 2024) <www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/dec-quarter-2023>.

98 See Claire Loughnan and Philomena Murray, 'Words Matter: Corrosive Narratives Dehumanise Refugees', *Asylum Insight* (Web Page, December 2023) <www.asyluminsight.com/loughnan-and-murray>.

evidence about a given individual's present circumstances and the level and type of risk they might pose to the community. The (then) Minister for Home Affairs, Mrs Clare O'Neil, stated that if it was within her power to keep those released in detention, she would do it.[99] Expressing the government's view, Minister O'Neil said the judicial ruling undermined the preferred practice of, essentially, preventive detention for all of them, forever:

> We knew that it was 20 years of legal precedent and we were advised that it was likely that the Commonwealth would win the case. That is, *allow us to do what we wanted to do, which is keep these people in detention*.[100]

These comments nourish the view that, since *Al-Kateb*, there has been a preparedness on the part of government officials to simply 'warehouse' or segregate the intractable cases via extra-judicial detention,[101] in the absence of dynamic risk assessments for individuals and considered application of community-based alternatives to prolonged detention.[102] Consequently, government policy and the, hitherto, lack of effective legal constraint on indefinite detention, has contributed to the slow progression of cases towards status resolution. [103] This has fostered a bureaucratic environment in which officials were 'immunised' to the prolonged incarceration of people.[104]

In summary, the laws hurriedly introduced in response to *NZYQ* were broadly and loosely justified on community safety grounds.[105] Evidently, some politicians regarded immigration detention as tool that was simply interchangeable with

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99 Paul Karp, 'Immigration Detention: Labor to Rush Through Emergency Legislation after High Court Ruling', *The Guardian* (online, 15 November 2023) <https://www.theguardian.com/australia-news/2023/nov/15/albanese-indefnite-detention-ruling-emergency-legislation>.

100 Michael Read, 'O'Neil Did Not Expect High Court to Overturn Indefinite Detention', *Australian Financial Review* (online, 19 November 2023) <https://www.afr.com/politics/o-neil-did-not-expect-high-court-to-overturn-indefinite-detention-20231119-p5el1j>. Emphasis added.

101 See Crock and Bones (n 48) 169, 172, 191 for a similar claim.

102 See Cornall (n 28), calling for more nuanced risk assessments and more modern management of detainees posing a medium risk of future criminal behaviour.

103 Ibid 55, citing the Commonwealth Ombudsman.

104 *Sami v Minister for Home Affairs* [2022] FCA 1513 [53] (Mortimer J) ('*Sami*'). For a discussion of *Sami* and related cases, see Peter Billings, 'Immunised and Indifferent to Indefinite Incarceration: The Corrosive Effect of Immigration Detention Laws on Officialdom' in Michelle Peterie (ed), *Immigration Detention and Social Harm: The Collateral Impacts of Migrant Incarceration* (Routledge, 2024) 175. See also Office of the Commonwealth Ombudsman, *Taking Liberties* (Report, February 2024) for a critical report on the government's policies and procedures for ensuring timely removal of unlawful non-citizens.

105 See Clare O'Neil, 'Keeping Australians Safe Following NZYQ Ruling' (Media Release, Parliament of Australia, 11 November 2023) <https://minister.homeaffairs.gov.au/ClareONeil/Pages/keeping-australian-safe.aspx>; Samantha O'Donnell and Lorena Rivas, 'Overlooked Harms: Indefinite Detention and the Australian High Court Decision', *Border Criminologies* (Blog Post, 11 December 2023) <https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/12/overlooked-harms-indefinite-detention-and-australian>.

criminal detention for 'enemy crimmigrants'[106] perceived as threatening. As Sanmati Verma observed:

> over the past 20 years, we have been led to believe and come to accept that immigration detention is an extension of prison, that migrants and refugees are inherently a risk to our safety and tacitly, that they deserve to be locked up forever.[107]

Thus, the '*NZYQ* cohort' became Australia's modern folk-devil,[108] and this served to justify novel, extraordinary and, arguably, disproportionate legislative responses affecting other non-citizens living on temporary (removal pending) visas in the community too.

V The Legislative Aftermath of *NZYQ*

A *The First Salvo of Reforms*

With indefinite detention outlawed as a means of excluding unlawful non-citizens from the community,[109] in a political state of emergency, Parliament rushed to legislate alternative forms of social exclusion that exhibited and reinforced political authority over immigration controls and placed restraints on the liberty and bodily integrity of non-deportable non-citizens. One week after the HCA issued (*ex tempore*) orders in *NZYQ* came the first legislative reply.[110] This rapid response afforded Parliament insufficient time for any proper scrutiny of matters that seriously impinged on personal rights and liberties,[111] and no opportunity to consider why the HCA had declared the impugned provisions invalid.

The emergency legislation was directed at all non-citizens immediately released into the community, on a temporary visa, because of the *NZYQ* ruling. However, the new rules could apply to any non-deportable non-citizen subsequently freed from detention. Parliament gave short shrift to equality-

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106 See Leanne Weber, Alison Gerard and Rebecca Powell, 'Indefinite Detention in Australia as "Enemy Crimmigration"', *Border Criminologies* (Blog Post, 8 December 2023) <https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2023/12/indefinite-detention-australia-enemy-crimmigration>.

107 Sanmati Verma, 'Released Detainees Have Done Their Time. Let Them Be', *The Sydney Morning Herald* (online, 17 November 2023) <www.smh.com.au/politics/federal/released-detainees-have-done-their-time-let-them-be-20231116-p5ekgt.html>.

108 See also Melanie Griffiths, 'Foreign, Criminal: A Doubly Damned Modern British Folk-Devil' (2017) 21(5) *Citizenship Studies* 527.

109 Subject to the later ruling in *ASF17* (n 6). Prolonged detention remains a real possibility pending the outcome of a visa application: see *CZA19* (n 6).

110 *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth) ('*Bridging Visa Conditions Act*') commenced on 18 November 2023. There was just 12 hours from introduction to enactment on 17 November. The hasty and ill-judged response to *NZYQ* occurred in the absence of the HCA's reasons, which were not released until 28 November.

111 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 15 of 2023, 29 November 2023) 8.

based arguments to the effect that the released detainees did not necessarily pose any greater community risk than post-sentence Australian citizens, and that additional punitive measures were prejudiced and unnecessary.[112] Of greater import was their past offending allied to their alienage and, thus, liability to territorial exclusion.[113] As Aas claims, the lack of formal membership is the essential factor contributing to different, punitive, measures directed at populations of non-citizens.[114] Precisely because non-citizens are liable to executive detention (on grounds that do not apply to citizens) and deportation, they are exposed to alternative and extraordinary forms of coercive power under both immigration law and criminal law.

The first Amendment Act made significant changes to the *Migration Act 1958* (Cth) and *Migration Regulations 1994* (the 'Regulations').[115] The objectives were: community safety; management of the '*NZYQ* cohort'; facilitation of removal when practicable; deterrence from future criminal offending; and, promoting public confidence in the migration system.[116] The legislation introduced major changes to an existing type of temporary visa — a bridging visa for people pending removal (a Bridging Visa R, 'BVR'). The reforms enabled the Minister for Immigration to grant a BVR to eligible non-citizens (encompassing the '*NZYQ* cohort') subject to several mandatory conditions involving, inter alia, assorted reporting requirements relating to residence and travel, associations and memberships, as well as restrictions on the performance of certain forms of work.[117] Especially severe were two additional visa conditions that the Minister could impose on people's liberty: a curfew condition, confining a person to a notified location between 10pm and 6am the next day, and an electronic monitoring ('EM') condition requiring the wearing of a device (a 'chunky form of ankle cuff in a plastic cover'[118]).

These methods of control entailed restraints that were not imposed on individuals following conventional procedural ('fair hearing') principles and a dynamic risk assessment.[119] Rather, conditions were imposed on BVR-holders *unless* the visa-holder subsequently, and successfully, made representations for their adjustment, such that the Minister (or their delegate) was satisfied that the non-citizen did not pose a risk to the community. There was no legislated time

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112 See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report No 13 of 2023, 29 November 2023) 24–5.

113 The Australian government's policy position is that entering or remaining in Australia is a *privilege* that is forfeited when a non-citizen has engaged in criminal conduct: Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction No 110: Visa Refusal and Cancellation under Section 501 and Revocation of Mandatory Cancellation of a Visa under Section 501CA* (7 June 2024) 5.2(1). This outlook informs a popular view that felonious non-citizens, liable to removal, should not enjoy freedom in the community.

114 Aas (n 46).

115 *Bridging Visa Conditions Act* (n 110) schs 1–2.

116 *YBFZ* (n 8) 21 [73] (Gageler CJ, Gordon, Gleeson and Jagot JJ) summarising the extrinsic material.

117 *Migration Regulations 1994* (Cth) sch 2 cl 070.612A(1) ('*Migration Regulations*') listed the conditions.

118 *YBFZ* (n 8) 19 [58] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

119 *Migration Act* (n 10) ss 76E(1)–(2) (the version currently in force reflects the ruling in *YBFZ*).

limit upon the imposition of the visa conditions which could interfere with human rights indefinitely pending the non-citizen's removal.

Although a curfew (or, 'home detention'[120]) and EM are relatively less burdensome restraints upon people's freedom of movement compared to the grave detriment occasioned by indefinite detention in secure detention, EM effectively criminalises, stigmatises and alienates non-citizens,[121] having a long association with criminal punishment, and exacting a human toll.[122] Equally, curfew restrictions are a familiar form of bail provision and an aspect of supervision regimes for people paroled from gaol before their criminal sentence ends. By contrast with bail conditions imposed on a criminal defendant by a judge, or conditions placed upon a parolee by an independent board, the new visa conditions were administered by public servants subject to further interposition by the Minister (or delegate).[123]

Additionally, the first Amending Act exposed former immigration detainees to the risk of gaol by creating three criminal offences for breaching specific BVR conditions relating to the curfew and monitoring conditions, without a reasonable excuse.[124] The policy shift to criminalising non-compliance with visa conditions was deemed the most effective response to manage the '*NZYQ* cohort', given the usual consequence of detention, triggered by visa cancellation, was inapplicable. Criminalising immigration violations is an escalating feature of crimmigration control globally, but what is remarkable, if not novel,[125] here is that the new offences carried a mandatory minimum sentence.

A visa holder convicted of breaching their visa conditions is liable to be sentenced to prison for at least 12 months for each proven offence, with a maximum five-year sentence, 300 penalty units or both. Reducing judicial discretion to impose a proportionate prison sentence for breaching visa

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120 *YBFZ* (n 8) 28 [104] (Edelman J).

121 Stephanie J Silverman, 'Electronically Monitoring Migrants Treats Them Like Criminals', *The Conversation* (online, 26 January 2018) <https://theconversation.com/electronically-monitoring-migrants-treats-them-like-criminals-90521>.

122 American Bar Association *Electronic Monitoring of Migrants: Punitive Not Prudent* (Report, 9 April 2024) 3 <https://www.americanbar.org/content/dam/aba/administrative/immigration/electronic-monitoring-report-2024-02-21.pdf>.

123 The Minister is assisted, in the task of assessing whether conditions are necessary, by a non-statutory advisory board established in December 2023 by the executive government, called 'The Community Protection Board'. The Board provides impartial and evidence-based recommendations to visa decision makers on visa conditions imposed on BVR holders. See Australian Government, 'Community Protection Summary', *Department of Home Affairs* (Web Page) <www.homeaffairs.gov.au/research-and-statistics/statistics/visa-statistics/live/community-protection#>.

124 The criminal offence provisions (ss 76B–76DA) were inserted into *Migration Act* (n 10) by sch 1 of the first Amending Act. Breach of a visa condition over several days constitutes several offences each carrying a minimum prison sentence of one year.

125 In *Magaming v The Queen* (2013) 252 CLR 381, the HCA rejected a challenge to the constitutionality of mandatory minimum sentences for 'people smuggling' because the applicant failed to persuade the court of a suitable basis on which to apply proportionality reasoning.

conditions is unorthodox and plainly conflicts with a primary objective of Australia's criminal law system.[126] Consequently, crimmigration law displays its distinctive character here by purporting to deny its subjects proportionality in punishment — the severity of the penalty does not fit with the nature of the offending.[127] The proportionality principle usually governs the sentencing of citizen-subjects of criminal law and cannot be trumped by the goal of community protection.[128] Not only does the principle of proportionality not constrain the criminal sanctioning of non-citizens in this context but, as several authors have observed, proportionality is often absent when deportation follows the administration of the mandatory visa cancellation regime, especially with respect to long-term permanent residents.[129]

The disproportionality of response occasioned by automatic visa conditions, regardless of the nature and extent of risk posed by an individual, cross-stitched to arbitrary minimum criminal sentences for visa infringements, alarmed parliamentary scrutineers who could only examine the initial legislative reforms post enactment.[130] The Parliamentary Joint Committee on Human Rights stated that mandatory visa conditions coupled to minimum sentences for visa non-compliance, constituted 'a significant interference with human rights'.[131]

In short, the initial, rushed, legislative response to *NZYQ* was not subject to meaningful parliamentary scrutiny and it was an excessive reaction. The reforms adopted harsh, extra-judicial measures that were not a tailored means to address the risk profile of individual non-citizens and promote the social goal of public safety.

B *The Second Legislative Salvo*

Further reforms quickly followed the publication of the HCA's reasons in *NZYQ*. Responding to the reasons for that decision, these reforms amended the bridging visa scheme and introduced a mutually exclusive community safety order ('CSO') regime for judicial orders to restrain the liberty of certain dangerous non-citizens.[132] Deterrence of future crime was the principal purpose of both the amended administrative visa scheme and the CSO regime to be applied by the

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126 See *Hoare v The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) for a clear statement of the proportionality principle in sentencing.

127 Relatedly, see Stumpf, 'Crimmigration: Encountering the Leviathan' (n 35) 246.

128 See, Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 10th ed, 2022) ch 6. For a short history of mandatory sentencing in Australia, and challenges to mandatory detention laws, see David Brown et al, *Criminal Laws* (Federation Press, 8th ed, 2025) 1205–7.

129 See Crock and Bones (n 48); Billings 'Regulating Crimmigrants' (n 48).

130 See Senate Standing Committee for the Scrutiny of Bills (n 111) 13–14; Parliamentary Joint Committee on Human Rights (n 112) 123.

131 Parliamentary Joint Committee on Human Rights (n 112) 28.

132 *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) (in force from 8 December 2023); *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (Cth) (in force from 8 December 2023).

judiciary. Again, the legislation was hurried through federal parliament, making a mockery of democratic processes designed to ensure robust scrutiny.[133]

With respect to enhancing the BVR framework, the government's second wave of reforms (inter alia) clarified the power of the Minister for Immigration to grant a BVR without application, ensured visa conditions were operative for 12 months from the date of grant, and introduced new, wide-ranging, mandatory visa conditions in tandem with criminal penalties for non-compliance for visa holders with a history of either offending in respect of minors or other vulnerable people, or violent offending or sexual assault. The reforms criminalised non-compliance with visa conditions that prevented non-citizens from working with children or other vulnerable persons, from being near a school, childcare or daycare centre, and from contacting the victims (or their relations) of violent or sexual crimes that the non-citizen had been convicted of.[134]

Moreover, the BVR reforms altered how a non-citizen could seek an exception to certain liberty-restrictive conditions imposed on their visa, to somewhat reflect the reasoning in *NZYQ*. Following a decision, made under s 73 of the *Migration Act*, to grant a bridging visa subject to conditions, the Minister was obliged, under s 76E(3), to provide notice of, and reasons for, the decision and, to invite representations about lifting the conditions. Critically, if the Minister was then of a mind ('satisfied') that the imposition of conditions was 'not reasonably necessary for the protection of any part of the Australian community', they were required, under s 76E(4), to grant a second visa without prescribed conditions. This scheme was substantively unjust and procedurally irregular.

The revised ministerial powers were ill-defined and unparticularised with respect to the extent and degree of risk of harm to the community potentially occurring. This lack of specificity proved to be a decisive legal defect.[135] Furthermore, natural justice — a person's opportunity to be heard and make representations — applied after their interests were affected by the imposition of visa restrictions: in circumstances where it had not been assessed and established that the imposition of the condition(s) was reasonably necessary for the achievement of the (broad) purpose of community protection; and, where the condition would remain for up to 12 months. Moreover, there was no safeguard in the form of independent (merits) review to check the substantive justice of administering visa conditions in individual cases, though judicial review action was possible.

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133 David Crowe, 'Teal MPs Slam "Perversion of Democracy" on Immigration Laws', *The Sydney Morning Herald* (online, 6 December 2023) <www.smh.com.au/politics/federal/teal-mps-slam-perversion-of-democracy-on-immigration-laws-20231206-p5epeg.html>. Similar criticisms were directed at the lack of debate around the enactment of the *Anti-Terrorism Act (No 2) 2005* (Cth), which introduced preventive detention orders into the *Criminal Code Act 1995 (Cth)* ('*Criminal Code*'). See Svetlana Tyulkina and George Williams, 'Preventative Detention Orders in Australia' (2015) 38(2) *University of New South Wales Law Journal* 738.

134 Explanatory Memorandum, Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (Cth).

135 *YBFZ* (n 8) 22 [79], 23 [81]–[82] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

As the second Amendment Bill progressed through Parliament, the government added another 'extraordinary' measure,[136] enabling a state or territory Supreme Court to impose 'community safety orders' for the preventive detention or supervision of the most dangerous non-citizens released from indefinite immigration detention.[137] This approach drew upon the reasoning in *NZYQ* which had flagged the legal possibility of a preventive detention regime for high-risk non-citizens. In *NZYQ*, the Court explained that release from immigration detention did not prevent detention on another legal basis, 'such as under a law providing for preventive detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody'.[138] The possibility of re-purposing an existing legal framework, directed to protecting the community from a small group of high-risk non-citizen offenders, was realised by inserting a new div 395 into the *Criminal Code Act 1995* (Cth) ('*Criminal Code*').[139] The scheme parallels a federal regime reserved for high-risk terrorist offenders,[140] and enables the imprisonment or strict supervision of non-citizens with serious criminal histories who cannot be deported in the reasonably foreseeable future. Although contained in the *Criminal Code*, formally, this is a civil scheme with a non-punitive 'protective' purpose.[141] In several ways, this CSO scheme mirrored similar preventive schemes targeting high-risk individuals (including serious offenders under custodial sentence) in the states, which had weathered constitutional legal challenges.[142] Key features of the CSO hybrid scheme are briefly described, and analysed, below.

With respect to a community safety detention order ('CSDO'), upon application by the Minister for Immigration[143] a court must first determine that an adult non-citizen (who is in detention *or* the community) has a prior conviction in Australia *or* overseas for a serious violent or sexual offence, punishable by life imprisonment or a period of at least seven years.[144] A court must then be satisfied,

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136 *Benbrika [No 1]* (n 58) 98 [38] (Kiefel CJ, Bell, Keane and Steward JJ) describing *Criminal Code* (n 133) div 105A (continuing detention orders).

137 Community Safety Detention Order ('CSDO') or Community Safety Supervision Order ('CSSO').

138 *NZYQ* (n 3) 166 [72] (The Court).

139 *Criminal Code* (n 133) pt 9.10, div 395 (community safety orders).

140 Ibid pt 5.3, div 104 provides for interim control orders for prevention of terrorist acts. The validity of the scheme was upheld in *Thomas v Mowbray* (2007) 233 CLR 307.

141 Though, formally, imposed for 'protective' purposes, in practice preventive detention is always experienced as punitive. See Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth' (2008) 30(1) *Sydney Law Review* 101. Maintaining a strict dichotomy between detention imposed as punishment for past criminal wrongdoing and preventive detention imposed for protective purposes is, arguably, erroneous: see *Benbrika [No 1]* (n 58) 155–7[197]–[200] (Edelman J); *YBFZ* (n 8) 34 [130]–[132] (Edelman J).

142 See, eg, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219; *Garlett v Western Australia* (2022) 277 CLR 1.

143 *Criminal Code* (n 133) s 395.8(1)(a).

144 Ibid ss 395.2 (defines a serious violent or sexual offence), 395.6 (preconditions for community safety orders).

based on admissible evidence, and to a high degree of probability, that the serious offender 'poses an unacceptable risk of seriously harming the community by committing a serious or violent sexual offence'.[145] Also, a court must be satisfied that less restrictive measures (eg visa conditions) would be ineffective in protecting the community from serious harm.[146] The effect of a CSDO is to commit a person to custody in prison for a maximum period of three years and a court can order successive CSDOs, such that when one order ceases another comes into effect immediately.[147] The orders are subject to annual judicial re-evaluation.[148]

The threshold for the application of preventive detention to non-deportable non-citizens is quite demanding. As a civil scheme, the rules of evidence and procedure for civil matters apply.[149] However, the standard of proof ('high degree of probability') appears elevated to a higher standard than the 'balance of probabilities' without rising to the evidential standard used in criminal cases. Additionally, the yardstick of 'unacceptable risk' is undefined, but use of that phrase in the parallel scheme for terrorist offenders (under div 105A of the *Criminal Code*) is understood to require a judicial determination of whether the likelihood of the commission of an offence and magnitude of possible harm is tolerable.[150]

There is also the option of a community safety supervision order ('CSSO') which the Minister for Immigration can apply for, or which a court may order when satisfied the thresholds for a detention order are not met.[151] For a CSSO, the court must be satisfied, on balance and upon admissible evidence, that an adult non-citizen (who may be in detention or the community) poses an unacceptable risk of committing a serious violent or sexual offence, and that visa restrictions would not be as effective for community protection.[152] A range of obligations, prohibitions or restrictions (eg on a person's movement, residence, associations and use of technology) may be ordered by a court if satisfied that each condition and their combined effect is reasonably necessary (appropriate and adapted) for community protection.[153] A court could order a monitoring condition such that the person must allow their photograph or fingerprints to be taken by a specified authority, or allow police officers to attend and enter their residence to confirm compliance with a curfew condition or the wearing of an EM device. Thus, invasive police powers, available for the monitoring

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145 Ibid s 395.12 (making a community safety detention order). The reference to 'admissible evidence' denotes that the court must apply the rules of evidence and procedure for civil matters: at s 395.27. A court may appoint one or more experts to assist the court in its determination of whether a non-citizen poses an unacceptable risk to the community: at s 395.9. Expert reports are provided equally to all parties to proceedings and these reports are one of several relevant matters the court must pay regard to in making a community safety order ('CSO'): at s 395.11.

146 Ibid ss 395.12(1)(c)–(d).

147 Ibid ss 395.12(5)–(6).

148 Ibid s 395.23.

149 Ibid s 395.27.

150 *Benbrika [No 1]* (n 58) 151–3 [190]–[192] (Edelman J).

151 *Criminal Code* (n 133) ss 395.8(1)(b), 395.13(1)(a)(ii).

152 Ibid ss 395.13(1)(b)–(c) (making a community safety supervision order).

153 Ibid ss 395.13(1)(d), 395.14 (conditions of community safety supervision orders).

of high-risk terrorist offenders under supervision orders, are extended to the supervision of non-citizens subject to CCSOs.[154] Supervision orders may also apply for up to three years and may be issued consecutively.

What is distinctive about this new CSO regime is that the executive can, *at any time*, request its application with respect to a deportable non-citizen living in the community *in addition* to a non-citizen held in criminal or immigration detention. So, the regime operates more expansively compared to the federal high-risk terrorist offender scheme, or state serious offender schemes, upon which it is based. Also conspicuous is the inclusion of serious foreign violent or sexual offences as qualifying offences for the CSO regime. This gives rise to concerns about whether criminal proceedings in foreign jurisdictions will have adhered to fair trial principles. This is not a fanciful concern. The problem has arisen in administrative review proceedings dealing with visa cancellations on adverse character grounds referable to overseas convictions. In *Trikilis v Minister for Immigration and Border Protection* ('*Trikilis*'), the Administrative Appeals Tribunal flagged serious concerns about the fairness of trials in Israeli Military Courts and, on the unchallenged evidence before it, had reservations about the circumstances on which convictions were based.[155]

Another unusual feature of the regime is the use of mandatory criminal sanctions for contravening a community safety supervision order given that the CSSO regime adopts a civil procedure. It is a criminal offence to contravene a CSSO,[156] which carries a mandatory minimum sentence of one year imprisonment and a maximum five-year term.[157] Additionally, there are offences relating to conduct that interferes with or disrupts the functioning of a monitoring device under a CSSO, that carry a maximum penalty of five years imprisonment.[158] This underscores the hybridity of CSSOs, akin to counter-terrorism control orders developed over twenty years ago.[159]

The use of preventive imprisonment, for lengthy periods, for dangerous non-deportable non-citizens, is a novel approach to migration control but fairly anticipated given the appetite for post-sentence preventive detention laws in Australia and the political rumpus around the *NZYQ* case. Yet the extension of a pre-crime scheme to non-deportable non-citizens, that puts them on a similar

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154 *Crimes Act 1914* (Cth) pt IAABA amends how pt IAAB operates and largely applies pt IAAB to community safety supervision orders.

155 [2017] AATA 1409 [54]–[57].

156 *Criminal Code* (n 133) s 395.38. This approach to restrictions borrows from the *Terrorism (High Risk Offenders) Act 2017* (NSW). See Supplementary Explanatory Memorandum, Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (Cth) 42 [208].

157 *Criminal Code* (n 133) s 395.40.

158 Ibid s 395.39. A 'reasonable excuse' defence is available for any contraventions of community safety orders, which is analogous to the defence created under *Bridging Visa Conditions Act* (n 110) (discussed above).

159 Ashworth and Zedner described control orders as 'hybrid civil-criminal': see Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 184.

footing to high-risk terrorist offenders, came just shortly after a critical report on the effectiveness of preventive detention laws. Grant Donaldson SC recommended abolishing the power to make continuing detention orders, noting that the laws had made Australia a 'coarser and harsher society' without necessarily making the community safer.[160] Indeed, Donaldson sharply criticised the planned use of preventive detention laws for former immigration detainees.[161]

Essentially, one form of incarceration (immigration detention) has been exchanged for another (community safety detention). Although the latter regime does not have the safeguards of a criminal trial, it does at least have superior procedural, evidential and institutional safeguards compared to the mandatory immigration detention scheme,[162] notably: community safety detention is a measure of last resort; a CSDO can only be made after an *inter partes* hearing in open court at which civil procedural and evidential rules apply; there is provision for judicial reasons for decisions; and appeal rights.[163] These are key safeguards and mitigate the risk of unnecessary and unjustifiable detention.

At the time of completing revisions to this article, no preventive detention orders had been sought by the federal government, and just twelve supervision orders were under active consideration.[164] The spectre of judicial administration of community detention or supervision orders, coupled to reasonably stringent legal thresholds for the application of CSDOs, partly explains why no non-citizen has been detained under this regime to date — mirroring state experience with prevalent but little-used court ordered anti-bikie control order schemes.[165] The efficacy of the strict bridging visa conditions is another factor.[166] Extending preventive regimes for high-risk terrorist offenders or other serious offenders to non-deportable non-citizens appears to be an example of legislative overreach — a case of normalising exceptional pre-crime measures, despite their apparent lack of utility.

The risk of legislating in haste to bypass a politically inconvenient court decision protective of individual liberty is, as Anne Twomey suggested, that it may create a

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160 Grant Donaldson, 'Review into Division 105A (and Related Provisions) of the Criminal Code Act 1995 (Cth)' (Report, 3 March 2023) 7, 11 <https://www.inslm.gov.au/system/files/2024-02/inslm-report-division-105a-3-march-2023.pdf>.

161 Angus Thompson, 'Former Security Watchdog Labels Preventative Detention Laws a "Disgrace"', *The Sydney Morning Herald* (online, 3 December 2023) <www.smh.com.au/politics/federal/former-security-watchdog-labels-preventative-detention-laws-a-disgrace-20231201-p5eof6.html>.

162 The absence of substantive judicial review over the reasonableness and necessity for detention in individual cases, coupled with the absence of periodic review, have long been recognised as violating international laws prohibiting arbitrary detention. See Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997, adopted 3 April 1997) ('*A v Australia*').

163 *Criminal Code* (n 133) ss 395.35–395.36.

164 Commonwealth, Legal and Constitutional Affairs Legislation Committee, *Senate Estimates*, 27 March 2025, 68 (Clare Sharp).

165 See Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) *Melbourne University Law Review* 362.

166 Commonwealth (n 164) 68.

'spiral of litigation and legislation'.[167] So it proved, with the Federal Court establishing a panel of judges to review an increasing and complex caseload in the fallout from *NZYQ*,[168] subsequent appeals to the HCA, and more legislative counterstrokes.

VI The Legislative Answer to *ASF17*

On 26 March 2024, the government unsuccessfully tried to enact more reforms without meaningful scrutiny and parliamentary debate.[169] The Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) ('Removal Bill') sought (inter alia) to address and reduce the intractable removals caseload and to slow down the entry pipeline into Australia of other potentially intractable removal cases in the future.[170] Reducing the intractable caseload was to be achieved by introducing behavioural expectations wedded to new criminal offences for non-citizens,[171] on a 'removal pathway', who refuse to follow administrative directions and engage with efforts to remove them, absent a reasonable excuse.[172] The measure was directed to (approximately) 150–200 unlawful non-citizens in detention who refused to co-operate with removal efforts and could also apply to the non-citizens released from detention following the *NZYQ* case. Yet, the Bill threatened punishment for a broader cohort, including non-citizens with a temporary visa (a Bridging Visa E, 'BVE') issued for removal

167 Anne Twomey, 'New Laws to Deal with Immigration Detainees Were Rushed, Leading to Legal Risks', *The Conversation* (online, 13 December 2023) <https://theconversation.com/new-laws-to-deal-with-immigration-detainees-were-rushed-leading-to-legal-risks-219384>.

168 Rhiannon Down, 'Federal Court Convenes Crisis Panel to Tackle NZYQ Case Wave', *The Australian* (online, 7 July 2024) <https://www.proquest.com/newspapers/federal-court-convenes-crisis-panel-tackle-nzyq/docview/3076532678/se-2?accountid=14723>.

169 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 5 of 2024, 27 March 2024) 8–9.

170 Explanatory Memorandum, Migration Amendment (Removal and Other Measures) Bill 2024 (Cth) 3.

171 Excluding those non-citizens owed protection obligations, protection visa applicants, and children under 18 (though a direction may be given to a child's parent who is a removal pathway non-citizen).

172 The Bill gave examples of what would *not* be a reasonable excuse: eg a subjectively held fear of persecution, in situations where a non-citizen is not the subject of a formal protection finding or has no valid protection visa application ongoing.

purposes (over 4400 people). The latter group form part of the 'Legacy Caseload',[173] and include rejected refugee claimants residing in Australia.[174]

The Removal Bill proposed a new, extensive, power for the Minister for Immigration to give a written direction to a 'removal pathway non-citizen', whose visa application was finally determined, to force their cooperation with officials and removal to their home country or safe third country. To deter non-cooperation, the Bill threatened penalties equivalent to those in the second Amending Act of 2023, with a mandatory minimum twelve-month prison term and a maximum sentence of five years (300 penalty points or both) for non-compliance with administrative directions. The Bill also provided (inter alia) the Minister with a non-delegable power, to designate, by statutory instrument, a 'removal concern country' in the national interest; effectively enabling the Minister to impose a blanket ban on visa grants to nationals (subject to certain exceptions) from designated countries. The political goal was to provide the government with a negotiating tool, to leverage the cooperation of countries who refuse to accept involuntary returnees. The proposed means would serve to penalise blameless people wishing to travel to Australia (to visit family and communities or, potentially, seek asylum) rather than the government of the designated country that refuses to cooperate with Australia.

The draft laws stalled in the Senate which referred the Bill to a Committee inquiry. The government's haste to pass the Removal Bill stemmed, in part, from their desire to get ahead of a forthcoming case involving a 'failed' asylum seeker. An Iranian man (pseudonym ASF17) had been detained for almost ten years pending the outcome of legal proceedings. He was uncooperative with Iranian officials with respect to his removal due to a declared (but unproven) fear of persecution.[175] Before the HCA, ASF17 argued that, because of his recalcitrance, removal was impracticable in the reasonably foreseeable future. Therefore, the constitutional limit established in *NZYQ* was reached.

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173 Asylum seekers arriving by boat during the period August 2012 to 1 January 2014 are a distinct cohort of asylum seekers, that numbered around 30,000 people. They were designated the 'Legacy Caseload' under migration legislation introduced in 2014 and treated differently to other protection seekers in Australia. They were subject to a, flawed, 'fast-track' protection visa assessment process, and if successful they were subject to temporary protection arrangements with no path to permanent residency. Those refused substantive visas were placed on temporary bridging visas pending departure, but many remain in Australia due to practical obstacles inhibiting departure or unresolved legal proceedings.

174 The Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Migration Amendment (Removal and Other Measures) Bill 2024* (Report, May 2024) 4 [1.18]–[1.19], referring to Bridging Visa Rs ('BVR') (Subclass 070) and Bridging Visa Es ('BVE') (Subclass 050).

175 Problematically, ASF17 had not had a proper consideration of certain elements of his refugee claim (see *ASF17* (n 6) 794 [63] (Edelman J)), aspects which were raised, belatedly, after the merits of the initial protection visa application had been decided and rejected. Consequently, it is troubling that the HCA determined ASF17 was *choosing* not to co-operate with his removal. The choice is imagined in circumstances where, as the courts accepted in habeas corpus proceedings, ASF17 faced a real risk of persecution in Iran based on his sexuality.

In *ASF17*,[176] the HCA dispelled the federal government's fears about the prospect of another adverse court ruling and other detainees being freed. The HCA found that a person in the position of ASF17 (neither stateless nor a declared refugee) who has the capacity,[177] but chooses not to cooperate with administrative officials may, lawfully, be kept in detention. The bare fact of a detainee's non-cooperation with authorities was insufficient to refute the existence of the legitimate and non-punitive purpose of detention (removal), with six members of the Court agreeing that:

> The short point is, that conformably with the *Lim* principle, continuing detention for a non-punitive purpose that is occurring because of a voluntary decision of the detainee cannot be characterised as penal or punitive.[178]

Justice Edelman reached the same result by a different path of reasoning.[179] The unanimous decision of the court was welcomed by a government alarmed at the possibility of a prospective deportee 'engineering' their release into the community by refusing to cooperate in removal efforts.

One important implication of the HCA's ruling was that the government could lawfully detain, *indefinitely*, a non-citizen refusing to cooperate in their removal. Consequently, the government was faced with a cohort of up to 200 people in a similar position to ASF17 — uncooperative and seemingly unreturnable.[180] Therefore, the government pressed on with its plans to coerce and criminalise noncompliant 'removal pathway' non-citizens, and to impose a crude travel ban on most people from countries whose governments refuse to assist with the return of their nationals from Australia.

The Removal Bill was finally assented to on 4 December 2024, eight months after its initial introduction in Parliament.[181] The Act established the statutory expectation that certain deportable non-citizens, in detention and on temporary visas within the community pending removal, will act on administrative

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176 Judgment issued three days after the Senate Committee reported and recommended that the Removal Bill be enacted. See Senate Legal and Constitutional Affairs Legislation Committee (n 174).

177 Cf *AZC20* (n 90), a case in which the detainee lacked the capacity to co-operate with officials due to psychiatric illness.

178 *ASF17* (n 6) 791 [42] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

179 For non-citizens — such as ASF17 — who are capable of consenting but refuse to be removed to a country that requires voluntary removal, detention is reasonably necessary for their removal 'because there is a real prospect that aliens in that class (perhaps with counselling, advice and relocation assistance) will consent to be removed from Australia in the reasonably foreseeable future': *ASF17* (n 6) 803 [108] (Edelman J).

180 See Human Rights Law Centre, 'Explainer: High Court's Decision in ASF17 v Commonwealth' (Web Page, 10 May 2024) <https://www.hrlc.org.au/explainers/2024-05-10-asf17-high-court/>.

181 Notably, the amendments define a 'removal pathway non-citizen' and via sch 1 insert a new sub-div D into div 8 of pt 2 of the *Migration Act* (n 10). In a troubling development, sch 2 expanded ministerial powers to revisit and reverse refugee protection findings for lawful non-citizens in the community denied a substantive visa on adverse character grounds. See also Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 3 of 2024, 17 April 2024) 37–43.

instructions and submit to their removal from Australia. However, it is doubtful that the threat or actuality of criminal sanctions will coerce detainees, like ASF17, or those non-citizens with mental illnesses,[182] into complying with administrative directions — especially when experience reveals that some non-citizens appear to have chosen to endure prolonged immigration detention over repatriation. As the Iranian applicant in *ASF17* explained, 'if I didn't fear harm, I wouldn't have stayed in this camp for 10 years. I would have quickly gone back to begin with the first day. Who … will leave their family and prefer the prison?'[183] The prospect of lengthy criminal imprisonment may not provide any greater motivation, for certain non-citizens, to comply with removal directions than prolonged immigration detention has since its introduction in 1992.

Indeed, it must be stressed that there are many non-citizens, like ASF17, who have a legitimate claim for protection that has gone unanswered due, in part, to deficiencies with truncated refugee status assessment procedures in Australia.[184] Those in a comparable position to ASF17 are in a catch22: return to a country where there is, perhaps, a real risk of persecution or death, or face a minimum twelve-month prison sentence. Should they 'choose' the latter option, doubtless they would be recycled back into immigration detention upon expiration of their prison sentence, unless they cooperated with their removal which is contingent on interstate agreement. Consequently, Australia may violate her *non-refoulement* obligations by coercing people's removal under threat of criminal sanction.

In short, imposing an arbitrary minimum prison sentence for failing to follow an administrative direction will criminalise many non-citizens in immigration detention and within the wider community, including refused refugee protection seekers (among the 'Legacy Caseload') on a 'removal pathway', who pose little risk to community safety. This is a disproportionate and punitive response for a group that have lived, under temporary visas and in very precarious circumstances, within the Australian community for the past decade.[185]

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182 *AZC20* (n 90).

183 *ASF17* (n 6) 805 [119] (Edelman J).

184 Ibid 790 [38] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ) where the High Court of Australia adverted to the possibility that a person could be removed in circumstances where they might have a genuine ('eleventh-hour') protection claim. Also, the fast-track process that ASF17 was subject to lacked procedural safeguards, casting doubt on the correctness of substantive asylum decisions. For a critique, see Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *University of New South Wales Law Journal* 1003; Linda Kirk, 'Accelerated Asylum Procedures in the United Kingdom and Australia: "Fast Track" to *Refoulement*?' in Maria O'Sullivan and Dallal Stevens (eds), *States, the Law and Access to Refugee Protection: Fortresses and Fairness* (Hart Publishing, 2017) 243.

185 Australian Human Rights Commission, *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (Report, 2019). See also Laurie Berg, Sara Dehm and Anthea Vogl, 'Refugees and Asylum Seekers as Workers: Radical Temporariness and Labour Exploitation in Australia' (2022) 45(1) *University of New South Wales Law Journal* 35.

VII The Legislative Repercussions of YBFZ

Following *NZYQ* and the ensuing legislative responses, several challenges to the imposition of mandatory visa conditions upon the '*NZYQ* cohort' were filed in the HCA. Three cases were effectively shut down by the government after it removed curfews and monitoring devices from the plaintiffs soon after court papers were lodged.[186] This simply deferred a ruling on the validity of certain regulatory provisions that authorised visa conditions permitting confinement and surveillance: a curfew (for one-third of every day), and the wearing of a monitoring device at all times.

In *YBFZ*, a stateless Eritrean refugee, with a criminal history and no real prospect of removal, asked the HCA whether bridging visa restrictions impacting his liberty were punitive and, thus, constitutionally invalid.[187] Applying and extending the constitutional principle in *Lim*, as restated by six Justices in *NZYQ*,[188] to the impugned provisions,[189] the HCA decided, by a majority, that the regulations were invalid. The visa conditions imposed by the executive on *YBFZ* inflicted punishment, infringing the separation of powers.

The majority joint judgment (Gageler CJ, Gordon, Gleeson and Jagot JJ) held that the substance and detrimental effect of the curfew and monitoring conditions meant they were prima facie punitive.[190] The conditions amounted to 'material and relatively long-term' infringements of liberty and bodily integrity respectively.[191] Moreover, in their Honours' opinion, the conditions could not be justified as necessary for a legitimate and non-punitive purpose because the object (community protection 'from harm') was too ambiguous. Their Honours interpreted the regulatory provision to 'mean precisely what it says, that its object is the "protection of any part of the Australian community" in the broad sense',[192] rather than for more specific purposes, such as protection from the risk

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186 Matthew Doran, 'Immigration Detainees Drop High Court Challenges after Ankle Monitoring Bracelets Removed', *ABC News* (online, 1 February 2024) <https://www.abc.net.au/news/2024-02-01/immigration-detainee-challenges-dropped-ankle-monitoring-lifted/103409080>.

187 Following the Minister's decision (taken without according natural justice) to impose visa conditions, upon later invitation, YBFZ unsuccessfully petitioned the Minister to have the curfew and monitoring conditions removed from his BVR. YBFZ failed to comply with his conditions, and charges were pending in the Magistrates Court of Victoria at the time of his HCA appeal.

188 If a law authorises executive detention, it will contravene Ch III 'unless the law is reasonably capable of being seen as necessary for a legitimate and non-punitive purpose. In other words, detention is penal or punitive unless justified otherwise': *NZYQ* (n 3) 157 [39] (The Court).

189 *Migration Regulations* (n 117) sch 2 cls 070.612A(1)(a), (d) provided for the imposition of conditions upon bridging visas (Subclass 070) granted by the Minister under the Regulations.

190 *YBFZ* (n 8) 17–18 [47]–[52], 19–20 [58]–[63] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

191 Ibid 18 [52], 19 [60].

192 Ibid 22 [76].

of serious harm arising from future offending.[193] This purpose was 'unparticularised' and 'indeterminate',[194] and a concept of such elasticity that it was not inconsistent with the imposition of a criminal punishment following an adjudication of criminal guilt, a function lying in the heartland of judicial power.[195] Accordingly, the purported non-punitive purpose failed the legitimacy test due to its generality. The majority concluded that the conditions were 'a form of extra-judicial collective punishment based on membership of the class' and infringed upon judicial power.[196] Justice Edelman agreed the conditions were punitive and invalid offering separate reasons.[197]

Immediately after the *YBFZ* decision came more regulatory reforms,[198] to restore curfews and EM conditions for certain BVR holders, then consequential legislative amendments on 4 December 2024.[199] Responding directly to the majority (joint judgment) reasoning in *YBFZ* the government's regulatory powers to impose surveillance and monitoring conditions were reworked again. The new 'community protection test' provides that the Minister for Immigration must first be satisfied that, on balance, the BVR holder poses a *substantial risk of serious harm* to community safety by committing a serious offence, and that each visa condition is the means reasonably necessary, and *reasonably appropriate and adapted*, for the protective purpose. Therefore, a positive and proportionate decision is now, *initially*, required from the Minister, with respect to both the nature of harm to be protected against, and degree of future risk, the BVR holder may pose — as opposed to visa conditions being presumptively imposed on a person who is regarded, broadly, as a risk to any part of the Australian community, unless the Minister later decides otherwise.

Additionally, the migration amendments supplied (inter alia) new powers to enable the re-detention of non-citizens in circumstances where the government reaches a financial arrangement with a third country to allow the non-citizen to enter and remain. Where a foreign country agrees to receive a 'removal pathway

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193 Ibid 20–2 [66]–[76]. Cf Edelman J at 29–32 [110]–[123]. His Honour viewed the evident purpose of the regulatory terms as being to protect the community from the risk of serious future harm, and comparable to the meaning and application of the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW) s 6(1).

194 *YBFZ* (n 8) 22 [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

195 Ibid 23 [81].

196 Ibid 24 [86]–[87].

197 His Honour determined that the two conditions had a punitive character because they were, in fact, imposed by the executive to deter crime and based on past criminal activity: ibid 42 [165]–[166]; and because of the harshness of the consequence of home detention sanctioned by mandatory imprisonment for breach of that condition: ibid 43 [167]–[168].

198 New regulations were registered and commenced the morning after the *YBFZ* ruling: *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth).

199 *Migration Amendment Act 2024* (Cth) schs 6–7 ('*Migration Amendment Act*') amended subclass 070 Bridging (Removal Pending) Visas. See also Explanatory Statement, Migration Amendment (Bridging Visa Conditions) Regulations 2024 (Cth).

non-citizen', the Minister must issue a notice which triggers visa cancellation.[200] This cessation process (which does not attract natural justice)[201] renders a non-citizen unlawful and liable to immigration detention, because the third country agreement raises the spectre of removal being in prosect in the reasonably foreseeable future, thereby meeting the *NZYQ* threshold.

The latest legislative reforms also establish broad civil liability immunity for the government with respect to the prospective removal of unlawful non-citizens to foreign countries, including but not limited to those it has third country reception arrangements with (as outlined above).[202] This is a significant manoeuvre coming, as it does, after the Commonwealth government has only recently settled compensation claims from refugee claimants,[203] for their negligent mistreatment in third countries — Nauru and Papua New Guinea — while detained under 'regional processing' arrangements established in 2012.[204]

VI Conclusions on Escalating Crimmigration Controls

This article has explained and critically examined how and why criminal law and immigration law have been employed in innovative, interchangeable and mutually reinforcing way with respect to regulating, in the national interest, small groups of unwanted non-citizens. The targets of crimmigration include what the government views as 'undesirable' non-citizens with criminal histories who cannot be deported in the foreseeable future, and extends to non-citizens

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200 *Migration Amendment Act* (n 199) schs 1, 5. In February 2025 the government announced that three non-citizens, with criminal histories, from the NZYQ cohort would be transferred to Nauru, under a bilateral arrangement, for long-term resettlement: Jessica Bahr, 'Burke Expects Legal Challenge to Nauru Deal Deporting Three Violent NZYQ Members', *SBS News* (online, 16 February 2025) <https://www.sbs.com.au/news/article/three-members-of-nzyq-cohort-to-be-deported-to-nauru/atjo9345q>.

201 See also *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540, where the Court rejected procedural unfairness claims with respect to both the third country reception arrangements with Nauru (at [130]–[131]) and the related exercise of statutory powers (at [152]–[161]). The Court also ruled that the evidence did not support a finding that there was a real risk of indirect *refoulement* from Nauru to Iran (at [176]–[177]) and that the lack of suitable medical services in Nauru (to deal with the applicant's asthma) did not serve to prevent removal (at [182]–[185]). The Australian government later relied on *TCXM* to justify the total legislative exclusion of procedural fairness with respect to third country arrangements for affected 'removal pathway' non-citizens (see Part VII Postscript).

202 *Migration Amendment Act* (n 199) sch 2.

203 See, eg, *FBV18 v Commonwealth* [2024] FCA 947 (breach of duty of care in relation to medical treatment of a child detained on Nauru); *AYX18 v Minister for Home Affairs* [2024] FCA 974 (breach of duty of care in relation to medical facilities for a child detained on Nauru).

204 Since 13 August 2012, 4183 asylum seekers arriving by boat, unauthorised, were transferred to Papua New Guinea or Nauru for 'offshore processing' in camps widely criticised by human rights monitors due to the prolonged and arbitrary nature of detention, poor living conditions, lack of physical security and inadequate access to healthcare: see, eg, Australian Human Rights Commission, *Asylum Seekers, Refugees and Human Rights: Snapshot Report (2nd edition)* (Report, March 2017).

who are uncooperative with removal processes, including rejected refugee claimants with cogent claims to protection left unanswered.

For two decades *Al-Kateb* stood, without legislative correction, as authority for the validity of an illiberal scheme of indefinite immigration detention that institutionalised 'double punishment' in practice. The HCA ruling in *NZYQ* signalled an end to indefinite detention for some intractable cases — when deportation was not in prospect in the reasonably foreseeable future. Deprived of the administrative means to indefinitely detain and segregate a small population of unwanted non-citizens in Australia, the federal government hastily replaced immigration detention with novel, stringent, visa conditions and assorted constraints on individual liberty and bodily integrity (wedded to criminal penalties for non-compliance) to manage the '*NZYQ* cohort', deter future offending and promote community safety. The coupling of far-reaching and harsh visa conditions with severe and disproportionate criminal sanctions for non-compliance amounted to taking a blunt statutory sledgehammer to fix complex matters, and to accomplish political purposes that had previously been realised via the uncompromising regime of mandatory immigration detention.

Crimmigration is often characterised by different and depleted procedural standards and safeguards, and recent legislative reforms in Australia clearly evidence distinctive forms of procedural justice. Notably, punitive visa conditions were, originally, applied to the '*NZYQ* cohort' automatically, in a bureaucratic manner without affording natural justice. (prior notice and an opportunity to respond), leading to imprudent administrative visa decisions: effectively, a 'punish first, appeal later' approach.[205] After the *YBFZ* ruling, the replacement visa scheme heralded a somewhat improved procedure entailing a form of proportionality testing — a scheme better designed to promote an appropriate and adapted approach to the imposition of visa conditions on a case-by-case basis by the executive. Yet, still conspicuously absent is an independent and impartial review mechanism to promote substantive justice.

Imposing restrictive visa conditions, under the pain of criminal sanction for non-compliance and associated mandatory sentence provisions, evidences the distinctive melange of criminal and immigration law emblematic of crimmigration control. That is, measures and detriments commonly associated with the criminal justice system (eg curfews and electronic monitoring) are injected into the immigration realm but without the associated institutional oversight and procedural justice safeguards protective of people's basic rights to life, liberty and bodily integrity.

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[205] This unconventional approach also characterises the mandatory visa cancellation scheme which operates without prior notice and an opportunity to be heard. Instead, there is a post-decisional procedural fairness via a 'revocation' process through which non-citizens may challenge cancellation decisions. See Billings, 'Regulating Crimmigrants' (n 48).

It is telling that some judges appear to have utilised their residual sentencing discretion to impose (wholly or partially) suspended custodial sentences for visa offences committed by the '*NZYQ* cohort',[206] likely born out of misgivings about the disproportionality of imposing a minimum 12-month custodial sentence in particular cases of visa non-compliance. In one reported case, a Perth Magistrate imposed a 12-month suspended sentence on a former immigration detainee for breaching his curfew and monitoring conditions. In deciding to bail him, the Magistrates Court took account of the fact that (inter alia) the offender would remain subject to strict monitoring under migration rules.[207] It remains to be seen if Parliament will tighten its crimmigration controls further by legislating to close this 'loophole' and remove judicial discretion over the mandatory sentencing provisions for certain visa breaches. Such a reform would further evidence how the substance of crimmigration laws and their consequences, in particular cases, may bespeak 'arbitrariness or disproportion of response'.[208]

Reforms to the *Criminal Code* enacted in December 2023 have permitted the preventive detention or strict community supervision of the riskiest among the people released from detention after the *NZYQ* decision and others who may be released in future. Intensifying crimmigration controls in this way — by utilising and broadening a scheme intended for high-risk terrorism offenders to net a small population of criminal non-citizens — has not resulted in any applications for CSOs before the courts to date. This is unsurprising given: (i) the complexity of cases (offender profile and mental health considerations); (ii) the relatively strict requirements for CSOs (including, burden of proof and evidentiary threshold); and (iii) the availability of less restrictive alternatives to prison (including, BVR conditions). Indeed, it took three years to prepare a case under the related, high-risk terrorist offender, scheme which was comparatively more straightforward to utilise.[209] Whether the preventive detention order powers will ever be used by a judge, to remove dangerous non-citizens from the community, appears doubtful. Redesigning the scheme to make it easier for the executive to bring a case to court successfully would invite constitutional challenges.

Following the opening legislative rejoinders to *NZYQ* enacted in December 2023, a year later, crimmigration controls were expanded further, with new powers targeting a small sector of, seemingly, 'uncooperative' immigration detainees to coerce their compliance with administrative removal directions. Criminalising non-compliance with administrative directions, combined with

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206 Commonwealth (n 164) 73–4.

207 Joanna Menagh and Tabarak Al Jrood, 'Ex-Immigration Detainee Released back into Community after AFP Arrest in WA over Curfew, Ankle Monitor Breaches', *ABC News* (online, 21 May 2024) <https://www.abc.net.au/news/2024-05-21/wa-ex-immigration-detainee-pleads-guilty-to-curfew-breach/103874566>.

208 See the observations of Allsop CJ in *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 6 [15] in the context of the consequences of a visa cancellation decision upon a long-term resident.

209 Commonwealth, Legal and Constitutional Affairs Legislation Committee, *Senate Estimates*, 24 February 2025, 117.

the imposition of mandatory minimum sentences, is novel in Australia. Globally, it appears to be an unparalleled means of facilitating 'voluntary' removals notwithstanding many other countries face a similar problem with repatriating certain non-citizens (including, refugees and stateless persons). These reforms extend beyond the deliberately uncooperative immigration detainees and may capture those in the community on bridging visa, including over four thousand people (among the 'Legacy Caseload') denied substantive refugee protection visas who have lived, on temporary visas, in the community for many years pending their departure. Again, while the prompt removal of non-citizens fairly refused a substantive visa is a legitimate end of an effective immigration system, threatening adults (who may, but need not, be of character concern) with prison, for at least one year, to procure immigration compliance denotes an inordinate means of control. This may lead to the indefinite recycling of people between prison and immigration detention, and may expose non-citizens (including those, like *YBFZ*, subject to the faulty 'fast-track' asylum process) to *refoulement*.

Legislators' hasty responses to *NZYQ* overreached by defaulting to criminalising people because of their lack of formal membership and unwanted presence, as much as (and seemingly more than) for the risk of harm they might cause through any future offending. The symbolic use of contemporary crimmigration controls — to communicate and re-assert the sovereign power of the state (qua government) over immigration enforcement — is plain to see. Australia remobilised criminal law to manage (and potentially segregate from the community) migrants on a removal pathway, in tandem with heightened immigration law measures, to effectively, side-step the constitutional limits on the immigration detention regime. This coupling of immigration (visa) restrictions and administrative (removal) directions with new criminal offences and severe penalties, and the civil-criminal hybrid CSO scheme exemplifies, somewhat, crimmigration control as, an 'instrumental panoply of laws, geared towards the exclusion of undesirable non-citizens, from which immigration officials may "cherry-pick" at their wish'.[210] As such, the legislative replies to *NZYQ*, *ASF17* and *YBFZ*, have underscored Australia's position as a state at the forefront of an expanding phenomenon — crimmigration — globally.

VII Postscript

In September 2025, after the completion and acceptance of this article for publication, the *Migration Act 1958* (Cth) was amended, yet again, via the *Home Affairs Legislation Amendment (2025 Measures No 1) Act 2025* (Cth), targeting non-citizens on a removal pathway. The reforms (inter alia) expressly stipulated that provisions authorising and enabling executive action with respect to third-country

[210] Bowling and Westenra (n 36).

resettlement arrangements and non-citizens' removal are unconditioned by natural justice obligations. Ostensibly, to reduce the scope for future litigation[211] and, thus, facilitate the swift, forcible exclusion of unwanted aliens from Australia (which, as discussed earlier, is a group wider than the small '*NZYQ* cohort' and includes stateless persons and refugees owed protection obligations under international law). The total exclusion of procedural justice requirements, coupled with the retrospective validation of all things done in relation to third country reception arrangements (again, to pre-empt legal challenges), is textbook crimmigration law. It will preclude people from being heard; denying them the opportunity of ensuring that removal action is based on all relevant information about their circumstances, including the likely effects of removal upon them. This latest reform paved the way for the announcement of a new (and financially costly) arrangement with Nauru to accept (and essentially 'warehouse') up to 280 non-citizens from the '*NZYQ* cohort' on long-term visas.[212] One member of the '*NZYQ* cohort', re-detained in Australia pending removal to Nauru under the new arrangements, stated:

> These days are like living in a nightmare. I made mistakes since I came to Australia – I have been punished for those mistakes. I have tried everything to put my life back on track. I am not a young man – I cannot keep rebuilding my life. I do not know why Australia has selected me for this terrible punishment.[213]

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211 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 August 2025, 1 (Tony Burke, Minister for Home Affairs). See also Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 5 of 2025, 4 September 2025) for initial, critical, scrutiny of the Home Affairs Legislation Amendment (2025 Measures No 1) Bill 2025 (Cth).

212 Michelle Grattan, 'View from the Hill: Albanese Government Resorts to Whatever-It-Takes to Rid Australia of Former Detainees', *The Conversation* (online, 31 August 2025) <https://theconversation.com/view-from-the-hill-albanese-government-resorts-to-whatever-it-takes-to-rid-australia-of-former-detainees-263914>.

213 Sarah Basford Canales, 'Adnan thought he'd served his time. But one night border force raided his home to deport him to Nauru', *The Guardian* (online, 28 October 2025) <https://www.theguardian.com/australia-news/2025/oct/28/australian-border-force-nzyq-non-citizens-nauru>.

'How is Research Dangerous?': A Study of Australian Universities and Research Security Incidents

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The performance of scientific and technological research has always been done openly, collaboratively and with the widest scope of international cooperation. However, recent moves by autocratic nations to exploit the standards of openness displayed by Western universities and research institutions has fuelled the emergence of 'research security', a domain invoking the protection of sensitive, classified or economically valuable knowledge and technologies from espionage, theft, interference and illicit transfers. Australia — once considered a 'first mover' by criminalising foreign interference and university espionage in 2018 — has since languished in legal and policy restrictions on research security. In some part, this is due to an unwillingness by academia to recognise that national security threats to the research enterprise are real. Therefore, this paper seeks to empirically examine live cases of research incidents from Australian institutions obtained from Freedom of Information requests. Building on those case studies, the paper then seeks to argue that Australian (and indeed global) academia is still a fundamental target for foreign adversaries seeking to expand or mature their technological and industrial bases through illicit means.

I Introduction

In 2017, Australia faced a significant national security problem. The nation was confronting a sophisticated espionage campaign on an 'extensive, unrelenting' scale,[1] so much so that it threatened to overwhelm the resources of its domestic intelligence agency (the Australian Security Intelligence Organisation, or 'ASIO').[2] ASIO was under so much pressure it was co-opting academics to provide evidence on espionage activities.[3] According to a classified report commissioned

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1 Jane Norman, 'ASIO Says Espionage in Australia "Extensive, Unrelenting, Increasingly Sophisticated"', *ABC News* (online, 17 June 2017) <https://www.abc.net.au/news/2017-06-17/espionage-australia-extensive-unrelenting-asio-says/8626072>.

2 Andrew Greene, 'ASIO Overwhelmed by Foreign Spying Threats Against Australia in Past Year', *ABC News* (online, 18 October 2017) <https://www.abc.net.au/news/2017-10-18/asio-overwhelmed-by-foreign-spying-threats-against-australia/9061728>.

3 Stephen Dziedzic, 'Academic Says Australian Spy Agency Asked Her to Report on Chinese Students', *ABC News* (online, 15 November 2024) <https://www.abc.net.au/news/2024-11-15/china-academic-asked-to-report-on-students-criticises-spy-agency/104601814>.

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by the Department of the Prime Minister and Cabinet and completed by consultancy firm McGrathNicol, Australia was at dire risk of becoming a haven for foreign spies.[4]

On 7 December 2017, then-Prime Minister Malcolm Turnbull introduced one of the most significant pieces of legislation to impact Australia's national security environment: the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2018 (Cth) ('EFI Bill'). The Bill sought to comprehensively rewrite some of the most fundamental provisions of the *Criminal Code 1995 Act* (Cth) sch 1 ('*Criminal Code*'),[5] refreshing the decades-old definition of espionage and providing a suite of new offences for engaging in foreign interference, supporting to a foreign intelligence agency and theft of trade secrets. The amendments also sought to define wholly new classes of entity subject to potential regulation — 'foreign principals', 'foreign government principal' and 'foreign political organisation'.[6] The EFI Bill was passed by both Houses and became law on 29 June 2018.

But following the legislative flurry of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) ('*EFI Act*'), Australia has largely languished on research security law and policy. Legislative efforts in 2018 have since been eclipsed by allies in the Five Eyes: the United States ('US'),[7] Canada,[8] the United Kingdom ('UK'),[9] and New Zealand.[10] A critical analysis of the cyber domain demonstrated that Australian universities continue to struggle to protect themselves from attack.[11] The Australian policy guidelines for countering foreign interference in the university sector have remained unrefreshed since

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4 Stephanie Borys, 'China's "Brazen" and "Aggressive" Political Interference Outlined in Top-Secret Report', *ABC News* (online, 29 May 2018) <https://www.abc.net.au/news/2018-05-29/chinas-been-interfering-in-australian-politics-for-past-decade/9810236>.

5 *Criminal Code 1995 Act* (Cth) sch 1 ('*Criminal Code*').

6 Ibid ss 90.1–90.3.

7 Erin N Grubbs, 'Academic Espionage: Striking the Balance Between Open and Collaborative Universities and Protecting National Security' (2019) 20(5) *North Carolina Journal of Law and Technology* 235. The US already criminalised 'standard' espionage at 18 USC § 793 (1948) but also 'economic espionage' at 18 USC § 1831 (1948).

8 Government of Canada, *Safeguarding Research in Canada: A Guide for University Policies and Practices* (Web Page, 16 May 2024) <https://science.gc.ca/site/science/en/safeguarding-your-research/guidelines-and-tools-implement-research-security/guidance-research-organizations-funders-and-universities/safeguarding-research-canada-guide-university-policies-and-practices>. See also *Foreign Interference and Security of Information Act*, RSC 1985, c O-5.

9 National Protective Security Authority, *Trusted Research Guidance for Academia* (Web Page, 18 July 2025) <https://www.npsa.gov.uk/specialised-guidance/trusted-research/trusted-research-academia>. See also *National Security Act 2023* (UK).

10 Brendan Walker-Munro, 'Land of the Long White Lab Coat: Aotearoa New Zealand and the Laws of Trusted Research' (2025) 31 *Canterbury Law Review* 1. See also Crimes (Countering Foreign Interference) Amendment Bill 2024 (NZ).

11 Ivano Bongiovanni, 'The Least Secure Places in the Universe? A Systematic Literature Review on Information Security Management in Higher Education' (2019) 86 *Computers and Security* 350; Jin Li, Wei Xiao and Chong Zhang, 'Data Security Crisis in Universities: Identification of Key Factors Affecting Data Breach Incidents' (2023) 10(1) *Humanities and Social Sciences Communications* 270.

2021.[12] The changes wrought by the *EFI Act* itself are now under review by the Independent National Security Legislation Monitor, who has identified a significant number of issues in both the drafting and implementation of its measures.[13] And in August 2025, the Director-General of Security Mike Burgess used the annual Hawke Lecture at the University of South Australia to warn Australians that espionage is estimated to be costing the country around $12.5 billion annually.[14]

What remains unclear is the precise scope and scale of the threats posed to universities, and Australian universities in particular. Globally, academics continue to feature in news stories around the world for their involvement in acts of espionage, foreign interference and trade secret theft. Notable examples include:

- the arrest of a Brazilian university professor in Norway for acts of espionage, with allegations that he was a Colonel in the *Glavnoye Razvedyvatelnoye Upravleniye* ('GRU'),[15] the wing of Russia's military intelligence directorate with a mandate to engage in foreign spying;[16]
- an investigation into associations between Chinese academics at Stanford University detailing credible allegations that the university's research programs had been infiltrated by officials of China's Ministry of State Security;[17] and
- a parliamentary researcher and academic arrested and charged (then sensationally acquitted) by UK police for allegedly 'providing prejudicial information to a foreign state'.[18]

In the Australian context, public reporting of these types of issues is spotty. A report released by the Australian Parliament's Joint Committee on Intelligence and Security ('PJCIS') in 2022 found that 'incidents of foreign interference, censorship and intimidation were occurring on [Australian] university

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12 University Foreign Interference Taskforce, *Guidelines to Counter Foreign Interference in the Australian University Sector* (Report, 17 November 2021).

13 Independent National Security Legislation Monitor, *Review of Australia's Espionage, Foreign Interference, Sabotage and Theft of Trade Secrets Offences* (Issues Paper, 12 May 2025).

14 HawkeCentre, '2025 Annual Hawke Lecture delivered by Mike Burgess AM, Director-General of Security, ASIO' (YouTube, 6 August 2025) <https://www.youtube.com/watch?v=tkKecsvhMNc>, citing Anthony Morgan and Alexandra Voce, *The Cost of Espionage* (Special Report, 1 August 2025).

15 Thomas Nilsen, '"José" Turns Mikhail. GRU Colonel Admits Being Russian National', *The Barents Observer* (online, 14 December 2023) <https://www.thebarentsobserver.com/security/jose-turns-mikhail-gru-colonel-admits-being-russian-national/164095>.

16 'Main Intelligence Administration (GRU): Glavnoye Razvedyvatelnoye Upravlenie (GRU)', *GlobalSecurity.org* (Web Page, 30 July 2021) <https://www.globalsecurity.org/intell/world/russia/gru.htm>.

17 Garret Molloy and Elsa Johnson, 'INVESTIGATION: Uncovering Chinese Academic Espionage at Stanford', *The Stanford Review* (online, 7 May 2025) <https://stanfordreview.org/investigation-uncovering-chinese-academic-espionage-at-stanford/>.

18 Joint Committee on the National Security Strategy, *Espionage Cases and the Official Secrets Acts* (House of Lords Paper No 223, House of Commons Paper No 1414, Session 2024–26).

campuses'.[19] A Queensland PhD student was refused a student visa for allegedly being 'directly or indirectly associated with the proliferation of weapons of mass destruction', but was still permitted to finish his PhD studies and return to China.[20] And a researcher — one of the few persons charged with foreign interference offences — is still yet to face trial, with delays reportedly arising from failures to obtain the consent of the Attorney-General,[21] the convoluted nature of the charges involved,[22] and national security concerns over a jury.[23]

Thus, precise numbers or empirical data on research security incidents (especially in Australia) remains elusive. That evidential shortfall is potentially damaging: in 2021, during the formulation of guidelines on the handling of foreign interference risks, Universities Australia Chief Executive and Board Director Catriona Jackson was lampooned in the media for being unable to articulate particular case studies.[24] Therefore, using documents obtained under the *Freedom of Information Act 1982* (Cth), this paper seeks to address that shortfall. Helpfully for this paper, one of the mechanisms established in the Australian government is a National Countering Foreign Interference Coordinator ('NCFIC'), supported by the Countering Foreign Interference Coordination Centre ('CFICC'). These two entities oversee much of the implementation of Australia's policy in research security, though it is couched in terms of 'countering foreign interference'.[25] The CFICC was the target of Freedom of Information ('FOI') requests related to documentation

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19 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into National Security Risks Affecting the Australian Higher Education and Research Sector* (Report, March 2022) 117 [6.13] ('*PJCIS National Security Risks Affecting Higher Education Report*').

20 Jamie Walker, 'CSIRO Cuts China WMD Academic', *The Australian* (online, 19 May 2024) <https://www.theaustralian.com.au/nation/csiro-cuts-chinese-wmd-researcher-loose-pressure-on-qut/news-story/c105edcc2d88fa643b2e40b9dc6fc1a7>. See also *Zhu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] FedCFamC2G 411, cited in Brendan Walker-Munro, 'Risks of Espionage in Our Universities? Lessons on Research Security from *Li v Canada*' (2024) 45(3) *Adelaide Law Review* 635.

21 *Criminal Code* (n 5) s 93.1(1). See also Jamie McKinnell, 'Foreign Interference Charge Against Businessman Alexander Csergo Awaiting Attorney-General's "Consent", Court Told', *ABC News* (online, 4 October 2023) <https://www.abc.net.au/news/2023-10-04/nsw-businessman-alexander-csergo-accused-of-foreign-interference/102933340>.

22 Jamie McKinnell, 'Crown Drops Allegation Businessman Alexander Csergo Prejudiced Australia's National Security', *ABC News* (online, 20 March 2024) <https://www.abc.net.au/news/2024-03-20/nsw-alexander-csergo-foreign-interference-court/103609608>.

23 Nathan Schmidt, 'Sydney Businessman Charged with Foreign Interference Fronts Court for the First Time after 14 Months in Custody', *The Australian* (online, 19 August 2024) <https://www.theaustralian.com.au/breaking-news/sydney-businessman-charged-with-foreign-interference-fronts-court-for-the-first-time-after-14-months-in-custody/news-story/3959f3878a4d7fa6fb50996365da393b>.

24 Lisa Visentin, 'University Peak Body Unsure Which Countries Are a Foreign Interference Risk', *Sydney Morning Herald* (online, 13 September 2021) <https://www.smh.com.au/politics/federal/university-peak-body-unsure-which-countries-are-a-foreign-interference-risk-20210913-p58r81.html>.

25 'Countering Foreign Interference', *Department of Home Affairs (Cth)* (Web Page) <https://www.homeaffairs.gov.au/about-us/our-portfolios/national-security/countering-foreign-interference>.

involving research security incidents at Australian universities. This paper reports and analyses the results of those enquiries.

Following this Introduction, Part II will examine the current position of research security in Australia, including both governmental and non-governmental responses since the first criminalisation of foreign interference in 2018. Part III involves presentation, examination and analytical critique of the FOI case studies — empirical evidence that Australia continues to be a high-profile industrial and intelligence target for foreign adversaries. Before concluding, Part IV will propose three legal and policy measures which Australia needs to consider both in meeting the current geopolitical and strategic environment and bringing the country up to speed with its contemporaries and allies.

II What is the Current State of Australian Research Security?

As an opening observation, it is important to recognise that Australian law and policy guidance does not explicitly use the term 'research security', which for present purposes can be considered as 'safeguarding the research enterprise against the misappropriation of research and development to the detriment of national or economic security, related violations of research integrity, and foreign government interference'.[26] Instead, Australian frameworks make repeated reference only to the last of these three themes — 'countering foreign interference' — a far narrower proposition which explicitly excludes certain lawful and quasi-lawful activities that nonetheless pose national security risks to higher education settings such as, student/staff exchanges, cybersecurity, intellectual property disputes, and breaches of export controls.

Therefore, a more cohesive and coherent national policy on research security is a crucial starting proposition. The Australian government, through its funding institutions, administers not only the funds which universities need to survive, but also the competitive grants by which they demonstrate their value to society and the international economy. As will be seen in the exposition below, each element of the triumvirate — government, universities and funding agencies — have specific roles to play to support the protection of research from national security risks.

A *The Role of Government in Research Security*

Following the passage of the *EFI Act*, the Commonwealth government established the NCFIC and the CFICC at the same time as the Universities Foreign Interference

[26] Brendan Walker-Munro, 'A Missed Opportunity: Amending the *Defence Trade Controls Act 2012* (Cth) and Research Security' (2024) 2 *Journal of Strategic Trade Control* 1.

Taskforce ('UFIT') in 2019.[27] Unlike its counterpart in the Countering Foreign Interference Taskforce ('CFIT') — an enforcement-centric taskforce comprised of the Australian Federal Police, ASIO, the Australian Transaction Reports and Analysis Centre ('AUSTRAC'), and others[28] — UFIT was intended to 'collaboratively support and build an environment of trust and resilience, and to guide a university's decision-making based on proportionate risks, so Australian universities can continue to produce world-class research'.[29]

However, the role of UFIT has been criticised in recent years for not producing guidance of substance for the university sector. In the wake of the public release of generative artificial intelligence ('AI') platforms and their potential implications for national security in research, UFIT stayed completely silent.[30] Publication of the 'measures to safeguard Australia's sensitive research' in 2021 came not from UFIT, but the Group of Eight, a peak body representing Australia's eight most research-intensive universities.[31] In an Implementation Review in 2023 and a Pulse Check in 2024 (both of which were commissioned by the Department of Education),[32] universities expressed worries related to the communication and dissemination of information about UFIT initiatives and forward work plans. The specific concerns raised included 'a lack of clarity about what sort of foreign interference has relevance to the university sector'[33] and 'concerns about effectively communicating foreign interference considerations to staff, students and partners'[34] — precisely the types of clarity UFIT was meant to provide.

CFIT on the other hand appears to have been more successful in combatting foreign interference. Although prosecutions have been few and far between,[35] the Director-General of ASIO indicated in 2024 that CFIT had completed 'more than 120 operations to mitigate threats … [and i]n a sign of how the threat has grown, successful

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27 'University Foreign Interference Taskforce', *Department of Education* (Web Page, 11 June 2025) <https://www.education.gov.au/countering-foreign-interference-australian-university-sector/university-foreign-interference-taskforce>.

28 Senate Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Foreign Interference through Social Media* (Report, August 2023) 57 [4.29]–[4.30].

29 'University Foreign Interference Taskforce', *Department of Education* (n 27).

30 Matthew Clarke, Jeanette Fyffe and Peter Murphy, 'Use of AI in Research Raises Knotty Issues', *The Australian* (online, 2 July 2023) <https://www.theaustralian.com.au/higher-education/universities-need-to-provide-more-guidance-for-use-of-ai-in-research/news-story/a77a4d353fe67f6853b9c91a794fcb73>.

31 Group of Eight Australia, *Measures to Safeguard Australia's Sensitive Research* (Report, 19 March 2021) <https://go8.edu.au/wp-content/uploads/2021/03/Go8-Measures-to-Safeguard-Australias-Research.pdf >.

32 Department of Education (Cth), *Pulse Check on the Implementation of the Guidelines to Counter Foreign Interference in the Australian University Sector* (Report, 23 October 2024) ('*Pulse Check*'); Department of Education (Cth), *Report on Implementation of the Guidelines to Counter Foreign Interference in the Australian University Sector* (Report, 24 August 2023) ('*Report on Implementation*').

33 Department of Education (Cth), *Report on Implementation* (n 32) 7.

34 Department of Education (Cth), *Pulse Check* (n 32) 11.

35 Summarised in Independent National Security Legislation Monitor (n 13) 16.

disruptions have increased by 265 per cent, and continue to increase exponentially'.[36] The Director-General's evidence to Senate Estimates in 2025 was illuminating:

> One course of action could well be that the matter is handed over to the Federal Police for their lead on a prosecution. It could be that it's an intelligence led disruption by my organisation or the Australian Federal Police. That could look like an interview with the individual who is under investigation. It could be, subject to warrant, an overt entry-and-search operation or asking for a voluntary interview. It could be the use of compulsory questioning warrants. In our experience, when we declare our hand to individuals that are looking like they are either preparing or doing it, it has a deafening effect. Of course, when we've got a solid case — and that's a matter for the Federal Police — they take it on and they can do their prosecution.[37]

Further, there is evidence that the ambitious legislative regime introduced alongside the *EFI Act*, namely, the establishment of public registers to capture foreign lobbyists and influencers, also did not achieve the impact for which it was enacted. The *Foreign Influence Transparency Scheme Act 2018* (Cth) was supposed to 'provide the public with visibility of the nature, level and extent of foreign influence on Australia's government and politics'.[38] However, a statutory review conducted by the PJCIS in 2024 found that:

> Much of the evidence provided to the Committee in this review has argued that the Scheme's operation has been constrained, its effectiveness has been limited, and its implications are inhibited transparency outcomes despite a high regulatory compliance burden.
>
> In essence the Scheme has failed to achieve its intended purpose with little of consequence apparent.[39]

Likewise, the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth) reposed a power in the Minister for Foreign Affairs to cancel arrangements between Australian entities and foreign entities — such as under university research or funding agreements — that could adversely affect Australia's foreign relations and/or that are inconsistent with Australia's foreign policy.[40] Though some considered this legislation's 'capacity to politicise research and educational activities and increase regulatory burden risks undermining the core

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36 Mike Burgess, 'ASIO Annual Threat Assessment 2024' (Speech, Australian Security Intelligence Organisation Headquarters, 28 February 2024).

37 Evidence to the Legal and Constitutional Affairs Committee, Parliament of Australia, Canberra, 27 March 2025, 111 (Mike Burgess).

38 Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Foreign Influence Transparency Scheme Act 2018* (Report, March 2024) 1 [1.3] ('*PJCIS Foreign Interference Report*'), quoting 'Foreign Influence Transparency Scheme', *Attorney-General's Department (Cth)* (Web Page), <https://www.ag.gov.au/integrity/foreign-influence-transparency-scheme>.

39 *PJCIS Foreign Interference Report* (n 38) 75 [4.6]–[4.7].

40 *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth) ss 17(3), 24(3), 35(2), 36(2).

academic mission of public universities',[41] the Minister never publicly exercised that power, despite at least one instance involving Australian researchers that arguably warranted it. In 2022, the PJCIS heard evidence relating to a research contract being entered into between Monash University and Chinese government-owned Commercial Aircraft Corporation of China ('COMAC'), which 'has been linked to a global industrial cyber espionage campaign and been sanctioned by the US government'.[42] The PJCIS recommended the Minister exercise the power to cancel that arrangement, which the government politely demurred in its response nearly a year later, saying 'Monash University has advised that all currently active research projects between Monash and COMAC will conclude in the first half of 2023, and no further activity is planned'.[43] A similar incident in 2025 occurred at Macquarie University, where a cybersecurity collaboration with Nanjing Normal University 'raised "alarm bells" among security experts and prompted Minister for Foreign Affairs Penny Wong to order an 'urgent' review'.[44]

Another legislative framework, the *Security of Critical Infrastructure Act 2018* (Cth) ('*SOCI Act*'), was expanded to higher education institutions in 2022 by the *Security Legislation Amendment (Critical Infrastructure Protection) Act 2022* (Cth). This imposed the substantial compliance obligations of the *SOCI Act* — including registration of critical infrastructure assets with the government, reporting of cyber security incidents, and the development of the Risk Management Program — to universities, who were strongly opposed to the changes.[45] However, almost immediately following the expansion of the obligations to the higher education sector, both the Queensland University of Technology and the University of Wollongong were subject to cyberattacks that impacted campus systems.[46] Since that time, both Western Sydney University and the Australian National University

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41 Bill Cai, 'The Sword of Damocles: Implications of the Foreign Arrangements Scheme for the Academic Freedom of Australian Public Universities' (2022) 25 *International Journal of Law & Education* 1.

42 *PJCIS National Security Risks Affecting Higher Education Report* (n 19) 123 [6.37]–[6.38].

43 Australian Government, *Australian Government Response to the Parliamentary Joint Committee on Intelligence and Security report: National Security Risks Affecting the Australian Higher Education and Research Sector* (Report, February 2023) 6.

44 John Ross, '"Red flags" over Teaching Partnership with Chinese University', *Times Higher Education* (online, 6 November 2025) <https://www.timeshighereducation.com/news/red-flags-over-teaching-partnership-chinese-university>.

45 Universities Australia, Submission No. 148 to Department of Home Affairs (Cth), *Protecting Critical Infrastructure and Systems of National Significance Consultation* (September 2020)2 .

46 Alexandria Utting, 'More than 11,000 Employees, Students and Former Staff Affected by Cyber Attack, QUT Says' *ABC News* (online, 3 February 2023) <https://www.abc.net.au/news/2023-02-03/qut-cyber-attack-university-staff-students-affected/101929302>; Richard Chirgwin, 'University of Wollongong discloses data breach', *ITNews* (online, 11 December 2023) <https://www.itnews.com.au/news/university-of-wollongong-discloses-data-breach-603358>.

have also been impacted by cyberattacks,[47] the latter potentially assisting the government to more readily pass ransomware reporting changes to the *SOCI Act*.[48]

B *How Australian Universities Have Dealt with National Security Issues*

Like their global counterparts, Australian universities face something of an invidious challenge in the modern environment. They must balance a fundamental ethical commitment to openness, the pursuit of knowledge as a public commodity and commitment to public discourse, whilst also being forced to operate as businesses by the true financial costs of academic research.[49] As the Australian government limits research and development funding to only 1.86% of Australian GDP (compared to 3.59% in the US and 3.41% in Sweden and Japan),[50] researchers are inevitably incentivised to look abroad for funding sources. However, overseas collaborations inevitably come with the risk that either the entities providing the funding and/or the partners to that funding might subvert or sequester the research in a way that harms Australia's interests.[51] Further, changes in foreign governments can wreak havoc on funding sources if they relate to areas of research no longer considered 'appropriate' by the incoming government — for example, President Donald Trump's orders relating to excluding funding for programs incorporating diversity, equity and inclusion initiatives.[52]

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47 'Public Notification: Western Sydney University Cyber Incident', *Western Sydney University* (Web Page, 31 July 2024) <https://www.westernsydney.edu.au/news/cyber-incident>; Mitchell Langley, 'Australian National University Faces Cyber Attack, FSociety Ransomware Threatens Data Leak', *Security Daily Review* (online, 17 February 2025) <https://dailysecurityreview.com/security-spotlight/australian-national-university-faces-cyber-attack-fsociety-ransomware-threatens-data-leak/>.

48 *Cyber Security Act 2024* (Cth) pt 3, amending the *Security of Critical Infrastructure Act 2018* (Cth) ('*SOCI Act*') and authorising the *Cyber Security (Ransomware Payment Reporting) Rules 2025* (Cth).

49 Natasha Bita, 'Australia Must Ramp Up Research Spending in an Age of Hi-Tech Warfare, Nobel Laureate Warns', *The Australian* (online, 28 May 2025) < https://www.theaustralian.com.au/higher-education/australia-must-ramp-up-research-spending-in-an-age-of-hitech-warfare-nobel-laureate-warns/news-story/45a1371ce2a7cc937dc8bc61b56ef5c3>; Brendan Walker-Munro, 'Nobel Laureate Brian Schmidt is "Scared" about Australia's Research Capacity: This Is Why', *The Conversation* (online, 28 May 2025) <https://theconversation.com/nobel-laureate-brian-schmidt-is-scared-about-australias-research-capacity-this-is-why-257717>.

50 'Research and Development Expenditure (% of GDP)', *World Bank* (Web Page, 5 April 2025) <https://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS?most_recent_value_desc=true>.

51 Radomir Tylecote and Robert Clark, *Inadvertently Arming China? The Chinese Military Complex and its Potential Exploitation of Scientific Research at UK Universities* (Research Report, 24 February 2021); Brendan Walker-Munro, David Mount and Ruby Ioannou, *Are We Training Potential Adversaries? Australian Universities and National Security Challenges to Education* (Research Report, 30 October 2023).

52 Eddy Ng et al, 'The Anti-DEI Agenda: Navigating the Impact of Trump's Second Term on Diversity, Equity and Inclusion' (2025) 44(2) *Equality, Diversity and Inclusion* 137; Herman Aguinis et al, 'Voices from the Academy: A Response to President Donald Trump's Anti-DEI Policies' (2025) 44(2) *Equality, Diversity and Inclusion* 151.

At the same time, university involvement in national security discourse seems to be on the decline. In the 2024 Pulse Check on the UFIT Guidelines, the Department of Education noted that '49% of [Australian] universities reported experiencing new or emerging barriers to implementation [of] the Guidelines'.[53] Given that the UFIT was specifically designed to provide guidance on those matters, and no changes to the UFIT Guidelines appear forthcoming, this raises the question of precisely what role the UFIT seeks to play in a contemporary research security environment. At the same time, the Pulse Check also revealed that 'universities would benefit from greater dissemination of information to practitioner-level staff',[54] suggesting that the currently top-heavy membership of the UFIT (ie, involving senior management executives such as Vice-Chancellors) is in fact one of its greatest restrictions on achieving a proper degree of communication on research security issues.

The wider discussion around universities and national security has also led to broader questions about the precise role and nature of universities in society, and what form such institutions should take in the future. Internationally, Tommy Shih and Caroline S Wagner wrote that '[p]olicymakers should recognize that security alone cannot strengthen Western economic or scientific leadership; international collaboration has become an essential ingredient to scientific and technological advancements'.[55] From the Australian context, Wesley observes:

Australia's universities now occupy an uncomfortably central role in Australia life. They are the focus of individual aspirations and societal ambitions; the sites of acrimonious disputes over what and who we value; pivotal to competing conceptions of what knowledge is for and why it is valuable. Over the past thirty years, as they have moved from the periphery to the centre of Australian life, universities have become subject to a host of competing and contradictory social, policy and academic expectations. They must drive social mobility and inclusion while being committed to individual excellence and meritocratic reward. They should be widely available but socially prestigious. They must deliver high-quality higher education to a large number of Australians but at limited cost to the taxpayer. They need to be institutionally effective and efficient but remain collegial and grounded in non-material academic values. They should be a dynamic export sector that prioritises local, and the engine of the new economy that still supplies the skills needed by the old.[56]

What has become apparent is that universities cannot be reasonably expected to shoulder all the regulatory burden for the risks flowing from research security issues. This echoes the PJCIS's conclusion from 2022 that 'the sector must move

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53 Department of Education (Cth), *Pulse Check* (n 32) 11.

54 Ibid 10.

55 Tommy Shih and Caroline S Wagner, 'The Trap of Securitizing Science' (2024) 41(1) *Issues in Science & Technology* 100.

56 Michael Wesley, *Mind of the Nation: Universities in Australian Life* (Latrobe University Press, 2023) 196–7.

from a benign operating environment for our adversaries to a hardened environment … the sector, with government assistance, should create an environment where hostile activity is unfeasible, too expensive or too risky to undertake'.[57]

C *Funding Bodies and National Security Issues in Research*

Funding bodies also have a significant role to play in administering and responding to national security threat. In Australia, research is largely supported by the National Competitive Grants Program ('NCGP'), administered by a statutory body known as the Australian Research Council ('ARC').[58] Industry-specific funding can be sourced from the Commonwealth Scientific and Industrial Research Organisation ('CSIRO'), whilst medical and biological sciences are usually supported by the National Health and Medical Research Centre ('NHMRC'). Both CSIRO and NHMRC are statutory bodies, operating as Commonwealth entities with mandates that include funding administration and provision of support and guidance to Australian researchers.[59]

Of the three, the ARC has seemingly had the most exposure to national security issues. Under previous versions of the ARC's enabling legislation, the Minister for Education held a 'veto' power to refuse funding applications even in the face of recommendations from the ARC, its Board and/or its College of Experts appointed from academia.[60] This created something of a crisis of faith between academics and the Minister,[61] leading to an independent review of the ARC which concluded in 2023 that 'in every iteration, Ministerial interventions have drawn international attention, and placed at threat the capacity of Australian researchers to form research links with international university and industry collaborators'.[62] The ARC's legislation was subsequently amended to remove almost all aspects of the Minister's veto, *except* on grounds of national security, where the Minister retains that power:

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57 *PJCIS National Security Risks Affecting Higher Education Report* (n 19) 115 [6.4].

58 *Australian Research Council Act 2001* (Cth) ('*ARC Act*').

59 *Science and Industry Research Act 1949* (Cth); *National Health and Medical Research Council Act 1992* (Cth).

60 *ARC Act* (n 58) ss 51(1), 53(1), 52(4) (as immediately prior to the entering into force of the *Australian Research Council Amendment (Review Response) Act 2024* (Cth) on 1 July 2024).

61 Stephen Matchett, 'La Trobe VC Challenges ARC over Research Cancellation', *Campus Morning Mail* (online, 29 October 2018) <https://campusmorningmail.com.au/news/la-trobe-vc-challenges-arc-over-research-cancellation/>; Natassia Chrysanthos, 'Eminent Researchers Condemn Government's "Political and Short-sighted" Funding', *Sydney Morning Herald* (online, 11 January 2022) <https://www.smh.com.au/national/eminent-researchers-condemn-government-s-political-and-short-sighted-funding-20220110-p59n2i.html >.

62 Margaret Sheil, Susan Dodds and Mark Hutchinson, *Trusting Australia's Ability: Review of the Australian Research Council Act 2001* (Final Report, March 2023) 27.

> **Ministerial approval of grants of financial assistance for designated research programs**
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> (1) The Minister may, on behalf of the Commonwealth and in writing, approve the making of a grant of financial assistance to an organisation for a research project in relation to a designated research program.
>
> ...
>
> (6) The Minister must refuse to give an approval under subsection (1) if the Minister considers that, for reasons relevant to the security, defence or international relations of Australia, the approval should be refused.[63]

Concomitant with the amendment of its legislation, the ARC also published a new 'Research Security' webpage[64] as well as an updated *Countering Foreign Interference Framework*.[65] These resources should be considered as 'conditions precedent' to the operation of the Ministerial veto, as the ARC Board retains — consistent with both its enhanced research security focus and their *Framework* — a power to refuse to accept applications (or to refuse to supply such applications to the Minister for consideration for funding) which do not meet the rules of the funding program and/or the eligibility criteria.[66]

The NHMRC and CSIRO have not publicised how they counter research security risks. The NHMRC publishes no public resources on research security and does not routinely appear to operate any awareness or education programs for researchers (a curious position to take given the recognised national security risks to the life sciences).[67] The CSIRO has produced a research security tool for applicants and is collaborating internationally with its counterparts; however, those efforts have been undertaken confidentially to prevent subversion or avoidance of the program.

There are other agencies in Australia that fund research with national security implications. While those bodies are intrinsically more adept at handling issues of likely risk, they seem less likely to publicise instances of research security threat. For example, the Office of National Intelligence ('ONI') — established to coordinate Australia's National Intelligence Community[68] — administers the National Intelligence Community Research Program, comprising

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63 *ARC Act* (n 58) ss 48(1), 48(6).

64 'Research Security', *Australian Research Council* (Web Page) <https://www.arc.gov.au/funding-research/research-security>.

65 Australian Research Council, *ARC Countering Foreign Interference Framework* (Report, December 2023).

66 *ARC Act* (n 58) s 47(4).

67 For example, see the issues of 'gain-of-function research' conducted by Ron Fouchier which led to him needing an export control licence before publishing his research publicly: Roy D Sleator, 'Ferretting Out the Facts behind the H5N1 Controversy' (2012) 3(3) *Bioengineered Bugs* 139. The US has since banned all forms of 'gain-of-function' research: *Executive Order 14292: Improving the Safety and Security of Biological Research*, 90 Fed Reg 19421, 19611 (5 May 2025).

68 *Office of National Intelligence Act 2018* (Cth) s 7(1)(a).

both the National Intelligence Discovery Grants ('NIDG') and the National Intelligence Post-Doctoral Grants ('NIPG').[69] The Department of Defence, under programs such as Defence Cooperative Research Centres and the Strategic Policy Grants Program also funds research.[70] Neither ONI nor the Department of Defence are likely to publicise details on research security incidents to the broader community. The result is a significant gap in the communication of funding outcomes with potential national security implications to anyone other than the immediate applicant and (perhaps) their employing university — far from the 'hardened environment' envisaged by the PJCIS.

III FOI Case Studies

A full version of the documents supplied by the Department of Home Affairs are summarised in Table 1 below.[71] It is important to note that these incidents are very recent as they must, in order to have been provided to the NCFIC and CFICC, have occurred since 2019 when those agencies were established. These case studies have then been supplemented in Table 2 by case studies already listed by the Commonwealth Department of Education on their website.[72] It is unclear whether these latter case studies in Table 2 are based on real events that actually occurred, or have been created to foster discussion in the higher education sector (as there are some that show clear overlap of themes) — hence they have been labelled as 'hypothetical' below.

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69 'National Intelligence Community Research Program', *Office of National Intelligence* (Web Page, 2024) <https://www.oni.gov.au/news/national-intelligence-community-research-program-grant-applications>.

70 'Grants', *Department of Defence (Cth)* (Web Page) <https://www.defence.gov.au/about/governance/grants>.

71 A copy of this document was obtained under Freedom of Information from the Countering Foreign Interference Coordination Centre and is held by the author.

72 'Countering Foreign Interference in the Australian University Sector: Resources', *Department of Education (Cth)* (Web Page) <https://www.education.gov.au/resources/countering-foreign-interference-australian-university-sector>.

Table 1: Summary of case studies involving research security incidents in Australia

Case Study Summary	Threat Raised	Response
A researcher specialising in maritime defence policy and anti-piracy was the subject of a targeted spear phishing campaign. Subsequent investigations determined the researcher had previously worked in cooperation with the Royal Australian Navy.	• Cybersecurity • Conflicts of interest	Consultation with affected researcher.
A foreign academic requested 'visiting academic' status for one year, which would have enabled access to domestic resources. Their host institution was assessed as high risk on publicly available due diligence resources.	• Critical technologies (cryptography)	Proposal for visiting researcher was refused by university.
A lecturer was asked by international students in a discussion forum to remove Taiwan from the list of countries from an assignment task, because China held sovereignty over Taiwan and it was not a 'country'. There were allegations students 'intimidated' the lecturer and possibly other students.	• Foreign interference • Transnational repression • Academic freedom	Lecturer conceded to demands and removed Taiwan without discussion with other staff. Full investigation concluded that education of Faculty was necessary.
A university received several requests from PhD students to visit Australian campuses as part of their studies. All these students were part of the same research group and institute, at a foreign university which had institutional links to defence and aerospace sectors.	• Espionage • Foreign interference • Critical technologies (defence & aerospace)	Proposal for visiting researchers was refused by university.

A university student published articles with pro-democracy messaging. She was subject to a number of unwelcome and threatening acts, including: • suspicious emails; • negative reviews of her articles; • attempts to hack her social media; and • an interview with a foreign visa official conducted in the student's home.	• Foreign interference • Transnational repression	Unknown (case study did not provide this information).
An academic whose work has potential military applications (dual-use) is pressured by a senior former colleague from their home country to accept a visiting PhD researcher, paid for by a foreign government. The visiting researcher has a CV disclosing links to a university with strong defence and military links.	• Critical technologies (dual-use) • Espionage • Foreign interference	Proposal for visiting researcher was refused by university.
A foreign company offered to establish an exaflop AI supercomputer at an Australian university campus, maintained by on-campus staff employed by that foreign company. The foreign company was established and run by several persons with ties to the foreign country's 'military-industrial complex'.	• Critical technologies (AI/supercomputing) • Espionage • Foreign interference	Proposal was refused.

A foreign PhD student applied to a university to stay in Australia for two years on a scholarship paid for by the foreign government to study metamaterials. The supervisor of this student was a highly regarded academic who had received numerous defence and intelligence-centric grants. The student also requested that the letter of support not mention any critical technologies.	• Critical technologies (metamaterials) • Espionage • Foreign interference	Proposal for visiting researcher was refused by university. Attempt to 'bypass' visa scrutiny was referred to 'relevant stakeholders in the Commonwealth Government'.
A visiting academic proposed to conduct unspecified 'field work' into the use of social media by their country's ethnic minorities. The Australian university was requested only to provide visa support, office space and library access.	• Transnational repression • Foreign interference	Proposal for visiting researcher was refused by university.
A group of students published an article critical of a foreign government's repressive practices. Messages were then received from persons claiming to be from the foreign country, making threats of a personal and professional nature.	• Transnational repression • Foreign interference	Provision of support services to students. Additional training to coursework students regarding academic freedom and reporting. Increased monitoring of communications and digital safety.
An academic employee researching an area with dual-use implications was alleged to be involved in a dual appointment with a foreign university, as well as a commercial company in that country. Both allegations were substantiated after the employee had left the university's employment.	• Espionage • Critical technologies (dual-use) • Talent recruitment programs	Mandated annual disclosures for academic staff. Subsequent investigation into paid foreign appointments evidenced by publications resulted in 'a small number of staff' resigning.

A foreign doctoral candidate proposed a joint PhD between an Australian university and foreign entity. Checks showed the candidate was (then) employed by one of the foreign government's ministries (unspecified), and had appeared on state-controlled news articles on military and strategic technologies, including 'killer robots, the role of AI tools in assassinations, cyber warfare and weaponising technologies'. The candidate was also already engaged in PhD and Masters studies at two different institutions in two different countries at the time of the application.	• Espionage • Critical technologies (dual-use) • Talent recruitment programs	Unclear what action was taken –– a permit application was submitted to Defence Export Control.[73]

Table 2: Summary of Case Studies from Department of Education Resources

Case Study Summary	Threat Raised	Response
An academic writes an article critical of a foreign government and receives threats and pressure to publish more favourable views of the foreign government.[74]	• Academic freedom • Transnational repression	Discussing behavioural expectations and consequences of misconduct with students and student associations. Providing guidance to staff on facilitating these discussions at the start of the course, and throughout.

[73] As required by the *Defence Trade Controls Act 2012* (Cth).

[74] This table is copied directly from the source material provided by the Department: Department of Education (Cth), *Countering Foreign Interference Case Studies* (14 October 2024) <https://www.education.gov.au/download/18667/countering-foreign-interference-case-studies/39354/document/pdf>.

'Following a class discussion on the issues raised in the academic's paper, some students receive harassment and intimidation from fellow students, threatening to report them to the foreign country's embassy and share their personal details online. Some of the affected students fear reprisals on their family overseas from a foreign government.'[75]	• Foreign interference	Secure contact mechanisms (eg, encrypted email) for reporting. Allowing staff to report issues on behalf of students. 'No wrong door' approach, enabling students to report to a trusted figure in the university. Formal investigation and report to ASIO.
'A PhD student at an Australian university is undertaking a research project in the field of chemical engineering. The topic of their research has a sensitive dual-use application relating to chemical toxic agents.'[76]	• Export controls	Due diligence on research proposal.
A professor researching 'swarm' technology is identified as participating in an overseas talent recruitment program as well as holding an appointment as a professor at a foreign military university.[77]	• Critical technologies (drones) • Talent recruitment programs	Due diligence on academic appointments. Full investigation, leading to termination of employment.
An academic researching advanced batteries for clean energy is offered an adjunct role (including payment of research and travel costs for three months of the year) by a foreign university.[78]	• Critical technologies (clean energy) • Talent recruitment programs	Due diligence on academic appointments. Consideration of whether university conflict of interest policies and procedures are adequate.

75 Ibid.

76 Ibid.

77 Department of Education (Cth), *Case Studies: Due Diligence, Risk Assessments and Management* (11 June 2025) <https://www.education.gov.au/download/19016/case-studies-due-diligence-risk-assessments-and-management/41096/document/pdf>.

78 Ibid.

A university is encouraged to invite offers from a foreign venture capital fund (controlled by a foreign government) for that university's planned campus development works.[79]	• Foreign investment	University declined to go ahead with the investment.
Following a public protest, media reports that numerous students who attended a demonstration have received online messages from fellow students calling them traitors and threatening to report them to a foreign country's consulate.[80]	• Foreign interference • Transnational repression •	Investigation. Contacting affected students with support. Publishing a statement in support of academic freedom and democratic, lawful protest.
'An academic issues a reading list to students which is comprised of articles expressing a range of positions on a topic with strong opposing views. Some of the students enrolled in the course complained to the academic that some of the articles were offensive and demanded that those articles be removed from the list.'[81]	• Academic freedom • Transnational repression •	Provision of support to lecturer to retain reading list. Supporting the academic's response to the complainant.
Students report engaging in self-censorship in class discussions and assessments, reporting other students threatening to report them to the consulate.[82]	• Academic freedom Transnational repression • Foreign interference	Reinforce commitment to academic freedom. Providing students alternative modes of participation.

79 Ibid.

80 Department of Education (Cth), *Case Studies: Governance and Risk Frameworks* (11 June 2025) <https://www.education.gov.au/download/19010/case-studies-governance-and-risk-frameworks/41105/document/pdf>.

81 Ibid.

82 Ibid.

An academic expressing views contrary to those articulated by a foreign autocratic government receives a large volume of abusive messages and realises their personal contact details have been shared without their permission.[83]	• Cybersecurity ('doxing')84	Cybersecurity measures. Formal investigation and referral to law enforcement. Publishing a statement in support of academic freedom.
A university is considering establishing a foreign campus in a country suffering violent political protests and outbursts; however, the partnership agreement would give the foreign entity access to Australian student data.[85]	• Cybersecurity • Privacy	Personnel and physical security measures. Limiting offshore access to student data. Any reporting requirements obliged by Australian law.
An academic who supervises students at a foreign campus is approached by someone alleging to be a researcher interested in their project, which involves quantum physics.[86]	• Critical technologies (quantum) • Espionage	Report incident to University/ASIO. Consider engaging consular support.
A PhD candidate is invited to participate in research by one of her supervisors, located at a foreign university. This research occurs outside the scope of her PhD work, and is not supervised by her supervisor at the Australian university. She is confronted by the University Academic Integrity Officer, alleging a potential breach of their Misconduct Policy.[87]	• Lack of supervision • Reputational implications	Consideration of appropriate supervision guidelines. Assessment of whether university's conflict of interest policies and procedures are adequate.

83 Ibid.

84 Doxing is defined by Australia's e-safety Commissioner as 'intentional online exposure of an individual's identity, private information or personal details without their consent with the intent of causing harm': 'What is doxing?', *e-Safety Commissioner* (Web Page, 28 May 2025) <https://www.esafety.gov.au/industry/tech-trends-and-challenges/doxing>.

85 Department of Education (Cth), *University Foreign Interference Taskforce Transnational Education Working Group: Transnational Education Case Studies* (11 June 2025) <https://www.education.gov.au/download/19007/case-studies-transnational-education/41132/document/pdf>.

86 Ibid.

87 Ibid.

A *What the Case Studies Mean for Australian Research Security*

Both actual instances in FOI documents and the 'hypothetical' versions promulgated by the Department of Education demonstrate several lessons to Australian universities that are worth observing.

The first lesson is that the case studies reiterate warnings by Burgess in public Annual Threat Assessments since he commenced in the role of Director-General of ASIO in 2019, namely, that Australia was, is and will remain a site of intense intelligence and foreign interference interest into the future. Specific warnings borne out in the case studies include:

> We've seen visiting scientists and academics ingratiating themselves into university life with the aim of conducting clandestine intelligence collection. This strikes at the very heart of our notions of free and fair academic exchange.[88]
>
> Foreign spies are constantly seeking to penetrate … academia … to steal classified information, military capabilities, policy plans and sensitive research.[89]
>
> Following my previous address, our disruption of a 'nest of spies' got a lot of attention. But dismantling spy networks is business as usual for ASIO. We did it again last year. … Australians who were targeted by the foreign intelligence service included current and former high-ranking government officials, academics, members of think-tanks, business executives and members of a diaspora community.[90]
>
> Foreign intelligence services from multiple countries are aggressively seeking secrets about our … academic and think tank research … This applies equally to other professions that are traditionally targeted by foreign intelligence services: academics invited to an off-shore symposium …[91]
>
> [S]pies pose as consultants, head-hunters, local government officials, academics and think tank researchers, claiming to be from fictional companies… We have seen [the 'A-Team' spy network] try to recruit students, academics, politicians, businesspeople, researchers, law enforcement officials and public servants at all levels of government.[92]
>
> [N]ation states will want greater insights into their enemies –– and some of their friends –– to better understand strategic intent and capability. In a more complicated,

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88 Mike Burgess, 'ASIO Director-General's Annual Threat Assessment' (Speech, Australian Security Intelligence Organisation Headquarters, 24 February 2020).

89 Mike Burgess, 'Director-General's Annual Threat Assessment' (Speech, Australian Security Intelligence Organisation Headquarters, 17 March 2021).

90 Mike Burgess, 'Director-General's Annual Threat Assessment' (Speech, Australian Security Intelligence Organisation Headquarters, 9 February 2022).

91 Mike Burgess, 'Director-General's Annual Threat Assessment' (Speech, Australian Security Intelligence Organisation Headquarters, 21 February 2023).

92 Burgess, 'ASIO Annual Threat Assessment 2024' (n 36).

competitive world, regimes will seek to exert more influence and control over diaspora communities.[93]

The second lesson is that both the FOI documents and hypothetical case studies do not fully demonstrate the scope of potential national security threats to the Australian research security enterprise, nor the ways that they are evolving and adapting to changes in the geopolitical environment. For example, recent reports have highlighted that North Korea has leveraged its entire nation-state intelligence apparatus towards generating a 'shadow workforce' impersonating IT workers and is *inter alia* involved in stealing research from Western academics.[94] Talent recruitment programs — such as the infamous Thousand Talents Program run by China — are explicitly banned by US law and funding conditions,[95] but not otherwise regulated in Australia. Similarly, a generalised academic naivety remains a significant challenge to the formulation and application of research security policy. Despite Xiaolong Zhu being refused a student visa by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs for potential risks of the diversion of his research into weapons of mass destruction, his university continued to support the appeal of his visa, with his PhD supervisor claiming his work on drone navigation in contested environments was 'not applicable to military purposes'.[96] The Minister disagreed and stood by its determination that he posed a risk.[97] That decision was affirmed by the-then Administrative Appeals Tribunal, the Federal Circuit and Family Court of Australia, and the Full Court on appeal.[98]

The third lesson is that the fundamental challenge facing universities is one of *information*: both obtaining information to inform due diligence investigations and risk assessments (either before an activity is undertaken, or in response to a complaint or tip-off), and then being able to share that information with other members of the higher education sector in Australia (either to 'warn off' specific named threat actors, or to raise the profile of specific methodologies by threat actors). The PJCIS heard evidence relating to this exact limitation during their 2022 inquiry but made no specific recommendations about information-sharing or amending the various secrecy provisions which gave rise to the limitation.[99]

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93 Mike Burgess, 'Director-General's Annual Threat Assessment' (Speech, Australian Security Intelligence Organisation Headquarters, 19 February 2025).

94 Daryna Antoniuk, 'News Media, Foreign Affairs Experts are Targets of North Korean Group's Latest Campaign', *The Record* (online, 25 January 2024) <https://therecord.media/scarcruft-apt37-north-korea-espionage-south-korea-media-academia>; Michael Barnhart, *Exposing DPRK's Cyber Syndicate and Hidden IT Workforce* (Report, 2025).

95 See, eg, 42 USC § 10632 (2022).

96 *Zhu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2024] FedCFamC2G 411, [14], [29].

97 Ibid [15].

98 *Zhu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2025) 311 FCR 237, [30]-[36].

99 *PJCIS National Security Risks Affecting Higher Education Report* (n 19) 96 [4.81].

Finally, these case studies show that the Australian university sector is — in the words of a similar study on US institutions — simply 'too big, too distributed, too complex, and too exposed across too many sectors for a top-down, federally controlled approach to the research security challenge'.[100] One might argue that there is too much 'bad blood' or distrust between government and universities, with 'problems of authority, information, and trust, which on the one hand prevent the government from intervening or interfering in university research arbitrarily, and prevent properly informed collaboration between those two entities in response to national security risk on the other'.[101] This distrust can mean that universities adopt a hyper-cautious approach, refusing a collaboration, approach, visit or offer that had risks too high to mitigate. Although refusal could have been the appropriate decision in the circumstances, the line between 'refusal for risk' and 'racial profiling' is razor-thin and has on occasion been crossed with little benefit to Australia's reputation or interests.[102]

B *International Experiences of Research Security Threats*

Australia's experience is in line with other Western nations. In 2023 it was announced that the University of Amsterdam and the Free University of Amsterdam would partner with Huawei to build an AI laboratory in the Netherlands. However, Huawei was a poor choice of partner — in addition to having been banned from supplying 5G telecommunications infrastructure in a number of countries,[103] Huawei technology was also implicated in allegations of racial profiling of Uyghurs in Xinjiang.[104] Despite those issues, the lab was allowed to continue operating, concluding quietly at the end of 2025.

On the other hand, the Dutch government drew the ire of the research sector by proposing to implement a mandatory screening law (*Wet screening*

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100 Melissa Flagg and Zachary Arnold, *A New Institutional Approach to Research Security in the United States: Defending a Diverse R&D Ecosystem* (CSET Policy Brief, January 2021) 14.

101 Brendan Walker-Munro, '(Professor) Hadrian's Wall: The Role of the Australian Research Council in Securing University Research' (2025) 48(1) *UNSW Law Journal* 348, 351–352.

102 For example, in 2024 the Australian Defence Force Academy campus (University of New South Wales) indicated that 'collaborative research projects involving academics affiliated with Chinese universities will not be supported' –– a risk control based on nationality rather than specific risk factors: Andrew Greene, 'Chinese Academic Visits Banned at Canberra's Australian Defence Force Academy', *ABC News* (online, 21 August 2024) <https://www.abc.net.au/news/2024-08-21/adfa-bans-chinese-academic-visits/104247384>. Cf John Ross, 'Excluding Nationalities from Research Collaboration "Ineffective"', *Times Higher Education* (online, 24 August 2024) <https://www.timeshighereducation.com/news/excluding-nationalities-research-collaboration-ineffective>.

103 Noah Berman, Lindsay Maizland and Andrew Chatzky, 'Is China's Huawei a Threat to US National Security?' *Council on Foreign Relations* (Web Page, 8 February 2023) <https://www.cfr.org/backgrounder/chinas-huawei-threat-us-national-security>.

104 David Snetselaar, 'Dreams Lab: Assembling Knowledge Security in Sino-Dutch Research Collaborations' (2023) 32(2) *European Security* 233, 235.

kennisveiligheid)[105] which would require universities to submit all researchers — both local and international — whose research would touch on a sensitive technology area to 'security screening' (similar to a security clearance process). Those screenings would be performed by a departmental agency (*Screeningsautoriteit Justis*, a body that already conducts screenings for *vertrouwensfunctie* [position involving confidentiality]),[106] because Dutch intelligence agencies *Algemene Inlichtingen- en Veiligheidsdienst* ('AIVD') and *Militaire Inlichtingen en Veiligheidsdienst* ('MIVD') had declined to do so.[107] These investigations must be completed in no less than four weeks, or eight weeks for complex cases. Early estimates suggested *Screeningsautoriteit Justis* would perform 8,000 screenings per year (ie, completing around 30 screenings every working day);[108] however, that number has now risen to 10,000 per year and is likely to only increase.[109]

Germany likewise has recent experience with intelligence operatives at its universities. In April 2024, three persons were arrested by German authorities on suspicion of espionage, after they used academic contacts to obtain dual-use data on bearings in high-pressure machines and details of engines suitable for deployment on combat vessels. They also exported a laser to China in violation of German export laws.[110] On the other hand, students from China's Scholarship Council ('CSC') have been blocked from enrolments at German universities because they are required to give a 'loyalty pledge' to China's government that contravenes Germany's *Basic Law*.[111] CSC-funded students must also regularly

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105 'Screening for Researchers Wising [sic] to Handle Sensitive Knowledge', *Government of the Netherlands* (Web Page, 7 April 2025) <https://www.government.nl/latest/news/2025/04/07/screening-for-researchers-wising-to-handle-sensitive-knowledge>.

106 'The Security Screening', *Netherlands General Intelligence and Security Service* (Web Page) <https://english.aivd.nl/topics/security-screening/the-security-screening>.

107 'Dutch Government to Screen Thousands of Researchers over Espionage Fears', *NL Times* (online, 8 April 2025) <https://nltimes.nl/2025/04/08/dutch-government-screen-thousands-researchers-espionage-fears>.

108 'The Netherlands to Screen Academics to Stop Knowledge Leaks', *DutchNews* (online, 8 April 2025) <https://www.dutchnews.nl/2025/04/the-netherlands-to-screen-academics-to-stop-knowledge-leaks/>.

109 Daniel Hurst, 'ASIO to Take Over Issuing High-level Security Clearances due to "Unprecedented" Espionage Threat', *The Guardian* (online, 29 March 2023) <https://www.theguardian.com/australia-news/2023/mar/29/asio-to-take-over-issuing-high-level-security-clearances-due-to-unprecedented-espionage-threat>; Andrew Greene, 'Defence Struggling to Process Staff Security Clearances Needed Ahead of AUKUS Rush', *ABC News* (online, 31 March 2023) <https://www.abc.net.au/news/2023-03-31/defence-struggle-security-clearances-aukus-staff-rush/102167842>.

110 Ido Vock, 'Germany Spying: Three Suspected Chinese Agents Arrested', *BBC News* (online, 22 April 2024) <https://www.bbc.com/news/world-europe-68873836>; Markus Weisskopf, 'Chinese Scientific Espionage in Germany: What Next?', *Science Business* (online, 2 May 2024) <https://sciencebusiness.net/universities/chinese-scientific-espionage-germany-what-next>.

111 *Grundgesetz für die Bundesrepublik Deuschland* [Basic Law for the Federal Republic of Germany]. Articles 5(1) and (3) state: '(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources … (3) Arts and sciences, research and teaching shall be free.'

submit a 'situation report' to the relevant Chinese embassy or consulate.[112] Thus, hosting institutions can clearly see in the CSC contract a concern for research security, beyond the obvious ethical and legal implications.

For some time now, the UK has taken a more collaborative approach to its research security challenges by framing the threat in terms of 'trusted research' and establishing the Research Collaborative Advice Team ('RCAT'), a body inside the Department of Science, Innovation and Technology which serves as 'a first point of contact for official advice about national security risks linked to international research'.[113] The RCAT operates alongside more traditional research security controls including the Academic Technology Approval Scheme ('ATAS'), a migration scheme requiring a certificate from the Home Office before foreign scholars in certain technological fields can travel to the UK.

In the US, allegations of espionage at Stanford University have resulted in both Departmental and Congressional investigations into funding from foreign entities.[114] Simultaneously, US authorities have recently brought charges against researchers for allegedly attempting to smuggle biological material into the country. In the first case, two researchers were apprehended with samples of a fungus known as head blight alleged to be a 'potential agroterrorism weapon' causing 'billions of dollars in economic losses worldwide each year'.[115] Another case involved the detention of a PhD candidate bringing samples of round worms into the US after allegedly deleting the content of her electronic devices prior to apprehension.[116]

Canada has taken a policy journey on opposite tracks to Australia. Canada has focused on research security since 2016,[117] but has more recently pivoted to a foreign interference focus in response to alleged interference in Canadian electoral

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112 UK-China Transparency, *China Scholarship Council 'Rules': Translation and Notes* (15 November 2023) <https://ukctransparency.org/wp-content/uploads/2023/11/China-Scholarship-Council-Rules-translation-and-notes-1.pdf>.

113 'Trusted Research Guidance for Academia', *National Protective Security Agency* (Web Page, 18 July 2025) <https://www.npsa.gov.uk/specialised-guidance/trusted-research/trusted-research-academia>; 'Research Collaboration Advice Team: About Us', *Gov.UK* (Web Page) <https://www.gov.uk/government/organisations/research-collaboration-advice-team>.

114 Molloy and Johnson (n 17); Sophia Chu, 'Congress Requests Information about Chinese National Students, Cites National Security Concerns', *Stanford Daily* (online, 1 April 2025) <https://stanforddaily.com/2025/04/01/congress-chinese-stude-information/>; Phelim Kine and Eric Bazail-Eimil, 'Congress Worries about Chinese Spies on College Campuses', *Politico* (online, 9 May 2025) <https://www.politico.com/newsletters/national-security-daily/2025/05/09/congress-worries-about-chinese-spies-on-college-campuses-00339754>.

115 Department of Justice (US), 'Chinese Nationals Charged with Conspiracy and Smuggling a Dangerous Biological Pathogen into the US for Their Work at a University of Michigan Laboratory' (Press Release, 4 June 2025).

116 Department of Justice (US), 'Alien from Wuhan, China, Charged with Making False Statements and Smuggling Biological Materials into the US for Her Work at a University of Michigan Laboratory' (Press Release, 9 June 2025).

117 Public Safety Canada, 'Parliamentary Committee Notes: Research Security in Canada', *Government of Canada* (Web Page, 26 August 2024) <https://www.publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20240813/03-en.aspx>.

processes.[118] The Canadian university and research sector has been rocked by a number of national security scandals, including providing alleged 'background cover' (ie, a false employment connection) to the GRU Colonel arrested in Norway,[119] as well as possibly allowing two Chinese scientists with links to military microbiology labs to export potentially lethal biological weapons to China.[120]

C *Responding to Threats: The 'Blanket No'*

The FOI documents and hypothetical case studies suggest that Australian universities are more risk-averse than their international counterparts in instituting research security controls. Six of the 12 case studies in the FOI documents demonstrated that the university involved 'refused' to allow the relevant research or collaboration to proceed — suggesting, in effect, a 'blanket no' response. For context, a 'blanket no' response is one where the institution flat out refuses the research, collaboration or association, with no possibility of risk mitigations or management.

That result is surprising, given that research security protocols are often motivated by the desire to approve the conduct of the research, even if the research itself is subject to the imposition of regulatory controls or conditions.[121] Chief of Research Security Strategy and Policy at the US National Science Foundation, Dr Rebecca Kaiser, summarised this stance it recently in saying:

> We want to continue to fund the best research here in the United States, and if we decline proposals because we think they're too risky, then researchers might seek that funding elsewhere. We also want to focus on mitigation, rather than decline, and get to 'yes'.[122]

Given that international perspective, a finding that Australian universities are overwhelmingly tilting towards a 'blanket no' response is supported by the literature on risk management in higher education settings. Universities conduct substantial amounts of research across a vast swathe of fields, covering areas of law that carry national security implications including foreign direct investment,

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118 National Security and Intelligence Committee of Parliamentarians, *Special Report on Foreign Interference in Canada's Democratic Processes and Institutions* (Report, 22 March 2024).

119 Guillaume Corneau-Tremblay, 'Did a Russian Spy Operate out of Two of Canada's Universities?', *Policy Options* (online, 6 December 2022) <https://policyoptions.irpp.org/magazines/december-2022/russian-spy-canadian-universities/>.

120 Catharine Tunney, 'Lies and Scandal: How Two Rogue Scientists at a High-Security Lab Triggered a National Security Calamity', *CBC News* (online, 2 March 2024) <https://www.cbc.ca/news/politics/winnipeg-lab-firing-documents-released-china-1.7130284>.

121 Yoran Beldengrun, Carthage Smith, 'What is research security and why does it matter for global science?' *OECD* (blog, 21 November 2025) <https://www.oecd.org/en/blogs/2025/11/what-is-research-security-and-why-does-it-matter-for-global-science.html>.

122 Clare Zhang, 'Getting to "Yes": NSF Pilots Research Security Assessment for Grants', *American Institute of Physics* (Forum Post, 26 November 2024) <https://www.aip.org/fyi/getting-to-yes-nsf-pilots-research-security-assessment-for-grants>.

export controls and dealing with sanctioned countries and entities.[123] To mitigate those risks, states create new laws and impose new or modified duties to limit or prevent risk-taking behaviour.[124] Given that universities are generally considered one of the most highly regulated environments in the world,[125] one might assume that university research is an overwhelmingly dangerous exercise. Although that conclusion is clearly nonsense, it does highlight the obvious cultural tension between universities as austere and conservative bastions of free intellectual inquiry, and universities as protectors of knowledge that is in the nation-state's security or economic interests. Empirically too, universities continue to demonstrate that they are far more risk-averse in pursuit of research and development, innovation and commercialisation opportunities, unable to properly mimic the achievements of the private sector.[126]

Research security programs are also supposed to demonstrate 'country-agnosticism', that is, they apply to scholars and students irrespective of their nationality. Both the European Commission's recommendation on research security[127] and Canada's Sensitive Technology Research and Affiliations of Concern ('STRAC') policy[128] explicitly incorporate that notion. Yet country-agnosticism is harder to enact than it looks, with nationality (especially for Chinese scholars and students) often used as a proxy for actual risk.[129] Further, the impositions of certain countries' domestic laws can create difficulties in enacting country-agnosticism as a policy position.

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123 Brendan Walker-Munro, *Shifting the Needle: Making Australia's Research Security Ecosystem Work Smarter* (Policy Brief, 30 June 2025) ('*Shifting the Needle*').

124 Michael Power, 'The Risk Management of Everything' (2004) 5(3) *Journal of Risk Finance* 58; Olga Hrynkiv, 'Legal and Policy Responses to National Security Measures in International Economic Law' (2022) 54(2) *Georgetown Journal of International Law* 165.

125 Ann Brewer and Ian Walker, 'Risk Management in a University Environment' (2011) 5(2) *Journal of Business Continuity and Emergency Planning* 161; Ivano Bongiovanni, Karen Renaud and George Cairns, 'Securing Intellectual Capital: An Exploratory Study in Australian Universities' (2020) 21(3) *Journal of Intellectual Capital* 481; Group of Eight Australia, *Essential Decisions for National Success: Reducing the Regulatory Overload on our Universities* (Report, 2 May 2022); Marcus Smith and Patrick Walsh, 'Security Sensitive Research: Balancing Research Integrity, Academic Freedom and National Interest' (2023) 45(5) *Journal of Higher Education Policy and Management* 495.

126 Keiko Yokoyama, 'The Rise of Risk Management in the Universities: A New Way to Understand Quality in University Management' (2018) 24(1) *Quality in Higher Education* 3; Ana Paula Beck da Silva Etges and Marcelo Nogueira Cortimiglia, 'A Systematic Review of Risk Management in Innovation-Oriented Firms' (2019) 22(3) *Journal of Risk Research* 364; Anil K Narayan and John Kommunuri, 'New Development: The Behavioural Effects of Risk Management in Higher Education' (2022) 42(6) *Public Money & Management* 414.

127 *Council Recommendation of 23 May 2024 on Enhancing Research Security* [2024] OJ C 2024/3510, art 1(g).

128 Government of Canada, *Policy on Sensitive Technology Research and Affiliations of Concern* (Report, 9 January 2024).

129 Sapna Marwaha, 'The Challenge of Pursuing Research Security when Nationality Becomes a Shorthand for Risk', *Wonkhe* (Blog Post, 10 June 2024) <https://wonkhe.com/blogs/the-challenge-of-pursuing-research-security-when-nationality-becomes-a-shorthand-for-risk/>.

To give one example, we can turn to the EU where (in the name of protecting academic freedom) many Chinese academics are functionally blocked from research because of the conditions attached to their source of funding. In Germany, the Friedrich Alexander University of Erlangen-Nuremberg ('FAU') decided to 'suspend collaboration with holders of scholarships awarded by the [CSC] indefinitely'.[130] Faculties of several Netherlands institutions have also suspended or stopped their collaboration with CSC because of the infringements on academic freedom involved.[131] In Sweden, Aarhus University stopped admitting PhD students with CSC funding, while Uppsala and Lund Universities 'imposed a temporary bar'.[132]

Having a 'blanket no' approach to CSC-funded academics is a clear policy position allowing universities to redirect limited resources elsewhere, short-cutting the due diligence process. But not all universities have the capacity to make the same decision. For many institutions, appointing CSC-funded PhD students is financially beneficial due to the stipends paid through the scholarship. In Australia, cost-efficient PhD completions improve a university's block funding from the government, with the result that a large part of the expansion of a university's research capacity is usually the result of cross-subsidised or externally funded researchers.[133] However, universities should not have to accept greater threat to research security to maintain financial stability.

IV How Research Security in Australia Could (and Must) Change

Australian society has long recognised that the imperative to protect the sanctity of university teaching and research is not just a legal obligation, but a moral and ethical one as well. As the High Court of Australia articulated:

> The maintenance of high standards of teaching and research, and the furtherance of the export of university services by Australian universities, make it essential that public regulation of universities be scrupulously maintained, in accordance with the law enacted to achieve that objective. It also makes the defence of academic standards

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130 Yojana Sharma, 'German University Ends Ties with China Scholarship Scheme', *University World News* (online, 20 July 2023) https://www.universityworldnews.com/post.php?story=20230720113914406>.

131 These include the Free University of Amsterdam, the University of Amsterdam, the Erasmus School of Social and Behavioural Sciences and the Erasmus School of Economics, as well as the Technical University Delft and Utrecht University: Yojana Sharma, 'Universities Urged to Plan for Loss of China's PhD Students', *University World News* (online, 20 March 2024) <https://www.universityworldnews.com/post.php?story=20240321003823472>.

132 Louis Beck Petersen, 'AU Stops Admitting PhD Students from China Who Have Signed Allegiance to the Chinese Communist Party', *Omnibus* (online, 27 March 2023) <https://omnibus.au.dk/en/archive/show/artikel/au-stopper-optaget-af-kinesiske-phd-studerende-der-har-underskrevet-troskabsed>.

133 Universities Australia, *Investing in PhD Candidates in Australia* (Report, December 2024).

> and of the integrity of degrees or awards and university research a vital part of the functions of such statutory bodies.[134]

Universities have acknowledged that some level of risk-taking is involved (and, perhaps, even required) to achieve rigorous academic debate and the precipitation of innovation. Research security is imperative to enable international engagement, protect the staff and students, and protect the university itself. However, unnecessary bureaucratic burden can impede opportunities for researchers to pursue or engage in higher-risk activities in the first place. Further, levels of risk to which each university is exposed — and their relative appetites to accept residual risk — differ wildly across the university sector, owing to differences in research foci, student and staff demographics, local and global strategies, and competing market forces for grants and student enrolments.

A *Increased Research Security Prominence in Australian Policy*

Australia needs a federal research security policy that subsumes or replaces the existing UFIT Guidelines with a more cohesive and collaborative form of guidance. This will require that Australia capitalise on its earlier 'first-mover' advantage in passing the *EFI Act* by establishing a clear, flexible and balanced research security policy and provide whole-of-government clarity on precisely 'what research security entails, its purpose, and the standards expected consistently across the sector'.[135] That in turn will oblige the Australian government to consider which of the various regulatory approaches taken by comparable institutions is best suited to protecting our national interests — whether that is in the form of the EU's 'as open as possible, as closed as necessary' principle, or the more collaborative and advisory approach typified by the UK's RCAT.

As a contemporary example of what such a policy could look like, the recently released UK National Security Strategy announced expansion of the RCAT and the upcoming publication of the UK's first Research Security Strategy. According to the publication, academia is considered a strategic defence asset and require that '[t]he UK defence industrial base [will be] redefined to include academia, dual-use civilian-military companies, financial services, technologists and trade unions'.[136]

Australia's research security policy will need to move beyond the traditional political lens of countering foreign interference, a term derived in large part from the changes wrought by the *EFI Act*. That political lens is no longer fit-for-purpose, as Australia's limited prosecutions for the offence no doubt demonstrate: the charges of 'recklessly engaging in foreign interference' filed against Alexander Csergo have either captured an illicit provider of sensitive information to foreign

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134 *Griffith University v Tang* (2005) 213 ALR 724, [107] (Kirby J).

135 Walker-Munro, *Shifting the Needle* (n 123) 4.

136 Cabinet Office (UK), *National Security Strategy 2025: Security for the British People in a Dangerous World* (Policy Paper CP1338, 24 June 2025) 42.

intelligence agents, or subjected an honest open-source researcher to prosecution and potentially twenty years' imprisonment.[137] A properly formulated approach to research security not only subsumes foreign interference, it covers acts that are legal but are still of concern to Australia's interests.

The policy will also need to address that the time for the UFIT to act as a worthwhile contributor to Australian research security has well and truly passed. Although UFIT was instrumental in establishing the UFIT Guidelines and guiding early policy development, its utility appears to have waned. Departmental guidance from both Home Affairs and Education on countering foreign interference in higher education has continued largely independently of (or at least tangentially to) UFIT's involvement, and the Guidelines themselves have not been refreshed since 2021 despite several significant shifts in Australian geopolitics and foreign policy. Further, UFIT has been either subordinated or eroded by the establishment of numerous sub-groups such as the Trusted Information Sharing Network for higher education ('TISN'),[138] the Western Australian universities community of practice[139] and the Informal Foreign Interference Network ('INFIN'). Put another way, one might ask: 'If UFIT was working, why would universities need these additional bodies?'

An Australian research security policy will also need to address the generalised academic naivety as to Australia universities as intelligence targets. In 1988, then Director-General of Security Harvey Bennett famously quipped: 'With the simple self-confidence which living in an island state breeds, Australians are sometimes doubtful that their country might be of interest to foreign intelligence services.'[140] Nearly thirty years later, Mike Burgess gave the 2025 Hawke lecture, where he said that '[a] new iteration of great power competition is driving relentless hunger for strategic advantage and an insatiable appetite for inside information. … Nation states are spying at unprecedented levels and with unprecedented sophistication.'[141] Burgess' comments come

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137 Brendan Walker-Munro and Sarah Kendall, 'Could Using Open-Source Information Online Get You Arrested for Foreign Interference?', *The Conversation* (online, 4 May 2023) <https://theconversation.com/could-using-open-source-information-online-get-you-arrested-for-foreign-interference-204548>. For completeness, we note that a Chinese national has recently been charged with reckless foreign interference for surveilling the Buddhist organisation Guan Yin Citta Dharma Door –– however, this has no direct link to academia and will not be further examined: Elizabeth Byrne and Jade Toomey, 'Court Documents Allege "Unexplained Wealth" of Chinese National Charged with Reckless Foreign Interference', *ABC News* (online, 11 August 2025) <https://www.abc.net.au/news/2025-08-11/chinese-national-charged-foreign-interference-unexplained-wealth/105637550>.

138 'Trusted Information Sharing Network (TISN) for Higher Education and Research', *Critical Infrastructure Security Centre* (Web Page) <https://www.cisc.gov.au/information-for-your-industry/higher-education-and-research/partnership-and-collaboration/trusted-information-sharing-network>.

139 Department of Education (Cth), *Report on Implementation* (n 32) 11.

140 Harvey Barnett, *Tale of the Scorpion* (Allen and Unwin, 1988) 35.

141 HawkeCentre (n 14) 18:15, 23:40.

alongside six years of publicised ASIO threat assessments. Yet, Macquarie's relationship with Nanjing Normal University[142] and continued issues with foreign research collaborations[143] suggest that the message is not quite cutting through.

B *Dealing with Information Asymmetry*

In June 2025, the ARC communicated that it was strengthening its processes to protect the security of ARC funded research to meet new legislative requirements under amendments to the *Australian Research Council Act 2001* (Cth).[144] In addition to the establishment of the ARC Board (which replaced the previous governance structure), other actions by the ARC to support obligations where matters of national security, defence or international relations arise included engaging with universities for earlier research screening and to seek detailed and specific assurance and evidence that risks are managed appropriately. Although an early engagement focus is laudable, the existence of a veto power at both the level of the ARC Board and the Minister is concerning where there is no legislative requirement for transparency around the exercise of such powers.[145]

As touched on earlier, information sharing between governments, industry and academia remains a significant barrier to enhancing research security across all universities. The FOI case studies illustrate a range of threats to research security and allude to the key information that would enable universities to develop better safeguarding practices. Lack of knowledge sharing is already a well-known issue broadly relevant to national security. As Rory Medcalf recently said: 'When it comes to the security landscape, the gap between what government knows and what it says in public must become narrower, not widen.'[146] The result is that whilst

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142 Ross (n 44).

143 James King, 'Australian university uses taxpayer funds for research with Russian nuclear scientist', *Daily Telegraph* (online, 31 December 2025) <https://www.dailytelegraph.com.au/education/higher-education/australian-university-uses-taxpayer-funds-for-research-with-russian-nuclear-scientist/news-story/ee7b44ed1c6cb72f649c6f142a710109>; James King, 'Top scientist on Australian defence project worked with Chinese military researchers', *Daily Telegraph* (online, 28 January 2026) <https://www.dailytelegraph.com.au/news/national/top-scientist-on-australian-defence-project-worked-with-chinese-military-researchers/news-story/a923da9d45edb253401aa37c176d3eeb>.

144 Australian Research Council, 'Strengthened Processes, Funding Announcements and Extension Updates' (Network Message, 18 June 2025) <https://www.arc.gov.au/news-publications/media/network-messages/strengthened-processes-funding-announcements-and-extension-updates>.

145 *ARC Act* (n 58) ss 47(8), 48(6) permit the Minister to refuse grant applications or approvals 'for reasons relevant to the security, defence or international relations of Australia', but there is no provision that requires the Minister explain his or her reasons for doing so.

146 Rory Medcalf, 'Why We Need a Different Conversation about National Security' (Speech, 'Securing Our Future' National Security Conference, Australian National University, 8 April 2024).

government may hold relevant information, they are unaware in practical terms what most universities and researchers are doing. Simultaneously, universities and researchers remain largely unaware of what their fellow universities and researchers are doing, and privacy laws prevent them from informing each other. Promoting information sharing about who the threats are and what they are doing would, we argue, enable universities to proactively identify and address national security concerns at a local level, improve risk-based approaches, and foster a broader community-approach to research security.

Dealing with information asymmetry will also require Australia to confront whether it possesses the legislative capacity and Ministerial boldness to 'name names' of intelligence officials, foreign interference agents and proxies which pose threats to research security. This could be achieved either under broad-based provisions of *Autonomous Sanctions Act 2011* (Cth), or via a targeted legal reform of that Act. For example, the Joint Standing Committee on Foreign Affairs, Defence and Trade recently recommended that Australia 'include criteria for the thematic area of "threats to international peace and security"' in the *Autonomous Sanctions Regulations 2011* (Cth) to address inter alia 'pervasive national security threats to academia'.[147]

Unfortunately, the Australian government and its grant-awarding bodies have a history of being reticent to engage in naming entities that pose a research security risk, a contrast to its international counterparts. For example, the US Secretary of War must publish an annual list of foreign entities that have a demonstrated history of intellectual property theft, espionage, intelligence recruitment, or otherwise 'operate under the direction of the military forces or intelligence agency of the applicable country' or 'pose a serious risk of improper technology transfer of data, technology, or research that is not published or publicly available'.[148] The Canadian government, under its Policy on Sensitive Technology Research and Affiliations of Concern ('STRAC'), also publishes a list of *Named Research Organisations* which include any 'university, research institute or laboratory connected to military, national defence, or state security entities that could pose a risk to Canada's national security'.[149] Japan likewise publishes an 'End-User List' of entities to whom exports are forbidden without a licence,

147 Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Australia's Thematic Sanctions Framework: A Legislated Review of the Operation of the Autonomous Sanctions Amendment (Magnitsky-Style and Other Thematic Sanctions) Act 2021* (Report, March 2025) ix [1.71], 11 [1.35].

148 *William M (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021*, Pub L No 116-283, §1286, 41 Stat 1417. This is in addition to the Entity List maintained by the Bureau of Industry and Security under US Export Administration Regulations of 'persons or addresses involved in activities contrary to US national security or foreign policy interests' (15 CFR § 744, Supp No 4 (2026)).

149 Government of Canada, *Named Research Organizations* (January 2024) 3.

because the 'concerns about the development of weapons of mass destruction have not been eliminated'.[150]

Engaging in naming foreign entities with whom Australian research collaboration is not permitted or welcomed carries obvious risks to diplomacy, geopolitics and foreign policy. Those risks might be impossible to countenance for a country for whom tertiary education is in the top five of exported commodities.[151] But that argument ignores a fundamental observation about Australia's higher education sector: naming and shaming already occurs, but not in a holistic or coordinated way. For example, the publication of the Australian Strategic Policy Institute's *China Defence Universities Tracker* in 2019 was answered in some corners of the media with condemnation for pillorying Chinese students;[152] yet it had negligible impact on Australia's foreign student numbers or education export value. Nor has ASIO's carefully crafted but consistent warnings about espionage or intellectual property theft over the past six years done anything to discourage foreign student attendance in Australia. In February 2023, Burgess said that '[f]oreign intelligence services from multiple countries are aggressively seeking secrets about our…academic and think tank research';[153] yet in December of that same year Universities Australia CEO Catriona Jackson called our education exports for 2023 'the biggest export we don't dig out of the ground'.[154]

Declaring a list of prescribed entities (whether sanctioned or otherwise) also has the benefit of confronting and dealing with academic naivety in the research security space. Taking a look at the Canadian *Named Research Organisations* list published under their STRAC policy, it is difficult to conclude that Canadian researchers would *not* be threatened by potential associations with the 'Explosion and Impact Technology Research Centre' (Iran), the 'Center for Military Technical Problems of Biological Defense' (Russia), or the 'Rocket Force Research Institute' (People's Republic of China). Similarly, the STRAC policy makes very clear that researchers should remain open to the possibility of risk no matter the nature of their collaboration:

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150 Japan Ministry of Economy, Trade and Industry, 'Review of the End User List Providing Information on Foreign Entities for which Concern Cannot be Eliminated Regarding the Development of Weapons of Mass Destruction and Missiles' (Media Release, 31 January 2025).

151 'Education Export Income: Financial Year', *Department of Education (Cth)* (Web Page, 3 February 2026) <https://www.education.gov.au/international-education-data-and-research/education-export-income-financial-year>.

152 Brian Toohey, 'Reports of China Spies and Takeover Plots are Fanciful', *The Age* (online, 5 December 2019) <https://www.theage.com.au/national/reports-of-china-spies-and-takeover-plots-are-fanciful-20191204-p53gnu.html>; Myriam Robin, 'The Think Tank Behind Australia's Changing View of China', *The Australian* (online, 15 February 2020) <https://www.afr.com/policy/foreign-affairs/the-think-tank-behind-australia-s-changing-view-of-china-20200131-p53wgp>; Sam Varghese, 'ASPI Sensitive to Fact that China Study Paid for by US State Department', *ITWire* (online, 16 February 2020) <https://itwire.com/opinion-and-analysis-sp-481/open-sauce/aspi-sensitive-to-fact-that-china-study-paid-for-by-us-state-department.html>.

153 Burgess, 'ASIO 2023 Annual Threat Assessment' (n 91).

154 Universities Australia, 'Education Surges as Other Exports Drop' (Media Release, 5 December 2023).

> Researchers should keep in mind that institutions that are not included on the list may still pose a risk. As a best practice, researchers are encouraged to apply due diligence practices to mitigate risks that may be associated with any collaboration or partnership in a sensitive technology research area. Researchers are also encouraged to transparently disclose their affiliations, funding, and in-kind support with their sponsoring institution and with their research team, to foster trust and to ensure the security of sensitive research from unwanted transfer of knowledge and technology.[155]

In summary, attempts to address research security in Australia that fall short of some kind of 'naming and shaming' regime will 'ultimately be sub-optimal unless the government finds the courage to publicly name those who are interfering'.[156]

C *A Healthier, More Balanced View of Risk*

Beneath both a more prominent research security policy and the possibility of dealing with information asymmetry between government and academia, there is also a need for a more fulsome discussion of risk between both of those parties. In a recent report on Australia's National Intelligence Community, Chris Taylor argued that governmental innovation is essential to keep pace with larger partners and keep ahead of adversaries; yet Australia's intelligence agencies are increasingly risk averse and struggling to adopt emerging technologies.[157] Those findings echo an earlier landmark examination of innovation in the US intelligence community, which concluded that

> decisionmaking remains too focused on the risk of action but fails to assess and incorporate the risk of inaction and the opportunity cost of not acquiring and integrating new technologies into intelligence missions. This task force does not cavalierly dismiss the critical threats and risks … associated with new technology and data streams. Indeed, risk must always be central in analyzing technology adoption, but decisions cannot be made solely on those grounds. An element of [US]IC culture that leaders must prioritize transforming is this risk aversion, where risk-taking, experimentation, and creation will be rewarded and where innovators are not unduly punished when there is inevitable failure.[158]

Risk aversion has been, and remains, a significant brake on national security decision-making, whether in the university sector or elsewhere.[159] When it comes to regulating sensitive areas of research, there is space to address gaps in

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155 Government of Canada, *Named Research Organizations* (n 149) 3.

156 James Corera and Chris Taylor, 'Countering Foreign Interference: The Government Should Name Names', *The Strategist* (online, 28 January 2025) <https://www.aspistrategist.org.au/countering-foreign-interference-the-government-should-name-names/>.

157 Chris Taylor, *Match-Fit for the Global Contest? Innovation, Leadership, Culture and the Future of Australia's National Intelligence Community* (Special Report, 29 July 2025).

158 Center for Strategic and International Studies, *Maintaining the Intelligence Edge: Reimagining and Reinventing Intelligence through Innovation* (Report, January 2021) 42.

159 Gary P Corn, 'National Security Decision-Making in the Age of Technology: Delivering Outcomes on Time and on Target' (2021) 12(1) *Journal of National Security Law and Policy* 61.

Australia's framework through voluntary codes of conduct or accreditation schemes.[160] However, this may not meet all of Australia's strategic objectives, such as the need to have a comparable export control framework to the US, itself necessary for Australia to be part of the licence-free environment of the AUKUS community.[161] Moreover, it is unclear whether the costs associated with establishing and complying with self-regulation versus the costs of a focused Australian government process would be lower for the higher education research sector. The nature and the severity of the risks also suggest that instead of voluntary approaches, which may be inconsistent and have a slow uptake, government regulation would be more appropriate.

We suggest that a proper research security framework would use a Commonwealth research security policy (replacing the UFIT Guidelines) as a kind of 'baseline', establishing a set of requirements that apply across all universities in Australia's higher education research sector, irrespective of size, target markets, demographics and research profiles or specialties. Those 'baselines' should be the subject of auditing or certification by a governmental body such as the Tertiary Education Quality and Standards Agency (TEQSA). Once a set of commonalities that holistically address broad research security risk has been established across the sector, the role of government can shift from being regulator to being a trusted advisor, similar to the role provided by the UK'S RCAT. In that environment, universities should be encouraged to develop and self-assure their own security and risk management programs, but with guidance from government and its intelligence organs as appropriate to enable up-to-date threat intelligence sharing and best practice implementation.

Another approach drawing international attention is the establishment of security committees, composed of senior academics and risk professionals from across multiple faculties and given a mandate to review the entire research program of the university. Originating in Germany following the June 2014 report published by centralised research funding bodies *Deutsche Forschungsgemeinschaft* ('DFG') and Leopoldina,[162] these *Kommissionen für Ethik der Forschung* ('committees for ethics in security-relevant research', or 'KEF') were established at approximately 120 research institutions and campuses across Germany to advise on research with potential national security implications.[163]

There are criticisms of scrutiny committees. Some have suggested that these committees could themselves become tools of repression or suppression of

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160 See generally Smith and Walsh (n 125).

161 Gary Dutton et al, 'Reform of Australia's Export Control Regime', *PriceWaterhouseCoopers* (Insights Article, 5 March 2025) <https://www.pwc.com.au/tax/trade/reform-of-australias-export-control-regime.html>.

162 Deutsche Forschungsgemeinschaft and Leopoldina Nationale Akademie der Wissenchaften, *Scientific Freedom and Scientific Responsibility: Recommendations for Handling of Security-Relevant Research* (Report, June 2014).

163 'Find Contact Persons', *Gemeinsamer Ausschuss zum Umgang mit Sichereheitsrelevanter Forschung* (Web Page) <https://www.sicherheitsrelevante-forschung.org/contactpersons/>.

academic freedoms, by refusing to permit research in valuable areas of human endeavour because of a failure to properly meet 'risk appetites' (whether or not it is even physically possible to do so, given the nature of the research concerned).[164] But other jurisdictions have followed suit in establishing similar scrutiny committees: in the US, research security committees have been established largely in response to National Security Presidential Memorandum No 33 issued by the first Trump administration.[165] The EU is likewise considering the establishment of research security committees along the same lines as research ethics committees, in order to meet the obligations imposed by the European Council Recommendation of May 2024.[166]

Of course, such ambitious models have resourcing implications for both government (as regulator) and universities (as regulatees). Other jurisdictions offer funding vehicles to support universities in developing and implementing research security programs or initiatives, either in the form of research and development incentives or payment schemes designed to defray the costs of personnel and capital investment. For example, this could be achieved by establishing a 'national security focused technology fund' (in emulation of the UK's National Security Strategic Investment Fund)[167] or alternatively a research security-specific fund akin to Canada's Research Support Fund.[168] Whether Australia follows suit is a matter for the Treasury; given that universities have already borne the brunt of compliance costs for countering foreign interference on behalf of the government,[169] it might be appropriate (and indeed wise) for it to find a way to support the protection of Australian interests in higher education research.

V Conclusion

Australia had a strong head start when it passed its suite of national security laws in 2018, but it has since lost that first-mover advantage. The risk environment has

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164 Jessica Hehman and Catherine Salmon, 'How Institutional Review Boards Can Be (and Are) Weaponized Against Academic Freedom', *Unsafe Science* (Blog Post, 1 July 2024) <https://unsafescience.substack.com/p/how-institutional-review-boards-can>; Igor R Efimov et al, 'Politicizing Science Funding Undermines Public Trust in Science, Academic Freedom, and the Unbiased Generation of Knowledge' (2024) 9 *Frontiers in Research Metrics and Analytics* 1418065:1–13.

165 Office of the US President, *Presidential Memorandum on United States Government-Supported Research and Development National Security Policy* (National Security Presidential Memorandum No 33, 14 January 2021).

166 Vasiliki Mollaki et al, 'Challenges and Recommendations for Research Security: Learning from Research Ethics and Integrity' (2026) *Research Ethics* 17470161251404962:1, 8.

167 'National Security Strategic Investment Fund: About NSSIF', *British Business Bank* (Web Page) <https://www.british-business-bank.co.uk/finance-options/equity-finance/national-security-strategic-investment-fund>.

168 Public Safety Canada, *Evaluation of the Funding to Build Canada's Research Security Capacity* (Report, 4 July 2025).

169 Department of Education (Cth), *Report on Implementation* (n 32).

changed significantly, and regimes like the Foreign Arrangements Scheme and Foreign Interference Transparency Register now appear as outdated relics. Universities have changed as well, being increasingly mobilised to counter fractured geopolitics whilst also trying to balance finances tied to foreign students. Asking universities in that environment to work more closely and more openly with government, without a reciprocal investment by government in research funding, is not likely to be successful. Yet as the FOI case studies identified in this paper demonstrate, the current approach by Australia's higher education research ecosystem is simply not working.

As we have argued, Australia needs to adopt a research security policy as a matter of priority. That policy needs to be tied closely to the NCGP, so that only research which benefits Australia's national interests receives competitive funding. That might require the NCGP to be comprehensively reviewed to make sure it still meets its objectives, especially given recent criticisms that the program is being subordinated by generative AI[170] and broader university hiring dynamics.[171] That policy also needs to learn the lessons from other countries that academic freedom is a core promise for, and crucial enabler of, research security. Such lessons should encourage government and the higher education sector to co-design these measures, rather than impose them by fiat.[172]

Both the sector and the government also need to work together to iron out issues around sharing information on the one hand, and what that information *means* on the other. For example, privacy laws currently prevent universities from informing other institutions about the result of their due diligence investigations or incidents.[173] This allows foreign agents and their proxies to attempt infiltration at multiple Australian universities (both physically and virtually) and increasing their likelihood of success and little risk of detection. Those same laws also prevent 'naming and shaming' individuals who might pose a risk to the sector; however, sharing with government agencies *is* permitted, thus situating bodies like the CFICC and NCFIC as perfect 'clearinghouses' for the sector about persons or entities posing high risk to research. The government could consider — as part of their broader *Privacy Act 1988* (Cth) reforms — including opportunities for the sector better identify and call-out threats.

Higher education researchers also need to become far more aware of the risks applying to their work, especially when they look for funding or opportunities overseas. At the same time, government can support researchers by increasing

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170 Juan Manuel Parrilla, 'ChatGPT Use Shows that the Grant-Application System is Broken' (2023) 623 *Nature* 423.

171 Australian Council of Learned Academies, *Research Assessment in Australia: Evidence for Modernisation* (Report, 15 November 2023)

172 Ross McLennan, 'Balancing Collaboration and Security: A High-Wire Challenge for Australia's Universities' (Speech, Australian Institute of International Affairs, 8 June 2021); Kirsten Lyons, 'Universities' Relevance Hinges on Academic Freedom', *The Conversation* (online, 3 June 2021) <https://theconversation.com/universities-relevance-hinges-on-academic-freedom-160346>.

173 See, eg, Australian Privacy Principles 6.1(b), 6.2: *Privacy Act 1988* (Cth) sch 1 pt 6.

research funding and making it easier to apply for. The case studies in this paper demonstrate that researchers become especially vulnerable when they partner internationally but without regard for due diligence, a finding supported by the literature.[174]

Government intervention may not always be welcome, but it is also clear that the existing frameworks to support research security in a time of heightened geopolitical tensions do not always meet national interest objectives. To address contemporary threats to research security and the ability to respond to new and emerging threats (without unnecessary restrictions) a clear, robust, purposive and fit-for-purpose regulatory framework is required. Preferably, that framework should be adaptable, scalable and interoperable with the international countries with whom we align our values of transparency, openness, innovation and collaboration. If Australia intends to retain its position as a top-flight research environment, then the university sector needs to demonstrate that its collective protective security approach is to a standard that at least matches its US or European counterparts.

[174] Tania Babina et al, 'Cutting the Innovation Engine: How Federal Funding Shocks Affect University Patenting, Entrepreneurship, and Publications' (2023) 138(2) *Quarterly Journal of Economics* 895.

LEADERSHIP IN THE MODERN LAW FIRM: DEVELOPING LAWYER LEADERS

MICHAEL LEGG* AND ANTHONY SONG**

Australian law firms are at an inflection point. Externally, disruptive forces ranging from innovative technology, sustainability and new competitors are rapidly changing the practice of law. Internally, firms face concerns around retention, wellbeing and intergenerational demographics. Addressing these challenges requires effective leadership. However, the scarcity of literature and resources tailored to leadership in law firms, especially in the Australian context, poses problems for lawyers who seek direction on how best to navigate these profoundly transformative times. This article seeks to address the deficiency in lawyer-leader education. It proceeds on the basis that leadership is a skill that can be learnt, but requires understanding of context, here the modern law firm. The article then puts forward recommendations for how law firm leadership may be improved and developed.

I INTRODUCTION

> In the twenty-first century, the lawyer will need to think not just 'like a lawyer,' but 'like a leader'.[1]

The Australian legal profession is facing a confluence of transformative forces. Technological disruption, fuelled by the rapid advancement of artificial intelligence ('AI'),[2] automation, and Big Data giving rise to legal technology ('LegalTech'),[3] is promising to revolutionise the way law is practiced. The COVID-19 pandemic introduced new ways of working, including remote working, which has seen a desire amongst lawyers for greater flexibility.[4] Simultaneously, new

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1 Anthony C Thompson, *Dangerous Leaders: How and Why Lawyers Must Be Taught to Lead* (Stanford University Press, 2018) 149.

2 See Michael Legg and Felicity Bell, *Artificial Intelligence and the Legal Profession* (Hart Publishing, 2020); John McGinnis and Russell Pearce, 'The Great Disruption: How Machine Intelligence Will Transform the Role of Lawyers in the Delivery of Legal Services' (2014) 82(6) *Fordham Law Review* 3041; Robert Couture, 'The Impact of Artificial Intelligence on Law Firms' Business Models', *Center on the Legal Profession — Harvard Law School* (Web Page, 25 February 2025) <https://clp.law.harvard.edu/knowledge-hub/insights/the-impact-of-artificial-intelligence-on-law-law-firms-business-models/>.

3 See Ryan Whalen, 'Defining Legal Technology and Its Implications' (2022) 30(1) *International Journal of Law and Information Technology* 47.

4 Michael Legg, 'Lawyers Working From Home: A Technological and Social Experiment' [2021] 2 *Juriste* 46.

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forms of legal practice and service offerings are developing, such as agile, tech-enabled disruptors (termed 'NewLaw')[5] and growing inhouse counsel teams which are retaining more legal work rather than utilising outside law firms.[6] There is also the ebb and flow of professional accounting firms that offer legal services.[7] Meanwhile, retention presents challenges,[8] from increasingly profit-oriented partners[9] to progressively disillusioned juniors,[10] driven by concerns

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5 Also known as the Alternative Legal Service Provider ('ALSP') sector, NewLaw companies are not traditional firms but perform many of their functions using tech-enabled business models: see Eric A Seeger and Thomas S Clay, 'Law Firms in Transition' (Survey, Altman Weil, 2020); Neil M Oakes, 'Performance-Based Profit Sharing Versus Lock Step to Equality: Profit-Sharing Systems in Australian Law Firms. A Study of Comparative Outcomes' (DBA Thesis, Macquarie University, 2012) 12 ; George Beaton, *NewLaw New Rules - A Conversation about the Future of the Legal Services Industry* (Beaton Capital, 2013); Felicity Bell and Justine Rogers, '"Fit and Proper" Coders? How Might Legal Service Delivery by Non-Lawyers Be Regulated?' (2021) 24(2) *Legal Ethics* 111; Margaret Thornton, 'Legal Professionalism in a Context of Uberisation' (2021) 28(3) *International Journal of the Legal Profession* 243; Vicki Waye, Martie-Louise Verreynne and Jane Knowler, 'Innovation in the Australian Legal Profession' (2018) 25(2) *International Journal of the Legal Profession* 213, 223.

6 Urbis, '*2022 National Profile of Solicitors*' (Final Report, 26 April 2023) 1 (the number of in-house lawyers more than doubled (104%) between 2011 and 2022); Michael Legg and Felicity Bell, 'Insourcing – Implications for In-House Counsel and Private Practice Lawyers' [2018] 45 *LSJ: Law Society Journal* 70.

7 Throughout the 1990s, the Big Five accounting firms (Arthur Andersen, Deloitte, KPMG, Ernst & Young, and PricewaterhouseCoopers) provided legal services globally, before the fall of Arthur Andersen during the 2001 financial crisis ushered in regulation preventing the Big Four from offering non-audit services. These regulations gradually receded worldwide: see Casey E Faucon, 'Black Market Law Firms' (2020) 41(6) *Cardozo Law Review* 2283; David B Wilkins and Maria J Esteban Ferrer, 'The Integration of Law into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market' (2018) 43(3) *Law & Social Inquiry* 981. However, in Australia the Big Four have expanded and contracted their legal services offerings: see Maxim Shanahan, 'What Went Wrong With KPMG's Legal Experiment' *Australian Financial Review* (online, 18 July 2024) <https://www.afr.com/companies/professional-services/what-went-wrong-with-kpmg-s-legal-experiment-20240717-p5jufk>; Lauren Croft, '"Law Within the Big 4 Is Dying Slowly" Despite Disruption To Australian Market' *Lawyers Weekly* (online, 7 August 2024) <https://www.lawyersweekly.com.au/biglaw/40305-law-within-the-big-4-is-dying-slowly-despite-disruption-to-australian-market> (reporting on KPMG ending its legal offerings in Australia).

8 Thomson Reuters, *Tech & the Law 2022* (Report, 8 February 2022) 6 ('*Tech & the Law 2022*'). The survey received responses from 826 legal professionals, including 670 private practice lawyers and 156 in-house lawyers. Lawyer retention and hiring top talent in a competitive market is a major challenge for one in two legal professionals (50%); Michael Legg, Felicity Bell and Vicki McNamara, 'What Makes Lawyers Stay (and Leave) Law Firms?' [2024] *Australasian Law Management Journal.*

9 Maxim Shanahan, 'Top Legal Partners Want to "Eat What They Kill", Not Share Profits', *Australian Financial Review* (online, 26 October 2023) <https://www.afr.com/companies/professional-services/top-legal-partners-want-to-eat-what-they-kill-not-share-profits-20231024-p5eeph>.

10 Kate Beioley, 'Junior Lawyer Burnout: High Pay Can't Stop Exit from Elite Firms', *Australian Financial Review* (online, 4 January 2022) <https://www.afr.com/companies/professional-services/junior-lawyer-burnout-m-and-a-boom-accelerates-exit-from-elite-firms-20220104-p59loc>; Varsha Patel, 'We're "Too Busy": Are Law Firm Mental Health Efforts Failing Junior Lawyers?', *Law.com International* (online, 14 May 2021) <https://www.law.com/international-edition/2021/05/14/were-too-busy-are-law-firm-mental-health-efforts-failing-junior-lawyers/>.

such as long working hours,[11] wellbeing,[12] diversity,[13] workplace bullying,[14] and intergenerational clashes.[15] Firms are continuing to struggle with hiring and retaining mid-level lawyers[16] as more veer away from the traditional path to partnership.[17] Moreover, lawyers will leave firms that fail to adapt, whether it be to innovative technology,[18] flexible work,[19] better working conditions,[20] or failing to reflect the lawyer's values.[21] Shifting practice demographics are becoming particularly impactful. Since 2018, women now comprise over half of all solicitors in Australia, yet remain notably under-represented in senior positions.[22] For the first time, firms must balance the needs of four generations of employees in the workforce.[23] As younger lawyers form a greater proportion of the profession,[24]

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11 'The Dark Side of the Australian Workplace', *The Ethics Centre* (Web Page, 5 June 2019) <https://ethics.org.au/the-dark-side-of-the-australian-workplace/>.

12 Junior Lawyers Division, 'Resilience and Wellbeing Survey 2019' (Survey Report, The Law Society, April 2019); Vivian Holmes et al, 'Lawyer Wellbeing, Workplace Experiences and Ethics' (Research Report, The University of Melbourne and the Australian National University, 2025).

13 Lisa Webley et al, 'Access to a Career in the Legal Profession in England and Wales: Race, Class, and the Role of Educational Background' in David B Wilkins et al (eds), *Diversity in Practice: Race, Gender, and Class in Legal and Professional Careers* (Cambridge University Press, 2016) 198.

14 Joanne Bagust, 'The Culture of Bullying in Australian Corporate Law Firms' (2014) 17(2) *Legal Ethics* 177.

15 Jan L Jacobowitz, Katie M Lachter and Gabriella Morello, 'Cultural Evolution or Revolution: The Millennial's Growing Impact on Professionalism and the Practice of Law' (2016) 23(4) *Professional Lawyer* 20.

16 Mid-level refers to lawyers in the 3–8 years of PQE (post qualification experience) range.

17 Peerpoint, surveyed 1,000 lawyers and law students across all levels of seniority across private practice, in-house and legal consultants, principally in the United Kingdom ('UK') and Asia Pacific, and found only 21% of young lawyers were attracted to the idea of making partner at a law firm: see Peerpoint, *The Future for Legal Talent* (Survey Report, May 2018) 7 ('*The Future for Legal Talent* '); For data in Australia, see also the Mahlab report, which found that for an increasing number of mid-level lawyers, partnership is no longer a key career inspiration: Mahlab, *Mahlab Report 2022: Private Practice and Corporate* (Annual Report, 2022) 3.

18 A study by Thomson Reuters found that one in three legal professionals believe their firm is not innovative and are ready to leave for a more innovative one: Thomson Reuters, *Tech & the Law 2022* (n 8) 6; Thomson Reuters, *Tech & the Law 2023* (Report, 2023) 7.

19 Young Lawyers Committee: The Law Society of Western Australia, 'Early Career Lawyers Overwhelmingly Want Our New "Business as Usual" to Include Flexible Work Options' (2020) 47(7) *Brief* 35.

20 Ellie Dudley, 'Young Lawyers Fed up, Burnt Out', *The Australian* (Sydney, 16 January 2023) 3.

21 Hannah Wootton, 'Why Would I Stay at Minters When That's How It Treats Women?', *Australian Financial Review* (online, 3 December 2021) <https://www.afr.com/companies/professional-services/why-would-i-stay-at-minters-when-that-s-how-it-treats-women-20210312-p57a64>; Angela Tufvesson, 'How Gen Z Will Change the Legal Profession', *Law Society Journal* (online, 26 March 2025) <https://lsj.com.au/articles/how-gen-z-will-change-the-legal-profession/>.

22 See, eg, Meraiah Foley et al, *Designing Gender Equality into the Future of Law* (Final Report, 10 May 2023) 18; Bruce Cooper, 'Law Firm Leaders Failing? I Don't Think so', *Australian Financial Review* (online, 6 March 2021) <https://www.afr.com/companies/professional-services/law-firm-leaders-failing-i-don-t-think-so-20210602-p57xcj>; Lauren Croft, 'How Much Progress Have We Made in Promoting Female Leadership in Law?', *Lawyers Weekly* (Blog Post, 15 November 2023) <http://www.lawyersweekly.com.au/biglaw/38499-how-much-progress-have-we-made-in-promoting-female-leadership-in-law>.

23 Macquarie, *Law 2024: The Future of Legal Businesses* (Report, 2025) 2 ('*Law 2024*').

24 Urbis (n 6) 1 (one-third of the profession are under 35 years of age).

many are expressing a preference for socially responsible organisations,[25] elevating ESG (environmental, social and governance) into not just a new externally-focussed practice group, but a value law firms should adopt.[26] Overlaying all these issues are the broader macroeconomic pressures exerted on firms, including global and regional instability, the need for sustainable development, rising inflation, and political tensions.[27] Not only has the sheer quantity of forces increased, but their intensity and impact have risen.[28] Central to dealing with these challenges (and opportunities) is leadership.

II The Need for Leadership Within Law Firms

Leadership is crucial to navigate change. In today's competitive environment, simply relying on technical expertise and traditional service delivery is not enough to ensure success. Numerous benchmarking surveys of the Australian legal industry have shown leadership to be the key differentiator for outperformance amongst firms.[29] More fundamentally, leadership can be seen as part of lawyer competence. However, before delving into these details, it is first necessary to define leadership.

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[25] 'Talent & ESG Top Concerns as Firms Find New Ways of Working', *Thomas Reuters Institute* (Web Page, 2022) <https://www.thomsonreuters.com/en/reports/talent-and-esg-top-concerns-as-firms-find-new-ways-of-working.html>; Natalie Runyon, 'Associates Driving ESG Efforts across the Profession', The *Law Society Gazette* (online, 2 February 2023) <https://www.lawgazette.co.uk/commentary-and-opinion/associates-driving-esg-efforts-across-the-profession/5115013.article>; Tom Parry, 'Young Talent: Is the Allure of Big Law Enough to Silence ESG Concerns?', *Law.com International* (online, 18 January 2024) <https://www.law.com/international-edition/2024/01/18/young-talent-is-the-allure-of-big-law-enough-to-silence-esg-concerns/>.

[26] JP Box, 'A Millennial Explains How Law Firms Can Attract and Keep His Generation of Lawyers', *Your ABA* (Article, June 2018) <https://www.americanbar.org/news/abanews/publications/youraba/2018/june-2018/a-millennial-explains-how-law-firms-can-attract-and-keep-his-gen/>; Michael Pelly, 'What Firms Say Are the Keys to Keeping Staff' *Australian Financial Review* (Sydney, 7 July 2023) 33.

[27] Center on the Legal Profession, 'The Global Age of More for Less' (November/December 2014) *The Practice*; Michael Pelly, 'Economy, inflation top law firm concerns' *Australian Financial Review* (online, 29 June 2023) <https://www.afr.com/companies/professional-services/economy-inflation-top-law-firm-concerns-20230626-p5dje1>; Rachel Johnson, 'Climate Crisis: Further Action Needed from Legal Sector on Environmental Impact' *International Bar Association* (Article, 24 October 2024) <https://www.ibanet.org/legal-sector-environmental-impact>.

[28] Donald J Polden and Barry Z Posner, *Leading in Law: Leadership Development for Law Students* (Carolina Academic Press, 2022) 231 (referring to VUCA, an acronym that stands for Volatile, Uncertain, Complex and Ambiguous, as descriptive of the practice of law today).

[29] See, eg, Macquarie, *Law 2024* (n 23) 5, 12; Commonwealth Bank of Australia, 'CommBank Legal Market Pulse: November 2021', (Research Paper, November 2021).

A *Defining Leadership*

Millions of books and articles have been written on leadership.[30] While many are grounded in empirical research, a significant amount reflect the personal opinions of authors shaped by their experiences, observations, or beliefs.[31] There is no universal consensus on a definition of leadership,[32] but a workable definition for the purposes of this article is that a leader provides a vision or direction and then motivates others to achieve that vision, including through influencing the culture of a team, group, or firm.[33]

There is, however, some benefit in tracing how the thinking around the source of leadership success has evolved over time. Traditional approaches revolved around the individual leader (or the so-called 'Great Man' approach)[34] focussing on what personality, behaviours and profile the ideal leader exhibits.[35] Yet, this traditional assumption of leadership — that leaders are 'born, not made' — was eclipsed by the notion that leadership skills can be developed and taught. Studies then shifted from the individual towards the process and context surrounding leadership. These included the skills approach (leadership is a set of skills that is acquired through effort);[36] the counter-charisma theory (leadership is contextually bound);[37] contingency theories (effective leadership is contingent on matching the leader's character to the conditions to be addressed),[38] and

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30 Zenger and Folkman note that over 499 million books and 3.5 billion articles have been published about leadership in the past century: John Zenger and Joseph Folkman, *The New Extraordinary Leader: Turning Good Managers into Great Leaders* (McGraw-Hill, 3rd edition, 2019).

31 Gary Yukl, 'Managerial Leadership: A Review of Theory and Research' (1989) 15(2) *Journal of Management* 251, 252; Zenger and Folkman note that only 419 million research studies were published in scholarly journals: Ibid.

32 Ralph M Stogdill, *Handbook of Leadership: A Survey of Theory and Research* (Free Press, 1974) 7.

33 Yukl (n 31) 253; April Barton, 'Teaching Lawyers to Think Like Leaders: The Next Big Shift in Legal Education' (2021) 73(1) *Baylor Law Review* 115, 115–17.

34 Early Greek philosophers (Plato, Aristotle, and Socrates) assumed leadership required exceptional personal qualities (especially intelligence). Then in the 19th century, Thomas Carlyle popularised the "Great Man" theory of leadership, declaring that world history was fundamentally the "History of the Great Men who have worked here": Thomas Carlyle, *On Heroes, Hero-Worship, & the Heroic in History* (James Fraser, 1841) Lecture 1.

35 Roger Gill, *Theory and Practice of Leadership* (Sage Publications, 2nd ed, 2011) 39; Bill George et al, 'Discovering Your Authentic Leadership' (February 2007) *Harvard Business Review* 129, 129.

36 Elihu Katz and Paul F Lazarsfeld, *Personal Influence: The Part Played by People in the Flow of Mass Communications* (Free Press, 1955).

37 The theory proposes that the 'context, history, follower characteristics, economics and other situational factors impact the necessity and possibility of leadership': Georgia Sorenson, 'The Nexus between Leadership Theory and Law' in Paula Monopoli and Susan McCarty (eds), *Law and Leadership* (Routledge, 2013) 19. See also Chief Justice Andrew Bell, 'Leading in the Law' (Speech, University of New South Wales: Centre for the Future of the Legal Profession, 25 February 2025) 4 [16] ('The demands of leadership will in part be dictated by the nature, function and size of the organisation or entity being led.' The Chief Justice also examines leadership in a number of contexts, including judicial leadership and leading professional organisations).

38 Fred E Fiedler, 'Leadership Effectiveness' (1981) 24(5) *American Behavioral Scientist* 619.

leadership in terms of the power relationship (between leaders and followers).[39] In this article we take the view that leadership is a skill that can be learnt but aspects of it are context specific, namely the skill develops within the framework of the legal profession and in the law firm environment.[40]

B *Leadership in Law Firms*

Many of these conventional models of leadership are premised on the crucial notion that leaders, by definition, must have followers.[41] This narrow definition, which typically frames leadership around an individual's position or title, makes the critical mistake of assuming leadership is role-specific. However, exercising leadership in law firms does not depend on hierarchy or position; instead, it is a collaborative process of engaging others towards a common cause or greater mission consistent with professional obligations.[42] Indeed, the most influential leader may not even sit at the top of an organisation.[43] This is especially so for law firms, which are comprised of highly-educated, autonomy seeking professionals, and where the idea of 'leaders' and 'followers' is less distinctive.[44] Rather than traditional hierarchical relationships, interactions are more ambiguous, negotiated and informal amongst professional peers.[45] Law firm 'partnerships' (even those that are legally incorporated companies) are based on high but varying degrees of equality of status and authority underpinned by an 'ethos of partnership' which can inspire strong sentiments and political dynamics.[46] Moreover, unlike other disciplines, professionalism underlies the practice of law to the point of placing legally enforceable ethical obligations on lawyers towards

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39 John RP French Jr. and Bertram Raven, 'The Bases of Social Power' in Dorwin Cartwright (ed), *Studies in Social Power* (University of Michigan Institute for Social Research, 1959) 150.

40 Similarly, we would argue that successful leadership in an in-house, government, not-for-profit or corporate setting depends on understanding the context or setting in which leadership must occur.

41 Bruce J Avolio, Fred O Walumbwa and Todd J Weber, 'Leadership: Current Theories, Research, and Future Directions' (2009) 60(1) *Annual Review of Psychology* 421 ('Leadership'); Jane M Howell and Boas Shamir, 'The Role of Followers in the Charismatic Leadership Process: Relationships and Their Consequences' (2005) 30(1) *Academy of Management Review* 96.

42 Thompson (n 1) 10.

43 Ibid; Laura Empson, *Leading Professionals: Power, Politics, and Prima Donnas* (Oxford University Press, 2017) 17–36 ('*Leading Professionals*').

44 Ann Langley and Laura Empson, 'Leadership and Professionals: Multiple Manifestations of Influence in Professional Service Firms' in Laura Empson et al (eds), *The Oxford Handbook of Professional Service Firms* (Oxford University Press, 2015) 163, 163.

45 Ibid; Paul S Adler, Seok-Woo Kwon and Charles Heckscher, 'Perspective—Professional Work: The Emergence of Collaborative Community' (2008) 19(2) *Organization Science* 359, 371.

46 Empson, '*Leading Professionals*' (n 43) 66. In Empson's interviews, when participants were asked what partnership meant, they referred to phrases such as 'one for all and all for one' (The Three Musketeers, Alexandre Dumas) and 'band of brothers' (Henry V, William Shakespeare).

clients, other lawyers (including the profession as a whole), the justice system, and society more generally.[47]

Thus, law firms are unique organisational machines that have traditionally sat outside the managerial and business school literature from which much of leadership theory originates.[48] Indeed, it was only two decades ago that the study and teaching of leadership in the law emerged in the United Stated ('US') and United Kingdom ('UK').[49] The first lawyer leadership courses in the early-to-mid-2000s were largely based on personal experience and theories borrowed from other disciplines.[50] It is not surprising then that many commentators have noted the existence of a leadership deficit across the profession.[51] While there has been a growing movement overseas to bridge this gap,[52] there has unfortunately

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47 Law Council of Australia, *Australian Solicitors' Conduct Rules* (24 August 2011) ('*ASCR*'). The *ASCR* rules are uniform and have been adopted in the Australian states and the Australian Capital Territory: see, *Legal Profession (Solicitors) Conduct Rules 2015* (ACT); *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW); *Australian Solicitors' Conduct Rules 2023* (Qld); *South Australian Legal Practitioners' Conduct Rules 2022* (SA); *Legal Profession (Solicitors' Conduct) Rules 2020* (Tas); *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Vic); *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2022* (WA).

48 Laura Empson (ed), *Managing the Modern Law Firm* (Oxford University Press, 2007) 2 ('*Managing the Modern Law Firm*'). As Empson notes those who study an MBA 'will learn how to run an airline, a fast food business, a pharmaceutical company, or a bank, but will probably never hear mention of a law firm'. An MBA (Master of Business Administration) is a graduate-level business and management degree that focuses on leadership and managerial skills.

49 See the comments of one of the pioneers of the field, Deborah Rhode, at the first national conference on leadership in the United States ('US') in 2012, where she noted that the field of lawyer leadership was barely a field: Deborah L Rhode, 'Developing Leadership' (2012) 52(3) *Santa Clara Law Review* 689 ('Developing Leadership').

50 See George T Buck Lewis and Douglas A Blaze, 'Training Leaders the Very Best Way We Can' (2016) 83(3) *Tennessee Law Review* 771, 773; Garry W Jenkins and Jon J Lee, 'Leadership Evolution: The Rise of Lawyers in the C-Suite' (2022) 96(4) *Tulane Law Review* 695, 731–4.

51 See generally Scott A Westfahl and David B Wilkins, 'The Leadership Imperative: A Collaborative Approach to Professional Development in the Global Age of More for Less' (2017) 69(6) *Stanford Law Review* 1667; Scott Westfahl, 'Learning to Lead: Perspective on Bridging the Lawyer Leadership Gap' in Heidi Gardner and Rebecca Normand-Hochman (eds), *Leadership for Lawyers: Essential Leadership Strategies for Law Firm Success* (Globe Law and Business, 2nd Edition, 2019) 79 ('Learning to Lead'); Empson, '*Leading Professionals*' (n 43). For Australia, see Australian legal market consultant Joel Barolsky's reference to a 'leadership deficit' across law firms in Australia: Joel Barolsky, 'Law Firm Leaders Fail on Fun, Fame and Fortune', *Australian Financial Review* (online, 13 May 2021) <https://www.afr.com/companies/professional-services/law-firm-leaders-fail-on-fun-fame-and-fortune-20210513-p57rg6>. See also the comments from Waye and others' study of lawyers: Waye, Verreynne and Knowler (n 5) 215–16.

52 Deborah L Rhode, 'Lawyers and Leadership' (2010) 20(3) *Professional Lawyer* 1; Rhode, 'Developing Leadership'(n 49); Deborah L Rhode, 'Preparing Leaders: The Evolution of a Field and the Stresses of Leadership' (2019) 58(3) *Santa Clara Law Review* 411 ('Preparing Leaders'); Leah Witcher Jackson Teague, 'Training Lawyers For Leadership: Vitally Important Mission for the Future Success (and Maybe Survival) of the Legal Profession and Our Democracy' (2019) 58(3) *Santa Clara Law Review* 633; Donald J Polden, 'Leadership Matters: Lawyers' Leadership Skills and Competencies' (2012) 52(3) *Santa Clara Law Review* 899; Westfahl and Wilkins (n 51).

been less activity in Australia.[53] This article aims to begin to remedy this and instigate a conversation about the way forward.

We base our views on a review of the professional services and leadership literature, with an emphasis on lawyers, sourced primarily from the US and UK. The literature comprises theory and empirical studies (both academic and commercial). The article also draws on publications by Australian lawyers' professional associations and media reporting addressing Australian legal practice. Further, because the profession at large is too complex, fluid, and polysemic, we focus specifically on commercial law firms. Australia's legal profession is skewed toward servicing corporate clients,[54] and large commercial firms have established themselves as a central locus of power.[55] These firms play a pivotal role in contributing to the Australian economy, maintaining an effective legal system, and upholding confidence in the rule of law.[56] An Australian commercial law firm focus is also selected due to similarities with, or at least influence from, US and UK law firms, and the associated literature.[57] In Part II of this article, we describe the elements that make leading in commercial law firms a unique and challenging experience: (a) professionalism and business hybridity; (b) partnership models of ownership; (c) a practicing, managing and leading ('PML') trilemma; and (d) a distributed model. This collection of elements forms the context in which leadership in a commercial law firm operates. In Part III, consistent with our view that leadership is a skill that can be learnt, we argue for

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53 Outside of a selection of 'managerial' type academic articles, there is little discussion in the literature about legal leadership in the Australian context and no direct empirical studies focussing on leadership in law firms in Australia. There are a small number of postgraduate or executive level courses offered by Australia law schools, such as 'Legal Leadership Essentials (LAWS90226)', University of Melbourne: Handbook (Web Page, 19 December 2025) <https://handbook.unimelb.edu.au/subjects/laws90226/ >('Legal Leadership Essentials'); UNSW Law & Justice: Centre for the Future of the Legal Profession (Web Page) <https://www.unsw.edu.au/law-justice/centre-future-legal-profession/leadership-for-lawyers> ('Leadership for Lawyers').

54 Waye, Verreynne and Knowler (n 5) 217–18. Commercial law services are responsible for 32.3% of the $33.6bn of legal services revenue in Australia, equivalent to $10.8bn: Jayson Cooke, 'Legal Services in Australia: Market Research Report (2015-2030)' (Research Report, IBISWorld, January 2025) 3.

55 As Oakes (n 5) 12 notes: 'Large firms do not form the majority of Australian legal firms, nor do they employ the majority of lawyers, but they are influential in the industry in that they are trend setters and opinion leaders'. See also Ronit Dinovitzer and Bryant Garth, 'The New Place of Corporate Law Firms in the Structuring of Elite Legal Careers' (2020) 45(2) *Law & Social Inquiry* 339; Mitt Regan and Lisa H Rohrer, *BigLaw: Money and Meaning in the Modern Law Firm* (University of Chicago Press, 2020).

56 Law Council of Australia, *The Lawyer Project* (Report, September 2021) 13; Cooke (n 54) 3, 34. However, large law firms can allow their allegiances to large corporate clients to undermine their obligations to the legal system and rule of law: Andrew Boon, *Lawyers and the Rule of Law* (Hart Publishing, 2022) 385–6.

57 A number of Australian commercial law firms are part of, or linked with, global law firms. See, eg, A&O Shearman, Allens, Ashurst, Baker McKenzie, Clifford Chance, Dentons, DLA Piper, Herbert Smith Freehills Kramer, Jones Day, King & Wood Mallesons, Norton Rose Fulbright and White & Case. Other Australian law firms compete internationally, such as Arnold Bloch Leibler, Clayton Utz, Corrs Chambers Westgarth, Gilbert + Tobin, HWL Ebsworth, Johnson Winter Slattery, Lander & Rogers, Mills Oakley and Minter Ellison.

the teaching of leadership at law school, and that purposeful leadership education must continue within a law firm. Part IV concludes.

III Leading in Law Firms – Challenges and Idiosyncrasies

> After spending 25 years saying that all professions are similar and can learn from each other, I'm now ready to make a concession: Law firms are different.[58]

Much of the existing literature on leadership is difficult to apply in the context of law firms that are hybrid professional business partnerships. Leaders must balance an attachment to traditional governance models and a commitment to professional ideals with the newer, modern-day pressures of a competitive commercial environment. In such conditions, leadership training can be perceived as a distraction from the persistent pressure to bill more hours and generate new business. Some lawyers may not want to move away at all from their 'first love' of day-to-day client work into roles managing, directing, and leading their colleagues.[59] Compounding these factors, a mismatch between how firm ownership works in theory versus the actual power, politics, and ambiguity that operate in practice, can also divert resources away from focussing on leadership as a firmwide imperative.

A *Professionalism and Profit in the Practice of Law*

Law firms are commonly categorised as professional service firms ('PSFs') — organisations which employ groups of qualified individuals to provide knowledge, value and strategies to clients.[60] Professional work is characterised by attributes such as autonomy, task variety, competence, collegiality and public service orientation.[61] As the prototypical example of a 'classic PSF', law firms

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58 David H Maister, *Strategy and the Fat Smoker: Doing What's Obvious but Not Easy* (Spangle Press, 2008) 229.

59 Laura Empson, *Reluctant Leaders and Autonomous Followers: Leadership Tactics in Professional Service Firms* (Research Report, 24 June 2014) 26. See also Stefan Stern, 'What Makes People Follow Reluctant Leaders' (30 June 2014) *Harvard Business Review*.

60 Mirko Noordegraaf, 'Hybrid Professionalism and beyond: (New) Forms of Public Professionalism in Changing Organizational and Societal Contexts' (2015) 2(2) *Journal of Professions and Organization* 187; Bente Løwendahl, *Strategic Management of Professional Service Firms* (Copenhagen Business School Press, 3rd ed, 2005) 20-5.

61 As Holmes et al, note, while there is no universally accepted list of attributes across the literature, there is considerable consistency in the factors they have listed: Vivien Holmes et al, 'Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers' (2012) 15(1) *Legal Ethics* 29, 30.

exhibit the highest degree of professional service intensity which distinguishes them from other PSFs.[62]

This is evident first and foremost, through the legally binding ethical and professional obligations that lawyers owe. This ethical framework has 'fidelity to the law at its core' because of the paramount duty to the court and the administration of justice.[63] The content of the duty includes more specific duties such as honesty and candour.[64] But it also includes upholding the rule of law, which includes elements such as fairness and equality.[65] The paramount duty is bolstered by requirements of integrity, professional independence and an obligation not to bring the profession into disrepute.[66] Lawyers also have duties to their clients, including a fiduciary duty to not obtain any unauthorised benefit from the relationship and not be in a position of conflict,[67] as well as duties of skill and care.[68] Codes of ethics are also a way to moderate the monopolistic pursuit of self-interest, [69] preventing issues such as conflicts of interest, [70] while

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62 Andrew von Nordenflycht, 'What Is a Professional Service Firm? Toward a Theory and Taxonomy of Knowledge-Intensive Firms' (2010) 35(1) *Academy of Management Review* 155, 165. The other classic professional service firm ('PSF') is the accounting firm. By comparison, organisations such as consultancies and advertising agencies which place greater emphasis on knowledge intensity than professionalism are 'neo-PSFs'. Other types of PSFs in Nordenflycht's taxonomy include professional campuses (such as hospitals), which have high knowledge intensity and professionalised workforces but lack the mobility of low capital intensive PSFs given hospital facilities and other physical infrastructure; and technology developers (such as biotech or R&D — research and development — labs), which are characterized by knowledge intensity, but no professionalism or low capital intensity.

63 Holmes et al (n 61) 30; *Giannarelli v Wraith* (1988) 165 CLR 543, 555–6 (Mason CJ); Law Council of Australia (n 47) r 3.

64 *Re Gruzman; Ex parte Prothonotary* (1968) 70 SR (NSW) 316, 323 (Herron CJ, Wallace P and Sugerman JA); *Law Society of New South Wales v Foreman* (1994) 34 NSWLR 408, 447 (Mahoney JA); *Kyle v Legal Practitioners' Complaints Committee* (1999) 21 WAR 56, 60 [12] (Ipp J); *Victorian Legal Services Board v Gobbo* [2020] VSC 692, [49] (Forbes J).

65 Robert W Gordon, 'The Citizen Lawyer - A Brief Informal History of a Myth with Some Basis in Reality' (2009) 50(4) *William and Mary Law Review* 1169, 1173, 1176; Robert W Gordon, 'The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections' (2010) 11(1) *Theoretical Inquiries in Law* 441, 448–9, 465; Boon (n 56) 317-18; Michael Legg, 'Better Than a Bot – Instilling Ethical Judgement Into the Lawyers of the Future in the Age of AI' (2025) 33(3) *Griffith Law Review* 273, 279–80 ('Better Than a Bot').

66 Law Council of Australia (n 47) rr 4.1.4, 5.1.2.

67 See *Maguire v Makaronis* (1997) 188 CLR 449, 463 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7 (Mason J); ibid rr 10–12; Holmes et al (n 61) 31; Hilary Sommerlad, 'Researching and Theorizing the Processes of Professional Identity Formation' (2007) 34(2) *Journal of Law and Society* 190, 192.

68 *Hawkins v Clayton* (1988) 164 CLR 539, 574 (Deane J) (liability in contract and tort of negligence); Law Council of Australia (n 47) r 4.1.3 refers to delivering legal services 'competently, diligently and as promptly as reasonably possible'.

69 Royston Greenwood et al, 'Reputation, Diversification, and Organizational Explanations of Performance in Professional Service Firms' (2005) 16(6) *Organization Science* 661.

70 Thomas DeLong and Ashish Nanda, *Professional Services: Text and Cases* (McGraw-Hill, 2003).

encouraging trusteeship, [71] and altruistic service such as pro bono representation. [72] In Australia, the professional commitment to abide by the conduct rules is reinforced by state and territory legislation.[73] Other PSFs such as accounting firms, management consultancies, or investment banks and their associated professionals do not have the same strict ethical duties as law firms.[74]

Second, lawyers are also characterised by strong professional autonomy.[75] Autonomy is essential for lawyers to exercise their professional judgement, provide customised service, and protect their independence. A central element of law firms is their reliance on 'elevator assets' — ie professionals who come and go daily.[76] Unlike imitable business goods, 'human capital' is unique and the most valuable resource in a law firm.[77] Consequently, it can be more difficult to retain an intellectually skilled workforce of professionals with generally transferable skills[78] and to direct professionals to complete tasks, especially if such tasks are against their own individual interest. Indeed, it is from this logic that the common platitude that leading lawyers is like 'herding cats' is derived.[79]

While professionalism is central to law firms, many scholars have argued that it has been overshadowed by the rise and adoption of a more managed

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71 Steven Brint, *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life* (Princeton University Press, 2nd ed, 1996) 32; Roy Suddaby and Royston Greenwood, 'Rhetorical Strategies of Legitimacy' (2005) 50(1) *Administrative Science Quarterly* 35.

72 Løwendahl (n 60) 26-8.

73 *Legal Profession Uniform Law 2014* (NSW) s 427(2).

74 Legg, 'Better Than a Bot'(n 65) 279.

75 von Nordenflycht (n 62) 161; David L Torres, 'What, If Anything, Is Professionalism? Institutions and the Problem of Change' (1991) 8(1) *Research in the Sociology of Organizations* 43; Adler, Kwon and Heckscher (n 45) 361; Melissa Mazmanian, Wanda J Orlikowski and JoAnne Yates, 'The Autonomy Paradox: The Implications of Mobile Email Devices for Knowledge Professionals' (2013) 24(5) *Organization Science* 1337.

76 Russell W Coff, 'Human Assets and Management Dilemmas: Coping with Hazards on the Road to Resource-Based Theory' (1997) 22(2) *Academy of Management Review* 374; Mark C Scott, *The Intellect Industry: Profiting and Learning from Professional Services Firms* (Wiley, 1998) 2; Cooke (n 54) 19 ('the industry is labour-knowledge and skills-intensive').

77 Coff (n 76) 374; Empson, '*Managing the Modern Law Firm*' (n 48) 149-50; von Nordenflycht (n 62) 159, 160, 162.

78 DeLong and Nanda (n 70). David J Teece, 'Expert Talent and the Design of (Professional Services) Firms' (2003) 12(4) *Industrial and Corporate Change* 895. The ability of lawyers to move between firms, or indeed across legal sectors (eg, law firm to in-house or to the Bar), is illustrated by the high mobility of mid-level lawyers (5–8 years post-qualification experience) and the growth in lateral partner movement: Tufvesson (n 21); Dominic Peacock, 'Partners jump ship as legal firms target talent', *The Australian* (online, 3 September 2024) <https://www.theaustralian.com.au/business%2Flegal-affairs%2Fpartners-jump-ship-as-legal-firms-target-talent%2Fnews-story%2F93242fae895d3a8067ac522b0a946467?amp&nk=01b5f33edf1c764124457ec56fc163ed-1772079936>.

79 Indeed, the Cambridge Dictionary definition for the idiom 'like herding cats' directly uses lawyers as an example of the phrase: see Larry Richard, 'Herding Cats: The Lawyer Personality Revealed' (Research Paper, Managing Partner Forum, 2002).

professional business ('MPB') model focussed on profit-maximisation. [80] Professional obligations and the accompanying need for autonomy are seen as compromised or corporatised in aid of efficient profit generation.[81] Others contest the view that the pursuit of commercial achievements has compromised professional values. [82] At the heart of this debate lies the notion that professionalism has been redefined to represent a professional's unstinting commitment to serving the needs of their clients.[83]

Rather than delving into a debate of whether law is a business or profession, it is more pragmatic for our purposes to simply acknowledge that the reality of legal practice is one of *professional organisations* that are engaged in *business*. Law firms are businesses that exist to service their clients and make profits for their owners. Managing client relationships and the client experience are now a part of a larger service that involves advising on risk, compliance, governance and commercial strategy of corporates. [84] As such, leaders need to combine professionalism and ethical obligations with an entrepreneurial mindset and the broader business environment in which law firms are situated. [85] Ethical

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80 Royston Greenwood, CR Hinings and John Brown, '"P2-Form" Strategic Management: Corporate Practices in Professional Partnerships' (1990) 33(4) *Academy of Management Journal* 725; Ashly Pinnington and Timothy Morris, 'Archetype Change in Professional Organizations: Survey Evidence from Large Law Firms' (2003) 14(1) *British Journal of Management* 85, 86–7; John Flood, 'Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions' (2007) 14(1) *Indiana Journal of Global Legal Studies* 35; D Daniel Sokol, 'Globalization of Law Firms: A Survey of the Literature and a Research Agenda for Further Study' (2007) 14(1) *Indiana Journal of Global Legal Studies* 5; Matthew S Winings, 'The Power of Law Firm Partnership: Why Dominant Rainmakers Will Impede the Immediate, Widespread Implementation of an Autocratic Management Structure' (*SSRN Scholarly Paper No 713881*, 29 April 2005) <https://papers.ssrn.com/abstract=713881>. For discussion in Australian context: see Margaret Thornton, 'Squeezing the Life out of Lawyers: Legal Practice in the Market Embrace' (2016) 25(4) *Griffith Law Review* 471, 473; Iain Campbell and Sara Charlesworth, 'Salaried Lawyers and Billable Hours: A New Perspective from the Sociology of Work' (2012) 19(1) *International Journal of the Legal Profession* 89.

81 There have been well-known examples of lawyers or law firms failing to recognise the ethical dimensions of decisions. See, eg, Vivien Holmes and Francesca Bartlett, *Parker & Evans's Inside Lawyers' Ethics* (Cambridge University Press, 4th ed, 2023) 32-3, (discussing Clayton Utz and its advice on a document retention policy for British American Tobacco Australia Services Ltd) 199–201 (discussing Corrs Chambers Westgarth's representation of the Catholic Church in relation to child sexual abuse).

82 Elliott A Krause, *Death of the Guilds: Professions, States, and the Advance of Capitalism, 1930 to the Present* (Yale University Press, 1996) 280–1; Campbell and Charlesworth (n 80).

83 Fiona Anderson-Gough, Christopher Grey and Keith Robson, 'In the Name of the Client: The Service Ethic in Two Professional Services Firms' (2000) 53(9) *Human Relations* 1151, 1152. See generally Eliot Freidson, 'The Changing Nature of Professional Control' (1984) 10(1) *Annual Review of Sociology* 1.

84 Jack Newton, *The Client-Centered Law Firm: How to Succeed in an Experience-Driven World* (Blue Check Publishing, 2020); Regan and Rohrer (n 55) 1-2.

85 US scholar Kelly argued similarly: 'no coherent account of professionalism, legal ethics, or the contemporary legal profession is possible without understanding the workings of practice organizations': See Michael J Kelly, *Lives of Lawyers: Journeys in the Organizations of Practice* (University of Michigan Press, 1994) 18. For a stark example of institutional ethical failure, see the Post Office Scandal, where hundreds of sub-postmasters in the UK were wrongfully

obligations need to be seen as a point of difference or competitive advantage (eg, the requirements of integrity, honesty, and loyalty) and not as a burdensome regulation.[86] To lead a firm requires a profound understanding and appreciation of both dimensions and when we treat business and profession as dichotomous, 'they inhibit, rather than enhance, our understanding of modern practice'.[87]

B *Law Firm Organisational Structures*

Another distinctive feature of law firms is their unique organisational frameworks, evident in their firm structures, partnership ownership and compensation models.

1 *Firm Structures*

Compared to the history of the profession, the large, multi-jurisdictional, full-service 'BigLaw' firm[88] is relatively young. The traditional law firm model (in the common law) operated in three-tier, stratified apprenticeships with clear demarcations between junior, mid-level and senior professionals.[89] It was not until the late 20th century, driven by forces including marketisation (the expansion of

prosecuted due to careless reliance on faulty technology, egregious misconduct, and ethical failings by lawyers including misleading witness statements, polishing evidence (lawyers writing witness statements), oppressive litigation tactics (advancing claims contrary to evidence, alongside baseless counter-claims), and lawyers actively frustrating, rather than promoting the administration of justice: see *Bates v Post Office Ltd (No 6: Horizon Issues)* [2019] EWHC 3408 (QB); Richard Moorhead, Karen Nokes, and Rebecca Helm, 'Issues arising in the Conduct of the Bates Litigation' (Working Paper I, Evidence-Based Justice Lab: University of Exeter, 2 August 2021) 12-15; Richard Moorhead, Steven Vaughan, and Kenta Tsuda, *What Does It Mean for Lawyers to Uphold the Rule of Law? A Report for the Legal Services Board* (Report, October 2023) 25-6.

86 Legg and Bell (n 2) 329-33.

87 Regan and Rohrer (n 55) 16.

88 Some describe this process as the rise of 'mega-law': see John Flood, 'Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice' (1996) 3(1–2) *International Journal of the Legal Profession* 169; James Faulconbridge and Daniel Muzio, 'Organizational Professionalism in Globalizing Law Firms' (2008) 22(1) *Work, Employment and Society* 7, 8–9; Marc Galanter and William D Henderson, 'The Elastic Tournament: A Second Transformation of the Big Law Firm' (2008) 60(6) *Stanford Law Review* 1867.

89 These were derived from the Inns of Court in London and the Craft and Trade Guilds of Europe: see John J Gabarro, 'Prologue' in Laura Empson (ed), *Managing the Modern Law Firm* (Oxford University Press, 2007) xvii, xx; Anton-Hermann Chroust, 'The Beginning, Flourishing and Decline of the Inns of Court: The Consolidation of the English Legal Profession after 1400' (1956) 10(1) *Vanderbilt Law Review* 79; Jeremiah Lambert and Geoffrey S Stewart, *The Anointed: New York's White Shoe Law Firms — How They Started, How They Grew, and How They Ran the Country* (Lyons Press, 2021).

neoliberalism),[90] globalisation (the need to represent international clients),[91] and local competition policy (the shift to 'service providers' for 'consumers')[92] that saw the emergence of the BigLaw firm we know today. In New South Wales for example, until amendments to the *Partnership Act* 1892 (NSW) in the mid-1970s, partnerships were limited to ten partners.[93] Shortly thereafter, the monopoly on the provision of legal services[94] and ownership limitations of firms were also lifted.[95]

In the process, firms began to structure themselves into more distinct business units. Today firms are populated with non-legal staff,[96] ranging from human resources,[97] marketing,[98] change managers,[99] legal project managers[100] and pricing specialists.[101] However, unlike traditional corporates, law firms are not organised based on these functions, but are instead organised by practice areas (such as corporate, litigation, banking, etc).[102] These reflect where lawyers are effective 'on the ground', ie, in the areas where they actually serve clients and deliver their services as professionals.[103] Moreover, unlike other PSFs which largely rely on

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90 Marketisation involves the transformation of professional organisations from traditional partnership models into multidisciplinary practices ('MDPs') or incorporated legal practices ('ILPs'), the profession's exposure to free-market forces instead of state-imposed protections, and the introduction of managerial methods to pursue efficiency and profitability: Robin Paul Malloy, 'Law, Market and Marketization' (2016) 1(2) *University of Bologna Law Review* 166, 167–8.

91 Justine Rogers, Dimity Kingsford Smith and John Chellew, 'The Large Professional Service Firm: A New Force in the Regulative Bargain' (2017) 40(1) *University of New South Wales Law Journal* 218, 241.

92 See, eg, Law Council of Australia (n 47) r 4.1.3 ('deliver legal services competently, diligently and as promptly as reasonably possible'), and Glossary of Terms (definition of 'client') ('means a person … for whom the solicitor is engaged to provide legal services for a matter').

93 For other respective State Partnership Acts: see *Partnership Act 1963* (ACT); *Partnership Act 1997* (NT); *Partnership Act 1891* (Qld); *Partnership Act 1891* (SA); *Partnership Act 1891* (TAS); *Partnership Act 1958* (Vic); *Partnership Act 1895* (WA). See also Oakes (n 5) 15–16.

94 Currently non-lawyers can and do provide advice and representation in conveyancing, intellectual property, workplace relations, taxation and migration matters.

95 See, eg, *Legal Profession Uniform Law* (NSW) s 32; *Legal Profession Act 2007* (Qld) s 113; *Legal Practitioners Act 1981* (SA) sch 1 cl 3; *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 32; *Legal Profession Act 2008* (WA) s 101.

96 Paula Baron and Lillian Corbin, *Ethics and Legal Professionalism in Australia* (Oxford University Press, 3rd ed, 2020) 26–8.

97 Rakesh Khurana and David B Wilkins, 'The Changing Nature of Professionalism' (March-April 2015) *The Practice* <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/professionalism-in-the-21st-century/the-changing-nature-of-professionalism/>.

98 Justine Rogers and Anthony Song, 'Digital Marketing in the Legal Profession: What's Going on and Does It Matter?' (2023) 5(2) *Law, Technology and Humans* 134.

99 Justine Rogers and Felicity Bell, 'Transforming the Legal Profession: An Interview Study of Change Managers in Law' (2022) 42(3) *Legal Studies* 446.

100 Justine Rogers, Peter Dombkins and Felicity Bell, 'Legal Project Management: Projectifying the Legal Profession' (2021) 3(2) *Law, Technology and Humans* 133.

101 According to legal consultancy Altman Weil's 2020 survey of 810 US law firms, 70% of firms with 250 or more attorneys employ a pricing specialist: Seeger and Clay (n 5) 24.

102 Gabarro (n 89) xxi.

103 Ibid xxiii.

value-based pricing (including fixed fees, subscription models, or performance-based fees), the billable hour remains deeply entrenched across most law firms.[104]

2 *Partnership Ownership*

Another distinctive element of most law firms is their ownership structure. Like all businesses, law firms require capital to fund their costs of business. Most firms will raise equity from their partners in exchange for an ownership share.[105] One possible consequence of this, however, is that when law firms fail, they do not just go bankrupt — they 'collapse' due to a phenomenon John Morley coins a 'partner run'.[106] Analogous to a bank run, during a crisis, risk-averse partners jump ship, weakening the overall partnership, compelling others to follow suit. Without strong leadership to mitigate this process, a self-reinforcing spiral can occur as partners race to exit before their equity losses will become realised through an insolvency.[107] To reinforce his point, Morley points to the example of the Australian law firm Slater & Gordon,[108] the first law firm in the world to become a publicly listed company.[109] Morley argues that, unlike every other large law firm collapse he studied,[110] being investor-owned rather than lawyer-owned allowed Slater & Gordon to reorganise its debt and survive insolvency.[111] More generally, the experience highlights the importance of maintaining confidence in any law firm partnership that is comprised of top-billing partners and/or teams of partner-owners.

3 *Compensation Models*

Another point of distinction for law firms is the compensation models used. In Australia, three primary compensation models exist: (1) lockstep; (2) performance-based; and (3) a blend of the two: hybrid lockstep models.[112]

In the traditional lockstep model, new partners would contribute equal amounts to those contributed by all partners, ensuring an equal distribution of

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104 Although there is some change on the horizon: see Michael Legg, *The Sustainability of Law and Lawyers: The Future of Legal Costs and Fees - Time Based Billing and Alternative Fee Arrangements* (Law Society of NSW, 2020).

105 John Morley, 'Why Law Firms Collapse' (2019) 75(1) *The Business Lawyer* 1399, 1415.

106 Ibid 1400; Oakes (n 5) 15–16.

107 Morley (n 105) 1419.

108 Slater & Gordon was the first law firm in the world to go public, listing on the Australian Stock Exchange (ASX) in 2007. As of April 2023, Slater & Gordon has been delisted from the ASX after being acquired by a private equity firm Allegro Funds Pty Ltd.

109 In Australia, it is legally possible to raise capital by selling equity shares to public investors under the *Corporations Act 2001* (Cth).

110 In the last thirty years, Morley studied 37 collapses of 'AmLaw 200' law firms (the top 200 ranked law firms by size and economic performance according to media company American Lawyer): Morley (n 105).

111 Ibid 1423.

112 Oakes conducted in-depth interviews with managing partners of 19 large law firms in Australia: Oakes (n 5) 19.

capital, risk and profitability.[113] Associates rise through the ranks of the firm and are compensated based on their seniority.[114] The advantages of this model are said to be reciprocity of partnership, a sense of mutual assistance,[115] and the ability to better weather business market cycles.[116] While lockstep promotes collective alignment, it can lead to partners 'free-riding' on the efforts of their peers and to animosity towards underperforming or less engaged colleagues.[117]

In performance-based or 'eat-what-you-kill' type models, new partners contribute capital equal to the amount contributed by all partners, thereafter sharing profits according to their relative performance.[118] Criteria can vary between firms, but generally include financial performance, business-development activity, and other firm contributions relevant to strategic considerations.[119] Under this model, firms prize their 'rainmakers'[120] — the lawyers adept at developing business by selling the firm's expertise and brand ethos.[121] These firms expand primarily through lateral hires — acquiring individual lawyers, practice groups, or entire firms — rather than by promoting associates to partners. In turn, lawyers are likely to draw many of their norms

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113 This may occur through a points system, with partners starting at a predetermined level until they reach full partnership of 100 points: Lucinda Schmidt and Marcus Priest, 'Mega Litigation and Super Inflows Drive Big Profits', *Australian Financial Review* (online, 1 September 2006) <https://www.afr.com/companies/mega-litigation-and-super-inflows-drive-big-profits-20060901-jkigd>.

114 Jacob Dougherty, 'Can Lockstep Find Its Footing Again? Why the Lockstep Compensation Model Creates a Culture for Providing Better Legal Services' (2022) 84(1) *University of Pittsburgh Law Review* 313, 315, 319. Today, few, if any large global law firms operate under pure lockstep models. One notable exception is Wachtell, Lipton, Rosen & Katz, which has maintained a strict lockstep compensation model while sustaining its dominance as a market leader, operating from a single office in New York: See William H Starbuck, 'Keeping a Butterfly and an Elephant in a House of Cards: The Elements of Exceptional Success' (1993) 30(6) *Journal of Management Studies* 885; 'Meet America's Most Profitable Law Firm' *The Economist* (online, 2 August 2023) <https://www.economist.com/business/2023/08/02/meet-americas-most-profitable-law-firm>.

115 Paul C Saunders, 'When Compensation Creates Culture' (2006) 19(1) *Georgetown Journal of Legal Ethics* 295, 296.

116 For example, in booming market conditions, M&A (mergers and acquisitions) and banking practice areas thrive, while litigation-based practice areas such as insolvency litigation enjoy countercyclical activity.

117 Empson, '*Managing the Modern Law Firm*' (n 48) 25. For an example of some of the ways a firm might help mitigate free-riding (strict performance measurement, the ability to hold back compensation increases, or informally insulating one of their own by limiting the sharing of resources): see Emmanuel Lazega, *The Collegial Phenomenon: The Social Mechanisms of Cooperation among Peers in a Corporate Law Partnership* (Oxford University Press, 2001) 60–1.

118 Milton C Regan, *Eat What You Kill: The Fall of a Wall Street Lawyer* (University of Michigan Press, 2004).

119 Neil Oakes, 'Splitting the Pie: Some Thoughts on Profit Sharing Among Partners', *FMRC* (Web Page, 31 July 2019) <https://www.fmrc.com.au/splitting-the-pie-some-thoughts-on-profit-sharing-among-partners>.

120 Jane Fenton, Anna Grutzner and Brian Kogler, *The Rain Dance: A Marketing Book for Lawyers* (Fenton Communications, 1996) 2.

121 Tom Bird, 'How Do You Teach Lawyers to "Do" Business Development?' in Stephen Revell (ed), *Business Development: A Practical Handbook for Lawyers* (Globe Law and Business, 2nd ed, 2020) 153; Rogers and Song (n 98) 140.

from colleagues within their specialty, rather than the firm as a whole. This can lead to greater difficulty establishing and sustaining an overall organisational culture, and to a more 'multicultural' rather than monolithic organisational setting, which is underpinned by the general parameters of competition for reward and punishment set by the broader firm.[122]

Most firms in Australia take a more balanced approach of modified lockstep (where partner pay is still based on seniority, but often with a performance element allowing bonuses to be paid on top of salaries).[123] This has led to a greater hierarchical law firm ladder.[124] More stages and new roles now exist on the partnership track (including special counsel, managing associate, or head of practice group), and upon reaching partnership, many firms now utilise a 'two-tier' partnership model distinguishing between equity and non-equity partnership ('NEP').[125]

NEPs usually do not participate in the firm's partner profit-sharing system but are remunerated based on negotiated compensation. In Australia, the proportion of equity partners in law firms has reduced from 18% in 2014 to 13% in 2024.[126] While different firms will have different systems,[127] legal recruiters in Australia now estimate that it may take as many as 15–20 years in today's larger firms to reach equity partnership from commencing as a graduate;[128] instead of the traditional 10–plus years of service that had previously prevailed in large firms.[129]

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122 Regan (n 118) 8.

123 Hannah Wootton and Michael Pelly, 'Salary Arrangements Take Shine off Law Firm Partnerships', *Australian Financial Review* (online, 25 June 2020) <https://www.afr.com/companies/professional-services/salary-arrangements-take-shine-off-law-firm-partnerships-20200623-p555fo>. Some top-tier firms — MinterEllison and King & Wood Mallesons — have reported only having equity partners: Maxim Shanahan, 'Rapid growth puts pressure on law partnership structures', *Australian Financial Review* (online, 11 July 2024) <https://www.afr.com/companies/professional-services/rapid-growth-puts-pressure-on-law-partnership-structures-20240709-p5jsbt>.

124 Stephen Ackroyd and Daniel Muzio, 'The Reconstructed Professional Firm: Explaining Change in English Legal Practices' (2007) 28(5) *Organization Studies* 729.

125 Large Australian firms generally refer to these partners as 'fixed draw partners'. Others use the terms 'salaried partners' or 'non-equity partners'. See Oakes (n 5) 17; Thomson Reuters Institute, *2024 Australia: State of the Legal Market* (Report, 2024) 16 ('*2024 Australia*').

126 Thomson Reuters Institute, *2024 Australia* (n 125) 16.

127 For example, at HWL Ebsworth, 28% of its 279 partners are salaried, compared with more than 49% of Ashurst's 207 partners, 21% of Clayton Utz's 173 partners, and 25% of Herbert Smith Freehills' 171 partners: Shanahan (n 123).

128 Michael Pelly, 'Big Pay Increases Are Over for Lawyers', *Australian Financial Review* (online, 27 July 2023) <https://www.afr.com/companies/professional-services/big-pay-increases-are-over-for-lawyers-20230726-p5drg2>.

129 Wootton and Pelly (n 123). When firms were smaller, this was 5-7 years. See comments from Fionn Bowd, Chief Executive Officer ('CEO') of legal recruitment firm Bowd: Angela Tufvesson, 'Is the Partnership Model in Decline?', *Law Society Journal* (online, 7 March 2023) <https://lsj.com.au/articles/is-the-partnership-model-in-decline/>. See also Michael Pelly, 'Law Partnership Track Blows out to 15 Years', *Australian Financial Review* (online, 2 August 2019) <https://www.afr.com/companies/professional-services/law-partnership-track-blows-out-to-15-years-20190731-p52cki>.

Lawyer-leaders face difficulty due to the opaque nature of these models, which are often described as akin to a 'black box'.[130] The distinction between equity and NEPs is often not known or made visible within firms,[131] and details about their determinations are more complicated to source.[132]

C *Distributed Leadership in Law Firms*

Third, unlike in traditional hierarchical organisations, leadership in law firms is more distributed.[133] Reflecting the governance model of partnerships, every partner is a de facto leader of a firm.[134] Laura Empson terms this phenomenon a 'leadership constellation' — in which leadership roles are shared among multiple actors, authority is ambiguous and contested, and power and resources are dynamic.[135] Depending on the firm, these actors can be small groups — in a type of 'inner circle' — or various different tribes of groups ('like a series of concentric circles').[136] This could include the senior executives (managing partner ('MP'), senior partner ('SP'), chairman, and chief executive);[137] heads of business (leaders of major fee-earning areas, offices and practice area groups); heads of business services (operations, marketing, human resources etc); and key influencers (people with key client relationships, valuable expertise, or strong reputations).

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130 Nan Seuffert, Trish Mundy and Susan Price, 'Diversity Policies Meet the Competency Movement: Towards Reshaping Law Firm Partnership Models for the Future' (2018) 25(1) *International Journal of the Legal Profession* 31, 38.

131 Susan Price, Louise Mallon and Danielle Verde, '2020/21 Law Firm Comparison Project' (Research Paper, Women Lawyers Association of New South Wales, 25 October 2021) 24–5.

132 See, eg, the comments from The Women Lawyers Association of New South Wales ('WLANSW') in their 2020 survey of law firms, which had a low response rate. Only 12 firms provided the detailed information sought on partnership, with others citing information to be 'commercial in confidence' or other objections: Ibid 13.

133 Empson '*Leading Professionals*' (n 43) 31-6. Empson conducted more than 400 interviews, in 20 countries, working with 15 of the world's leading law firms in the UK, Europe and the US.

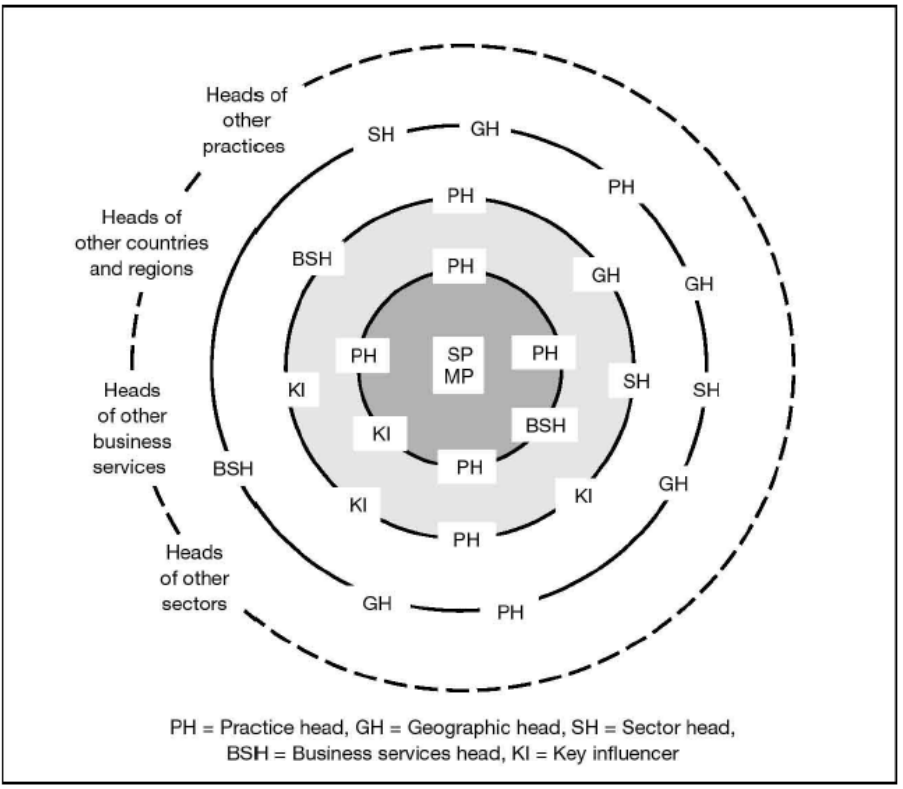
134 Heidi Gardner and Rebecca Normand-Hochman (eds), *Leadership for Lawyers: Essential Leadership Strategies for Law Firm Success* (Globe Law and Business, 2nd Edition, 2019).

135 Empson '*Leading Professionals*' (n 43) 17–36.

136 Ibid 202.

137 As Oller points out, many traditional large law firms 'were dominated by one or two senior partners who were more equal than others in power and pay': John Oller, *White Shoe: How a New Breed of Wall Street Lawyers Changed Big Business and the American Century* (Dutton, 2019) 55–6.

Figure 1: Empson's Leadership Constellation[138]



Crucially, individuals may see themselves as leaders due to their formal titles, yet they may not be part of the constellation if they are not recognised and accepted as leaders by their colleagues. For example, certain practice heads may be excluded from the inner circle, while some heads of business services (such as Human Resources) may be closer to the inner circle than even board members.

In other words, within law firms sits an informal power structure that is more opaque, implicit and dynamic. These hidden roles and relationships across the firm are negotiated on an ad-hoc basis, evolve over time, and often only come to light in a crisis.[139]

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138 Laura Empson, 'Leadership, Power and Politics in Law Firms' in Heidi Gardner and Rebecca Normand-Hochmand (eds), *Leadership for Lawyers: Essential Leadership Strategies for Law Firm Success* (Globe Law and Business, 2nd Edition, 2019) 89 ('Leadership, Power and Politics in Law Firms').

139 Empson '*Leading Professionals*' (n 43) 36; Scott Westfahl, 'Leveraging Lawyers' Strengths and Training Them to Support Team Problem-Solving Under Crisis Conditions' in Ray Brescia and Eric K Stern (eds), *Crisis Lawyering: Effective Legal Advocacy in Emergency Situations* (New York University Press, 2021) 340.

1 *Power and Politics in Law Firms*

In an organisation, power derives from the control of resources, networks, and the strategic use of relationships.[140] In law firms, partners are in charge of their own practice and control the primary nexus of power — client relationships.[141] Generally, the more business and billings a partner brings, the more freedom they have in how they run their practice.[142] Crucially, in a law firm, taking on a major leadership role can paradoxically entail a loss of power, as lawyers reduce fee-earning work and relinquish their most valuable assets — client relationships and professional expertise — to colleagues, or potentially, competitor firms.[143] As such, many partners value their independence and are wary of governance structures, bureaucratic incursions, or excessive management which may cede power or influence.[144]

This behaviour of partners as largely autonomous units presents challenges for leadership.[145] A vital requirement of leading professionals is the ability to earn the trust of others.[146] However, as David Maister argues, the desire for autonomy (and high levels of scepticism[147]) may make law firms a 'low trust environment'.[148] In today's firms, where there are competing claims for staff, clients and resources[149] — intensified by a general industry shift towards performance based compensation models — executing strategies that involve behaving as 'one firm' can be more difficult.[150] Empson conceptualises this challenge as being inherent in the tension between individual and collective motives, which is itself a byproduct of pluralism

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140 Jeffrey Pfeffer and Gerald R Salancik, *The External Control of Organizations: A Resource Dependence Perspective* (Harper & Row, 1978) 258; Jeffrey Pfeffer, *Managing with Power: Politics and Influence in Organizations* (Harvard Business Press, 1992) 111, 124.

141 Empson '*Leading Professionals*' (n 43) 24. Although it should also be recognised that there may be multiple people involved in the client relationship, including partners servicing the client and also relationship partners (or rainmakers) who are responsible for maintaining the relationship. Interest from other partners in a matter may be general (those who stand to benefit financially or reputationally from a successful outcome) or specific (where certain partners may have dealings with the same client that are likely to be affected by the outcome of the file).

142 Gardner and Normand-Hochman (n 134) 166.

143 Empson, 'Leadership, Power and Politics in Law Firms' (n 138) 89.

144 Richard (n 79) 7; Maister (n 58) 232, 230; Jeff Foster et al, *Understanding Lawyers: Why We Do the Things We Do* (White Paper, 2010) 8–9.

145 Greenwood, Hinings and Brown (n 80) 734.

146 David H Maister, *Managing the Professional Service Firm* (Free Press, 1993) 220.

147 Studies have shown that lawyers score higher on traits such as scepticism, autonomy and urgency, while scoring lower on traits like resilience, sociability and empathy: see, eg, Larry Richard, 'Leadership Competencies in Law' in Susan McCarty and Paula A Monopoli (eds), *Law and Leadership: Integrating Leadership Studies into the Law School Curriculum* (Routledge, 2016); Richard (n 79).

148 Maister (n 58) 231.

149 Stephen Mayson, 'Your Capital - Building Sustainable Value: A Capital Idea' in Laura Empson (ed), *Managing the Modern Law Firm* (Oxford University Press, 2007) 141, 155.

150 George Beaton and Imme Kaschner, *Remaking Law Firms: Why and How* (American Bar Association, 2016) 13; Gardner and Normand-Hochman (n 134) 167.

(ie, the multifaceted values, cultures, rules and expectations within firms).[151] Meanwhile, Mitt Regan and Lisa Rohrer, adopting a game-theoretic approach, refer to the simultaneous need for lawyer-leaders to solve a Prisoner's Dilemma (convincing partners that cooperative behaviour will be more financially advantageous than self-interested behaviour) and an Assurance Game (management must credibly communicate to partners that the firm has both financial and non-financial value that coordination realises).[152] Other scholars have focused on how 'collegiality' can create a distinct organisational form, distinguished from bureaucratic organisations, that is characterised by peer-based cooperation. Waters defines collegial organisations as 'those in which there is dominant orientation to a consensus achieved between the members of a body of experts who are theoretically equals in their levels of expertise but who are specialized by area of expertise'.[153] Emmanuel Lazega builds on this by considering the informal power dynamics that arise from collegial structures and their influence on the inherent conflicts between individual and collective interests.[154]

Despite their evident presence within law firms, the terms 'power' and 'politics' are often met with unease or deliberately sidestepped, as they can be perceived as incompatible with the ideal of collegiality.[155] Yet, in a context where power is dynamic, implicit, and distributed, as in law firms, political behaviours are inevitable.[156] Law firms are overtly governed by political structures and procedures — as to be admitted to partnership typically requires election from the partnership as a whole. Partners often have diverse goals, priorities, and motivations. At its most basic level, some partners may be focused on short-term financial performance (usually newer partners at the peak of their productivity), while others may be more concerned with their longer-term legacy or advancing into senior leadership positions (usually more experienced partners).[157] These leadership positions are often highly contested and politicised, as a managing partner role can offer the prospect of employment (eg, board appointments)

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151 Empson '*Leading Professionals*' (n 43) 85. See also Jean-Louis Denis, Lise Lamothe and Ann Langley, 'The Dynamics of Collective Leadership and Strategic Change in Pluralistic Organizations' (2001) 44(4) *Academy of Management Journal* 809.

152 Regan and Rohrer (n 55) 8.

153 Malcolm Waters, 'Collegiality, Bureaucratization, and Professionalization: A Weberian Analysis' (1989) 94(5) *American Journal of Sociology* 945, 956.

154 Lazega uses a detailed case study of a US corporate law firm, Spencer, Grace & Robbins, to show how collegiality, as an organising principle, causes power in law firms to be complex, distributed, and vested in the collectivity as a whole: Lazega (n 117).

155 Empson '*Leading Professionals*' (n 43) 28.

156 Ibid 27; Christopher P Parker, Robert L Dipboye and Stacy L Jackson, 'Perceptions of Organizational Politics: An Investigation of Antecedents and Consequences' (1995) 21(5) *Journal of Management* 891, 891–3 ; Samantha Fairclough, Tim Morris and Royston Greenwood, 'Decision Making in Professional Service Firms' in Paul Nutt and David Wilson (eds), *Handbook of Decision Making* (John Wiley & Sons, 2010) 275.

157 Empson '*Leading Professionals*' (n 43) 27.

following retirement from the firm.[158] Consequently, authority in law firms is collegial, fragile, and the result of election, granting the senior partner the status of first among equals.[159] Committees form to address any manner of topic, ensuring participation and a check and balance on any individual (or group's) decision-making power. Empson refers to this as a form of 'contingent authority' whereby the lawyer-leader may only lead by consent.[160] Personal credibility is ultimately essential to the calculus of leadership,[161] on the assumption that leaders cannot be effective if they do not first have the professional respect of their colleagues.[162] This extends beyond mere technical skill or rainmaking ability, but requires securing the trust and support of the partnership through subtle political acumen or strategic 'manoeuvring'.[163] Senior leaders must behave politically to move forward, yet appear apolitical to their peers — persuading them that their ambitions serve the interests of the organisation as a whole rather than just themselves.[164] Lawyer-leaders need to recognise these political and power dynamics and ensure goodwill not just from their clients, but also from their peers. However, in the whirlwind of everyday practice, this may not be so easy.

D *Everyday Legal Practice — A Practicing, Managing, Leading ('PML') Trilemma*

Finally, leading in law firms has traditionally been a challenge as it is ultimately one of many competing priorities. In practice, law firm leaders must often juggle billing legal work and rainmaking ('practice'),[165] with directing a team or practice area

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158 Ibid. Empson observes that a plethora of political terminology and processes is used in these elections, with prospective leaders issuing 'manifestos' and 'mandates', giving speeches at 'candidates' debates', referring to the 'electorate' and their 'constituents', and even appointing 'campaign managers'.

159 Langley and Empson (n 44) 164; Patrick J McKenna and David H Maister, *First Among Equals: How to Manage a Group of Professionals* (Free Press, 2005).

160 Empson '*Leading Professionals*' (n 43) 21; Langley and Empson (n 44) 163–88.

161 Aspatore Books interviewed senior lawyers (from managing partners to chairmen) to give their views on leading large law firms. A common theme was that to lead as a lawyer first requires respect as a partner from colleagues, earned through professional work: Aspatore Books, *Inside the Minds: Leading Lawyers: The Art & Science of Being a Successful Lawyer* (2002).

162 Maister (n 146) 221.

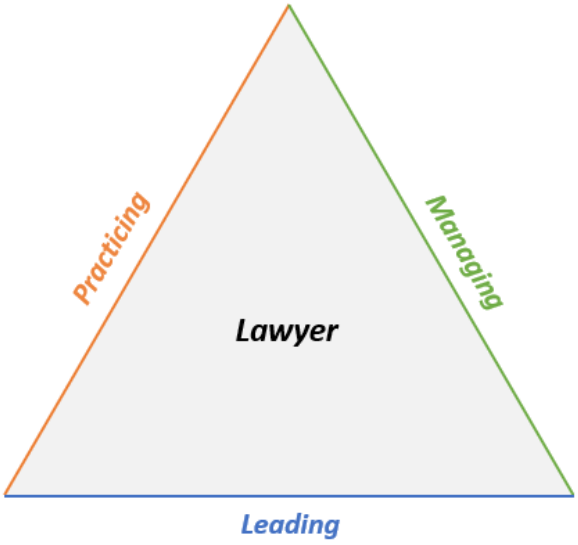
163 Empson '*Leading Professionals*' (n 43) 47–48. As Empson notes, if politics is too visible across the firm, the firm can collapse from deal-making and double dealing.

164 Ibid 50.

165 Practicing refers to the use of a lawyer's technical skills and specialised expertise to generate and deliver tangible outputs, services or products. This encompasses not only conventional every day legal tasks such as research, writing, the drafting of legal documents or appearing in court, but also extends to rainmaking — the ability to attract and retain clients, thereby contributing to the growth of the firm. This is a remnant of traditional professionalism, where partners were individually responsible for business development, client service, and execution: Gabarro (n 89) xxi.

('managing'),[166] all while overall inspiring and leading the wider firm as partner-owners ('leadership').[167] We call this phenomenon the 'PML Trilemma'.[168]

Figure 2: The Law Firm Leader PML Trilemma



1 *Understanding the PML Trilemma*

The trilemma incorporates existing concepts from the leadership literature and adapts them to the modern-day practice of law firms.

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166 Management is about maintaining the smooth functioning of routine operations for the ongoing business of the firm. Good management in law firms often entails effective organising, coordinating, delegating, and supervising to ensure defined objectives such as billable hour targets are met productively and profitably: John P Kotter, *John P. Kotter on What Leaders Really Do* (Harvard Business School Press, 1999) 52–3.

167 Leadership is about aligning a collective direction, executing strategic plans, and renewing an organisation: 'What Is Leadership: A Definition and Way Forward', *McKinsey & Company* (Web Page, 17 August 2022) <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-leadership>. Leadership is a team effort that involves establishing a vision, and coordinating, motivating, and guiding a team towards that goal: James M Kouzes and Barry Z Posner, *The Leadership Challenge: How to Make Extraordinary Things Happen in Organizations* (Wiley US, 2012).

168 The exception may be in the largest law firms where the managing partner may be a full-time leader, but even then they may need to manage multiple client needs, such as when conflicts arise, and maintain and develop client relationships.

First, the 'leadership vs. management' dilemma revolves around the distinction between inspiring and guiding people towards a vision (leadership) and organising, administering, and implementing that vision (management).[169] In the corporate world:

> Management involves planning and budgeting. Leadership involves setting direction. Management involves organizing and staffing. Leadership involves aligning people. Management provides control and solves problems. Leadership provides motivation.[170]

Managers and leaders are seen as distinct roles undertaken by separate people who need different skills; indeed, being one precludes being the other.[171] For lawyers, one person will commonly need to be both leader and manager.

Second, while both leadership and management are generally required, there is an additional priority within law firms in the form of practicing or billing. Despite entering leadership roles, such as becoming a partner or principal, lawyers usually continue to practice and remain engaged in client work. As explained above, this is necessary to provide the credibility to deal with clients and to lead other professionals.[172] Legal market consultant Joel Barolsky explains the distinction between corporations and law firms using the examples of mining company BHP Billiton and law firm Herbert Smith Freehills Kramer. The former's executives 'do not dig for iron ore, or cart coal, or drill for oil. They are 100 per cent dedicated to the task of leading and managing their company'.[173] In contrast, law firm partners remain involved in serving clients and overseeing teams and legal work, ie, practice.

Law firm leaders need to have a practice-manager-leader ('PML') role. Harvard scholarship recognised this additional element of professional work and examined the 'producer-manager' dilemma, namely the tension between needing to manage other professionals while still producing outputs and

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169 Smith and Marrow conceptualise it as 'leadership is about producing change, while management focuses on creating processes to produce predictable results': Roland B Smith and Paul Bennett Marrow, 'The Changing Nature of Leadership in Law Firms' (2008) 80(7) *New York State Bar Association Journal* 33, 33. See also a table of the differences between leadership and management: Leah Witcher Jackson Teague, Elizabeth Masters Fraley and Stephen L Rispoli, *Fundamentals of Lawyer Leadership* (Wolters Kluwer, 2021) 30. Meanwhile, Stephen Covey writes 'Management is efficiency in climbing the ladder of success; leadership determines whether the ladder is leaning against the right wall': Stephen R Covey, *The Seven Habits of Highly Effective People: Restoring the Character Ethic* (Franklin Covey, 1989) 57.

170 John P Kotter, 'What Leaders Really Do' (2001) 79(11) *Harvard Business Review* 85, 86; John Kotter, *A Force for Change: How Leadership Differs from Management* (Free Press, 1990).

171 Abraham Zaleznik, 'Managers and Leaders: Are They Different?' (May-June 1977) *Harvard Business Review* 55; Yukl (n 31) 253; Stuart G Walesh, *Managing and Leading* (American Society of Civil Engineers, 2003) 4.

172 Gabarro (n 89) xxi.

173 Joel Barolsky, 'Law Firm Partnerships Could Give BHP a Productivity Lesson' *Australian Financial Review* (Sydney, 6 September 2019).

servicing clients.[174] However, while more relevant for lawyers, the scholarship failed to distinguish between management and leadership as distinct concepts. Leadership needs to be emphasised because it is different from management, and development of leaders in law is central to successful law firms.

Thus, we conceive a more appropriate characterisation of practice for lawyers as being a PML trilemma.

2 *Balancing the PML Trilemma*

The reality of practice is that every day may require a different balance of practicing, managing, and leading. However, at some basic level, all three activities are necessary for effective law firm practice.

For example, a senior partner at a BigLaw firm meets their team to discuss a transactional deal. They begin by contextualising the deal, explaining the significance of the client, and how the deal fits in with the firm's broader goals (leadership). The partner then discusses deal specifics, distributes workload, and assigns deadlines (management). The partner then shares templates they have drafted or sourced for the deal and reviews work product (practice). The meeting ends with a final motivation for everyone to try their best (leadership).[175] The same partner may be a practice group leader, partner in charge of an office, or on the firm's board of directors.

However, it is common in busy law firms for one or two functions to be neglected in favour of the others. The lawyer who only wants to focus on lawyering and billing, and vents their frustration in having to deal with practice management and leadership may find their team unmotivated and dispirited (P without ML).[176] Conversely, lawyer-leaders who fail to practice may lose the respect of their clients and colleagues (ML without P), not to mention risking their position as a partner.

Meanwhile, a lawyer fixated on management or lack thereof (excessive micromanagement, perfectionism, failure to delegate work effectively, etc) may

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174 Jay W Lorsch and Peter F Mathias, 'When Professionals Have to Manage' (July-August 1987) *Harvard Business Review* <https://hbr.org/1987/07/when-professionals-have-to-manage> 78, 78–9; Mathieu Weggeman, 'Is the Professional Self-Managing or Is There Really a Need for Professional Management?' (1989) 7(4) *European Management Journal* 422. See, eg, discussion of Linklaters case study: 'Linklaters', *Advance HE* (Web Page) <https://www.advance-he.ac.uk/knowledge-hub/linklaters>.

175 This example is partially drawn from Teague's discussion on leading vs managing, with our own additions in relation to production: Teague, Fraley and Rispoli (n 169) 33–4.

176 William Brewster, 'Entering the Profession' in *Leading Lawyers: The Art & Science of Being a Successful Lawyer* (Aspatore, 2002) 9; Yuliani Suseno and Ashly H Pinnington, 'The War for Talent: Human Capital Challenges for Professional Service Firms' (2017) 23(2) *Asia Pacific Business Review* 205, 223. See also McNamara's study of the Australian legal profession finding that supervision processes were often relegated to production, as the billable hour regime forces supervision to be treated as an opportunity cost: Michael John McNamara, *Supervision in the Legal Profession* (Palgrave Macmillan, 2020) 55.

find their team frustrated or confused.[177] Unlike many organisations with distinct 'manager' roles, in law firms managerial and leadership roles are typically combined.[178] On the flip side is a lawyer-leader who might only articulate the vision, expecting the team to figure out the process themselves in an outcomes-driven approach (L without PM), which might overwhelm their team and lead to sub-optimal results, including errors from a lack of supervision.[179]

But perhaps the more common scenario in busy law firms is neglecting leadership as a priority. If a partner does not share their vision or strategy, but simply assigns a list of tasks, the work may get done, however associates may miss valuable opportunities to improve the end result by buying into the vision (PM without the L).[180] The team may be less motivated because they do not know or care about the broader purpose underlying their work. This can lead to weaker team development, feedback, coaching, relationships, and a focus on short-term billable goals.[181]

IV Developing Leadership for Law Firms

> The most dangerous leadership myth is that leaders are born — that there is a genetic factor to leadership … in fact, the opposite is true. Leaders are made rather than born.[182]

As we have sought to demonstrate, leading law firms is a unique phenomenon. While most lawyers do not currently receive formal education in leadership, leadership can be learnt.[183] Leadership development entails two elements: first,

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177 As Gazica et al note, 'the highly competitive nature of the legal profession, compounded by the importance of attention to detail in potentially high stakes legal matters, compels perfectionistic demands on lawyers in performing their work': Michele W Gazica, Samantha Rae Powers and Stacey R Kessler, 'Imperfectly Perfect: Examining Psychosocial Safety Climate's Influence on the Physical and Psychological Impact of Perfectionism in the Practice of Law' (2021) 39(6) *Behavioral Sciences & the Law* 741, 751.

178 Teague, Fraley and Rispoli (n 169) 30. The exception being large law firms, where there is a CEO instead of a managing partner. The term 'managing partner' itself is a cause of confusion, as despite being called 'managing' they are responsible for leading the firm.

179 Ibid 34. Existing research shows that people are more engaged when they work for a manager who works at least as much as they do: Ryan Fuller and Nina Shikaloff, 'What Great Managers Do Daily' *Harvard Business Review* (online, 14 December 2016) <https://hbr.org/2016/12/what-great-managers-do-daily>.

180 Teague, Fraley and Rispoli (n 169) 34.

181 David J Parnell, 'Law Firms Surveyed: Bad Actors Present Challenges for Leadership', *Forbes* (online, 28 October 2016) <https://www.forbes.com/sites/davidparnell/2016/10/28/bad-actors-challenges-law-firm-leadership/>.

182 Warren G Bennis, *Managing People Is like Herding Cats* (Executive Excellence Publishing, 1997) 163.

183 Daniel Goleman, 'What Makes a Leader?' (January 2004) *Harvard Business Review* <https://hbr.org/2004/01/what-makes-a-leader>; William Gentry et al, *Are Leaders Born or Made? Perspectives from the Executive Suite* (White Paper, March 2012) <https://doi.org/10.35613/ccl.2012.2028>; Warren Bennis, *On Becoming a Leader* (Perseus Pub, rev ed, 2003); Doris DelTosto Brogan, 'Stories of Leadership, Good and Bad: Another Modest Proposal for Teaching Leadership in Law Schools' (2021) 45(2) *Journal of the Legal Profession* 183, 205; Polden and Posner (n 28) 4.

equipping individuals with key capabilities and; second, establishing an organisational environment with systems that facilitate leadership.[184] This process of learning leadership should begin early in legal education and receive continuous reinforcement in legal workplaces.

A *Leadership Education in Law School*

Leadership should be part of a continuous learning process that starts with law school. The thinking and approaches found in the formative stages of university are essential in shaping habits and developing effective leadership behaviours over time.[185]

While there is a growing movement to incorporate leadership into legal education[186] (mainly in the US and UK),[187] a gap persists.[188] As lawyers assume leadership positions across various organisations (including in roles outside the legal profession) it is imperative that this gap is filled.[189]

The law school curriculum focuses on legal reasoning and technical skills, and on learning to think like a lawyer, with a recent turn towards human or 'soft' skills, but typically aimed at teamwork and collaboration, rather than leadership.[190] While some leadership skills are being taught in academic settings, perhaps more by

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184 Deborah L Rhode, 'Leadership in Law' (2017) 69(6) *Stanford Law Review* 1603, 1634, citing Peter M Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (Crown Currency, 1st ed, 1990) 3–4 ('Leadership in Law'); David V Day, 'Leadership Development: A Review in Context' (2000) 11(4) *Leadership Quarterly* 581, 584.

185 Thompson (n 1) 7.

186 See, eg, Susan McCarty and Paula Monopoli, *Law and Leadership: Integrating Leadership Studies into the Law School Curriculum* (Routledge, 2016); Barry Z Posner, 'Leadership Development in Law Schools: Myths, Principles, and Practices' (2019) 58(3) *Santa Clara Law Review* 399; Brogan (n 183); Leah Teague, 'Making Progress in Legal Education: Leadership Development Training in Law Schools' (2021) 73(1) *Baylor Law Review* 1; Martin H Brinkley, 'Teaching Leadership in American Law Schools: Why the Pushback?' (2021) 73(1) *Baylor Law Review* 194.

187 For example, The Association of American Law Schools has a Section on Leadership: See 'Section on Leadership', *Association of American Law Schools* (Web Page, 9 November 2017) <https://www.aals.org/sections/list/leadership/>.

188 As Thompson observes 'we find a deep chasm between what law schools teach lawyers to do and what the world expects of these lawyers who so often become leaders': Thompson (n 1) 5; Polden and Posner (n 28) 7–8. The gap appears to be greater in Australia: see Barolsky (n 173).

189 As Rhode observes, many law students will inevitably occupy leadership positions and 'exercise leadership as heads of teams, committees, task forces, and charitable initiatives' even if during law school they never thought themselves as potential leaders: Rhode, 'Preparing Leaders' (n 52) 414. See also Jenkins and Lee (n 50).

190 In Australia, law schools require technical expertise in 11 substantive areas (the 'Priestley 11'). There are also six threshold learning outcomes for the Bachelor of Laws: Sally Kift, Mark Israel and Rachael Field, 'Learning and Teaching Academic Standards Project: Bachelor of Laws Learning & Teaching Academic Standards Statement' (Discussion Paper, Australian Learning & Teaching Council, December 2010). However there are no requirements that address leadership.

chance than by design,[191] these processes would be more effective if they were taught intentionally and with reference to leadership research.[192]

Legal educators need to systematically consider how leadership can be integrated into the law school experience. It may be achieved through offering a course (whether compulsory or elective) or through a special program to address topics such as building trust, motivating others, communicating effectively, and conflict resolution.[193] While the focus in this article is law firm leadership, law schools need to address leadership in a range of potential careers and roles. Law graduates do not just go into commercial law firms; other roles such as in-house lawyer for government, a not-for-profit, or a corporation also beckon, and the law school curriculum must recognise this. Equally, leadership courses should not be generic and should address leadership in, and through, law with a focus on those matters that make the practice of law, including professional and ethical responsibilities, unique. Moreover, learning leadership is likely to be more effective if it is embedded throughout the law school curriculum and not limited to a single course. Repeated opportunities to lead (and be led) are more likely to develop the necessary leadership skills. Incorporating leadership as a transversal theme across multiple courses may also permit its adoption in an already crowded curriculum. Because of the novelty of the discipline, evaluation of the student's acquisition of the skill and of the effectiveness of the teaching method will be critical.[194]

1 *Leading Yourself*

Warren Bennis noted that becoming a leader is synonymous with becoming yourself.[195] Self-awareness is the critical first step towards leadership, involving identifying what skills are needed, reflecting on personal capacities, and thinking strategically about one's own goals, capabilities, and needs.[196]

There is no one singular type of 'successful' lawyer or leader. Throughout their career, lawyers discover their strongest attributes and learn how to capitalise on them, whether it is being particularly adept at persuasion and advocacy, or pulling the threads of a complex transaction together.[197] Simultaneously, lawyer-leaders need to understand their blind spots. An

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191 Rhode, (n 184) 1638. See also Brogan (n 183) 186–7.

192 Westfahl and Wilkins (n 51) 1707.

193 See Ibid 1706 (noting the difficulties in achieving curricular reform due to academic self-interest in teaching what the academic sees as important, or what they have knowledge of, rather than what students or the legal profession may value).

194 Rhode, 'Preparing Leaders' (n 52) 417.

195 Bennis (n 182).

196 Rhode, 'Leadership in Law' (n 184) 1640–1, citing Lisa A Boyce, Stephen J Zaccaro and Michelle Zazanis Wisecarver, 'Propensity for Self-Development of Leadership Attributes: Understanding, Predicting, and Supporting Performance of Leader Self-Development' (2010) 21(1) *The Leadership Quarterly* 159, 161.

197 Mary Cranston, 'Using Vision to Shape Lawyers and Law Firms' in Aspatore Books (ed), *Inside the Minds: Leading Lawyers: The Art & Science of Being a Successful Lawyer* (2002) 29, 31.

introverted lawyer technician may struggle with effective communication and public speaking, while an adversarial advocate may falter in building trust and collaboration.[198] Research shows lawyers may lack self-reflection, have a fixed mindset, or be more defensive about critical feedback.[199]

As such, leadership education should inspire law students to be lifelong learners.[200] Exceptional performers adopt a growth mindset, continuously seeking improvement and opportunities outside their comfort zones, [201] or 'stretch assignments'.[202] This journey of learning should begin from the first year of school, and some scholars have suggested using self-assessment instruments (these are not tests as they cannot be failed) that help law students gain insights into personalities, needs, values, attitudes, behavioural preferences, and learning styles.[203]

2 *Leading Others and Collaborating*

Effective leadership requires and can be developed through collaboration. Collaboration makes law firms more successful at delivering value to clients because complexity has increased, leading to a range of specialist skillsets that need to be combined to address challenging problems.[204] Effective collaboration is a combination of structures, processes, and roles, as well as foundational interpersonal competencies. [205] Leadership is a central part of successful collaboration as it helps create the environment where multiple people can work together towards a common goal.

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198 Leary Davis, 'Why Law Schools Should Emphasize Leadership Theory and Practice' in Susan McCarty and Paula A Monopoli (eds), *Law and Leadership: Integrating Leadership Studies into the Law School Curriculum* (Routledge, 2016) 91, 104–5.

199 Richard (n 79) 4, 9; Westfahl (n 139) 349; Susan Daicoff, 'Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism' (1997) 46(5) *American University Law Review* 1337; Rhode, 'Preparing Leaders' (n 52) 413.

200 Rhode, 'Preparing Leaders' (n 52) 415; Paul Brest and Linda Krieger, 'On Teaching Professional Judgment' (1994) 69(3) *Washington Law Review* 527, 559.

201 Zenger and Folkman (n 30) 103–8.

202 James M Kouzes and Barry Z Posner, *Learning Leadership: The Five Fundamentals of Becoming an Exemplary Leader* (Wiley, 2016) 143–4; Douglas A Ready, Jay A Conger and Linda A Hill, 'Are You a High Potential?' *Harvard Business Review* (online, June 2010) <https://hbr.org/2010/06/are-you-a-high-potential>; Day (n 184) 598.

203 Thompson (n 1) 151. In New York University's School of Law for example, every first-year law student is administered the Myers-Briggs Type Indicator ('MBTI') or Implicit Association Test ('IAT'). These provide personal insight and begin the process of students thinking about themselves as lawyers and potential leaders as well as setting a foundation for thinking about judgment, perception, and personal development. See also other methods from Davis (n 198) 106. FIRO-B (Fundamental Interpersonal Relations Orientation-Behaviour) measures need for inclusion, control, and affection. The DiSC Personal Profile System reveals management styles based on dominance, interaction, stability, and compliance with quality standards.

204 Heidi Gardner, *Smart Collaboration* (Harvard Business Review Press, 2017) 5–10.

205 See, eg, Steve WJ Kozlowski and Daniel R Ilgen, 'Enhancing the effectiveness of work groups and teams' (2006) 7(3) *Psychological Science in the Public Interest* 77, 79–80; Gudela Grote and Steve WJ Kozlowski 'Teamwork doesn't just happen: Policy recommendations from over half a century of team research' (2023) 9(1) *Behavioral Science & Policy* 59, 62–4.

However, commentators have noted that law students often approach teamwork differently compared to business students,[206] preferring to divide up work and complete tasks individually. This style can carry into professional life, where lawyer 'teams' in law firms end up being hierarchical, loose, working groups where a senior person controls client contact, a midlevel person communicates up and down the chain, and individual contributors perform varied tasks with little or no contact with each other or with connection to the broader purpose of the team's effort.[207] Lawyers' desire for autonomy can hinder the highly collaborative, multi-input, multi-stakeholder inclusive process of teamwork.[208]

To address this, leadership education should emphasise learning by doing and implement more collaborative assessments that involve both leading and being led. This approach can better prepare students for professional realities by highlighting the importance of 'soft' skills learned in group settings,[209] and hone competencies such as giving and receiving constructive feedback, conflict resolution, cross-cultural competence, and understanding different ways of working.[210] Significantly for law students, who as practitioners are required to exercise independence, collaboration also needs to include the ability to question, object, and persuade when an approach is believed to be ineffective or wrong.[211]

Indeed, Scott Westfahl and David Wilkins advocate not just making group work part of courses or assessment, but also teaching about teams. These include how best to collaborate, using tools around team launch, planning, identifying objectives, sharing information, feedback, check-in and communicating individual working styles of team members.[212] More broadly, they also suggest developing 'field' leadership experiences, where students could be challenged to lead teams, receive feedback and coaching, engage in group strategic-thinking exercises, and receive course credit or other recognition for their efforts.[213] Group work has become part of the Australian law curriculum but it needs to develop further, including incorporating development of leadership skills.

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206 Westfahl (n 139) 346; Robert J Rhee, 'Reflections on Team Production in Professional Schools and the Workplace' in Susan McCarty and Paula A Monopoli (eds), *Law and Leadership: Integrating Leadership Studies into the Law School Curriculum* (Routledge, 2016) 213, 216.

207 Westfahl (n 139) 346.

208 Ibid 345.

209 Rhee (n 206) 217.

210 Ibid 219.

211 See Ian Weinstein, 'Don't Believe Everything You Think: Cognitive Bias in Legal Decision Making' (2003) 9(2) *Clinical Law Review* 783 (an understanding of human behavioural biases, such as authority bias or social conformity, can assist in avoiding the acceptance of arguments or positions that should be more thoroughly scrutinised or challenged); Brogan (n 183) 215 (arguing that followers or team members need to be able to give voice to their own values and be prepared to challenge the leader).

212 Westfahl and Wilkins note that these tools are used in their Problem Solving Workshop at Harvard, a mandatory requirement for first-year students: Westfahl and Wilkins (n 51) 1708. See also Gudela Grote and Steve WJ Kozlowski, 'Teamwork Doesn't Just Happen: Policy Recommendations from Over Half a Century of Team Research' (2023) 9(1) *Behavioral Science & Policy* 59.

213 Westfahl and Wilkins (n 51) 1709–10.

3 *Teaching About Law Firms*

Australian commercial law firms have traditionally played an important role in training, developing, and socialising graduate lawyers, and many graduates will continue to be attracted to a career in such firms.[214] For these students, knowledge of how these firms work is scarce in the law school curriculum, with teaching typically being in the context of ethics courses and discussions about ethical conundrums.[215] In particular, the economics of practice, distributed leadership models, and the competing priorities of everyday practice (such as the PML trilemma) are only learnt or properly understood after years of practice experience. As leadership is context-specific, and to facilitate students' understanding of commercial law firms — including opportunities, limitations, challenges that law firm practice provides — the teaching of the topics discussed in Part II is desirable. The combination of leadership training, but informed by the practice context, is aimed at producing graduates who are not just 'technicians' but more skilled and well-rounded nascent professionals.[216]

B *Leadership Education in Law Firms*

After graduation, it is incumbent on law firms to continue to instil leadership by developing a system, structure, and culture of leadership. Law firms compete in two principal markets: clients and staff.[217] Equally important as winning clients, law firms should be attracting the best staff and preparing them to step forward into leadership roles.

It is essential to think about a leadership system as an integrated whole rather than a series of piecemeal initiatives. Large law firms may have leadership training programs, but not all do. We outline a four step process for integrating leadership into the DNA of a firm: (1) defining the 'why' of a firm; (2) setting up infrastructure; (3) learning by doing; and (4) a feedback cycle.

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214 Andrew M Francis, 'Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism' (2005) 12(2) *International Journal of the Legal Profession* 173.

215 See, eg, Holmes and Bartlett (n 81); John Littrich and Karina Murray, *Lawyers in Australia* (*Federation Press,* 5th ed 2025) 289–91; Baron and Corbin (n 96) 114, 143, 256.

216 Sally Kift and Kana Nakano, 'Reimagining the Professional Regulation of Australian Legal Education' (Research Report, Council of Australian Law Deans, 1 December 2021) 58–59 (discussing the new and different learning needs for 'practice-ready' graduates, including reference to leadership, but without the acknowledgement of the significance of context).

217 Maister (n 146).

1 *Defining the Why — Articulating Behaviours, Values, and Culture to Lead with Purpose*

As context is key to effective leadership, the starting point of developing leadership in a firm is to articulate a set of values, principles, and behaviours that the firm considers important. Maister notes that trust in an organisation only occurs when everyone can be depended upon to act in accordance with a commonly held, strictly observed set of principles.[218] Failing to define, communicate, or prioritise these values (as outlined in our PML trilemma) is the common pitfall. Leadership expert Simon Sinek conceptualises this through his 'Golden Circle' framework, proposing that every organisation consists of a 'what', 'how', and 'why'.[219] The 'what' is the product or service that is offered (ie, production); the 'how' details the processes and values (ie, management); and the 'why' encapsulates the organisation's core purpose, cause, or belief (ie, leadership).[220]

Sinek contends that successful organisations articulate and understand their 'why'.[221] For example, Apple has defined itself not by *what* it does (technology), but *why* it does it (challenging the status quo by embracing simplicity).[222]

For law firms, examples of a 'Why' might include: a class action litigation firm advocating for access to justice or holding corporations accountable; a commercial firm focusing on facilitating large international transactions for (sustainable) economic growth; an intellectual property firm empowering innovators; or a NewLaw firm with a goal to revolutionise the legal industry.

The danger is when leaders lose sight of their mission statement, including professional and ethical values. This might be seen with firms falling short of their public service commitments [223] or increasingly not aligning with newer generations of lawyers' values.[224]

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218 Maister (n 58) 206.

219 Simon Sinek, *Start With Why: How Great Leaders Inspire Everyone To Take Action* (Portfolio, 2009) 41–56.

220 Ibid 43.

221 Ibid 54–6.

222 Ibid 44–50.

223 Michael Pelly, 'Dreyfus to Name and Shame Pro Bono Laggards', *Australian Financial Review* (online, 31 August 2023) <https://www.afr.com/companies/professional-services/dreyfus-to-name-and-shame-pro-bono-laggards-20230827-p5dzoz>; Maxim Shanahan, 'HWL, Maddocks among Law Firms Named and Shamed for Pro Bono Failures', *Australian Financial Review* (online, 9 November 2023) <https://www.afr.com/companies/professional-services/hwl-maddocks-among-law-firms-named-and-shamed-for-pro-bono-failures-20231105-p5eho6>.

224 Only 21% of young lawyers are attracted to the prospect of making partner at a law firm, with a further 46% stating although they would like to make partner, it was not the most important thing to them: *The Future for Legal Talent* (n 17) 7. See also Kate Allman, 'Young Lawyers: Partnership No Longer the End Game for Millennial Lawyers' [2018] (46) *LSJ: Law Society of NSW Journal* 18; Hannah Wootton, 'Client, Employee Demands Push Law Firms towards Net Zero', *Australian Financial Review* (online, 13 December 2021) <https://www.afr.com/companies/professional-services/client-employee-demands-push-law-firms-towards-net-zero-20211213-p59h61>.

Research has indicated workplace satisfaction depends most on intrinsic factors such as feeling effective,[225] exercising strengths and virtues,[226] and contributing to socially valued ends that bring meaning and purpose.[227] Lawyers are often able to make or advise important individuals and entities on many of the world's most critical decisions. Leadership in law firms requires not just legal and business skills, but also clarity on values. Leaders must simultaneously balance the need to realise a strong vision, scale modern management practices to ensure profitability, and uphold high ethical standards.[228]

2 *Infrastructure — Teaching Leadership and Tracking Opportunities*

Firms should develop an infrastructure to train lawyers in leadership and provide, track, and develop leadership opportunities.[229] Training comprises an essential part of socialising lawyers to the culture of the organisation.[230] Current training often focuses on building technical skills (which are key to competent practice),[231] however as lawyers are promoted to new levels of responsibility, such as coordinating other lawyers to deliver legal work product, they should be trained in relevant leadership skills.[232] One example is in interpersonal skills and collaboration, key skills any leader must have, as explained above.[233] Another is fostering an understanding of how the firm operates, in other words, transparency around firm dynamics, practice economics and how drivers like firm compensation work, so that lawyers can comprehend leadership in context. Understanding these inner workings is required to develop the leaders who will eventually lead the firm. Equally, it is also leadership in the context of the profession and its professional and ethical responsibilities. The reason for the training, its objectives, and its relevance to the firm's lawyers should be made clear.

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225 David G Myers and Ed Diener, 'Who Is Happy?' (1995) 6(1) *Psychological Science* 10, 10–17.

226 Christopher Petersen and Martin EP Seligman, *Character Strengths and Virtues: A Handbook and Classification* (Oxford University Press, 2004) 28–30.

227 Ed Diener et al, 'Subjective Well-Being: Three Decades of Progress' (1999) 125(2) *Psychological Bulletin* 276, 288–93.

228 Cranston (n 197) 33–4.

229 Law firm teaching of leadership may usefully draw on external courses, such as the Melbourne and UNSW Law School programs 'Legal Leadership Essentials' (n 53); 'Leadership for Lawyers' (n 53), or on overseas programs such as: 'Leadership in Law Firms', *Harvard Law School* (Web Page) <https://hls.harvard.edu/executive-education/programs/in-person-programs/leadership-in-law-firms/>. But law firms need a more comprehensive approach, or as is termed here, infrastructure.

230 Regan (n 118) 25.

231 Jess M Krannich, James R Holbrook and Julie J McAdams, 'Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education' (2009) 86(2) *Denver University Law Review* 381, 382; Justine Rogers, 'Teaching Soft Skills Including Online: A Review and Framework' 2020 30(1) *Legal Education Review* 1, 2.

232 Westfahl and Wilkins (n 51) 1723.

233 Jack Zenger and Joseph Folkman, 'Overcoming Feedback Phobia: Take the First Step' *Harvard Business Review* (online, 17 December 2013) <https://hbr.org/2013/12/overcoming-feedback-phobia-take-the-first-step>; Zenger and Folkman (n 30) 88.

The firm also needs to track leadership opportunities and how those opportunities are distributed to individual lawyers. As explained below some opportunities will arise spontaneously, and others will be planned. For a firm to ensure it is developing all lawyers so as to make the most of its human resources, including reaping the benefits of diversity,[234] it needs to make sure that leadership opportunities are not left to happenstance or personal relationships, but are distributed evenly. Law firms should be willing to invest resources into a holistic system that signals the importance of leadership and the firm's values.[235]

3 *Learning by Doing — Leadership Roles in the Firm and Externally*

Firms need to emphasise a culture of learning leadership by doing, and create learning opportunities, as 'much of the skill needed for effective leadership is learnt from experience'. [236] This includes early occasions to lead internal initiatives, work on matters of interest, and take ownership over matters including: recruitment, training, mentoring, knowledge development and sharing, employee engagement, community building, technology-related opportunities and efficiencies, and pro bono efforts.[237] Individuals should also be cognisant of leadership opportunities or what engineering professor James Parkin called a 'leadership event' being a situation in organisational life which needs, and provides for the individual, a source of leadership.[238]

Coordinating more supervised occasions for both partners and associates to learn as leaders can also be beneficial. For example, many firms have mentoring programs or relationships where a more experienced lawyer helps a less experienced or junior lawyer. The junior lawyer receives guidance, encouragement, and assistance in understanding the practice of law and the operation of the firm, while the mentor can develop their leadership skills.[239] A firm can go beyond this and foster a culture of sponsorship. [240] Sponsorship requires senior lawyers to champion younger lawyers, creating challenging opportunities for the junior while offering the senior a chance to 'sponsor' their development with their own reputation on the line. To promote diversity as lawyers progress, mentorship and sponsorship should be coordinated to give all junior lawyers access to senior lawyers.

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234 Diverse organisations can recruit and retain high performing staff, improve productivity and performance, and increase organisational competitiveness and growth: Law Society of NSW, *Diversity and Inclusion in the Legal Profession: The Business Case* (Report, October 2021).

235 Westfahl and Wilkins (n 51) 1692.

236 Gary Yukl, *Leadership in Organizations* (Pearson, 8th ed, 2013) 370.

237 Westfahl and Wilkins (n 51) 1725.

238 James Parkin, 'Choosing to Lead' (1997) 13(1) *Journal of Management in Engineering* 62, 63 (Parkin provides a number of steps for addressing a leadership event, including confirming that your leadership is required and feasible, and identifying the potential network of interested actors); Walesh (n 171) 6.

239 Yukl (n 236) 377.

240 Westfahl and Wilkins (n 51) 1721.

Meanwhile, external to the firm, graduates could be encouraged to seek leadership positions in professional associations or even roles completely unrelated to the legal industry. It is important to nurture these experiences, and ensure associate committees are empowered with adequate resources to reinforce them instead of seeing such activities as a distraction from billing.

4. Evaluation — Feedback, Measure, and Reward

Firms should establish active feedback processes and transparent leadership evaluation models that set standards, assess lawyers' leadership styles, and clarify what is measured and rewarded. Without feedback, leaders risk overlooking problems or defaulting to self-serving biases.[241] Leadership effectiveness may be evaluated by reference to the performance of the team or organisation, including objective measures of performance such as hours billed, revenue, or new client matters opened. Another measure is more qualitative, namely ratings or feedback from superiors, peers, and subordinates.[242]

The typical feedback approach in firms involves multisource or upward (360) reviews.[243] Some best practices to structure candid dialogue involve: active listening; privacy for an honest conversation; mutual problem-solving; presenting examples; and expressing confidence in the ability to improve.[244] However, as others have observed, feedback is often poorly delivered, lacks related coaching, and may not be trusted by juniors.[245] Without a supportive culture, including follow-up actions such as training or coaching, feedback can be counterproductive as subordinates hesitate to volunteer critical messages, while untrained leaders may be defensive.[246] A firm-wide sense of trust and buy-in is crucial.[247] Maister suggests a system that requires partners to meet standards on

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241 Yukl (n 236) 371. See also Leary Davis, 'Competence as Situationally Appropriate Conduct: An Overarching Concept for Lawyering, Leadership, and Professionalism Leadership' (2012) 52(3) *Santa Clara Law Review* 725.

242 Yukl (n 236) 25.

243 For an overview see ibid 372. For examples, see real-time feedback with Compass at Allen & Overy: Rose Walker, 'A&O Set for Firmwide Rollout of New Performance Scheme as Firm Targets More "honest" Feedback', *Law.com International* (online, 17 April 2018) <https://www.law.com/international-edition/2018/04/17/ao-set-for-firmwide-rollout-of-new-performance-scheme-as-firm-targets-more-honest-feedback/>.

244 Rhode, 'Leadership in Law' (n 184) 1644, citing McKenna and Maister (n 159) 115; Robert E Quinn, David S Bright and Rachel E Sturm, *Becoming a Master Manager: A Competing Values Approach* (Wiley, 6th edition, 2015) 63.

245 Westfahl and Wilkins (n 51) 1724; Sheila Heen and Douglas Stone, 'Find the Coaching in Criticism' (online, January-February 2014) *Harvard Business Review* <https://hbr.org/2014/01/find-the-coaching-in-criticism>.

246 Rhode, 'Leadership in Law' (n 184) 1643, citing John Antonakis and David V Day (eds), *The Nature of Leadership* (SAGE Publications, 3rd Edition, 2018); Robert Jackall, *Moral Mazes: The World of Corporate Managers* (Oxford University Press, 1988); Doug Lennick and Fred Kiel, *Moral Intelligence: Enhancing Business Performance and Leadership Success* (Pearson Education, 2005).

247 Feedback should be used for development purposes not performance appraisal: Yukl (n 236) 372.

leadership and team satisfaction in the same way that partners have billable targets.[248] Putting this into practice, at McKinsey for example, one factor in promotion to partner is a bare minimum of upward feedback scores.[249] Similarly, at Bain & Company, a company consistently ranked as one of the best companies to work for,[250] a leader or manager receives fortnightly feedback, alongside deeper feedback throughout the year.[251] This feedback process converts subjective feedback into objective data, which is then used to celebrate role models. As Westfahl and Wilkins highlight, '[d]ata analytics and technology offer significant opportunities to engage, motivate, and develop lawyers'.[252]

V Conclusion

For law firms, a range of challenges are presenting themselves. Business and commercial imperatives are becoming increasingly important for survival in a hyper-competitive landscape. Commercial success will also hinge on being able to navigate the great challenges of our time, such as sustainability and artificial intelligence. Equally, attracting and servicing profitable clients requires a talented workforce, a workforce that is concerned with wellbeing, diversity, and social responsibility, not just compensation. A resilient and successful legal profession is also central to public service. In this environment of multiple responsibilities and challenges the law firm needs leaders — 'it is entirely possible that a firm's competitive success can be built on a superior ability to get the best out of its people'.[253]

The lawyers who make up the potential leadership pool are already expected to develop and maintain expertise, produce high quality work, manage client relationships, and adhere to ethical obligations. Leadership is an additional responsibility that requires additional skills. A comprehensive approach to leadership development needs formal programs during law school in concert with continuing workplace initiatives.

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248 Maister (n 58) 234.

249 Westfahl and Wilkins (n 51) 1724. For a detailed discussion of McKinsey's management model see: Christopher D McKenna, *The World's Newest Profession: Management Consulting in the Twentieth Century* (Cambridge University Press, 2010).

250 'Bain & Company Ranks on Fortune's 100 Best Companies to Work For List for the Second Year in a Row' *Bain & Company* (Media Release, 12 April 2021) <https://www.bain.com/about/media-center/pressreleases/2021/bain_company_ranks_on_fortunes_100_best_companies_to_work_for_list_for_the_second_year_in_a_row/>.

251 'S02 Episode 05: Leadership Value Chain', *Leading Professional People* (hosted by Laura Empson and David Morley, 12 July 2021) <https://www.lauraempson.com/podcasts/leading-professional-people/series1-2>. The types of characteristics that create inspirational leaders include behaviours that develop one's inner resources, such as stress tolerance, optimism, and emotional self-awareness, and another is the qualities related to leading a team: Mark Horwitch and Meredith Whipple Callahan, 'How Leaders Inspire: Cracking the Code', *Bain & Company* (Web Page, June 2016) <https://www.bain.com/insights/how-leaders-inspire-cracking-the-code/>.

252 Westfahl and Wilkins (n 51) 1720.

253 Maister (n 146) 221.

The 2025 Macrossan Lecture

What is Missing from Modern Legal Education?

1 April 2025, Banco Court, Supreme Court of Queensland

John McKenna KC*

I Introduction

One hundred years ago, on 7 August 1925, the family of a distinguished Queenslander donated £2000 to the University of Queensland to establish a series of annual public lectures in his memory[1].

That distinguished Queenslander was John Murtagh Macrossan.[2] He was remembered not just as a long-standing member of the Queensland Parliament, but also as one of the driving forces of Australian federation.

In 1890, Macrossan had accompanied Sir Samuel Griffith as one of the two Queensland delegates to the Australasian Federation Conference in Melbourne.[3] Then, in the following year, despite failing health, he again joined Sir Samuel Griffith as part of the Queensland delegation to the critical National Australasian Conference which was held in Sydney.[4]

The Easter break in the 1890 conference is often remembered as the occasion on which a small group of delegates, led by Sir Samuel Griffith, prepared a more refined draft of the proposed Constitution, during the course of a weekend voyage on the Queensland Government Yacht *Lucinda*.[5]

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1 *Calendar of the University of Queensland for the Year 1929* (AJ Cumming Government Printer, 1929) 251–3.

2 Harrison Bryan, 'Macrossan, John Murtagh (1833–1891)', *Australian Dictionary of Biography* (Melbourne University Press, 1974).

3 *Official Record of the Proceedings and Debates of the Australasian Federation Conference 1890* (Robert S Brain Government Printer, 1890) 5.

4 *Official Report of the National Australasian Convention Debates* (GS Chapman Government Printer, 1891) v.

5 Alex Castles, 'The Voyage of the 'Lucinda' and the Drafting of the Australian Constitution in 1891' (1991) 65 *Australian Law Journal* 277.

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However, it was also during this weekend, on Easter Monday, that John Macrossan died.

When the Conference resumed the following day, a motion of condolences was led by Griffith, who said this of Macrossan:

> there was no man in the colony of Queensland for whom I entertained a higher regard … as a true servant of his country …
>
> On the subject on which we are now met — the federation of Australia — I believe no man in Australia had a wider knowledge or a clearer sense of the work to be done. He had studied the subject profoundly, and sincerely believed in the cause of federation; indeed, I am satisfied that if it had not been for his high sense of duty … which impelled him to be present with us at the risk of his life, he might still have been spared to Australia for some time. The death of such men is a national loss, and … I hope those of us who remain behind may be actuated by the same high sense of duty as always actuated him in his public life …[6]

As with the Federation conferences, the Macrossan Lectures were intended to promote real public engagement on subjects of importance to Australian life, whether relating to history, economics, science, law, art or literature.

From the very first lecture, which was given in 1928, they were a great success. Their early success was probably due, in part, to the circumstances of the time. In 1928, very few Queenslanders had access to university education. After all, the State only had one university — and it had only commenced admitting students, in small numbers, from 1911.[7] Indeed, it was only in 1938 that the first law graduates began to emerge.[8] There were only four of them: Miss Una Bick, Mr Lex Dunn, Mr Lionel Morrison and Mr Reginald Carter. So the idea that the new local university would engage with the community by offering an annual public lecture, on a topic of general importance, was something which seems to have captured the imagination of the public.

The first lecture was given in the Albert Hall, which once stood in Albert Street in Brisbane, next to the beautiful Albert Street Uniting Church. The lecture was given over two nights, on 11 and 13 April 1928.[9] Aptly, the inaugural lecturer was William Holman KC, a former Premier of New South Wales, who presented an overview of the state of the Australian Constitution, particularly in the light of the *Engineer's Case* of 1920.[10] The lecture was well attended, not just by lawyers, but

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6 *Official Report of the National Australasian Convention Debates* (GS Chapman Government Printer, 1891) 520

7 Malcolm I Thomis, *A Place of Light & Learning* (University of Queensland Press, 1985) 37.

8 Michael White, *TC Beirne School of Law : A History* (TC Beirne School of Law, 2nd Ed, 2016) Appendix 1, 1.

9 'Macrossan Lectures', *Brisbane Courier* (Brisbane, 12 April 1928) 13; 'Industrial Law, Conflicting Legislation; Limitations of the States; Mr Holman and Commonwealth Constitution', *Brisbane Courier* (Brisbane, 14 April 1928) 19.

10 W A Holman, 'The Australian Constitution: Its Interpretation and Amendment' (Speech, University of Queensland, 1928).

also by prominent figures from the Parliament, the churches, the professions and the business community.

Over the next 70 years, the Macrossan Lectures covered a quite remarkable range of topics from matters of international affairs — such as the post-war lecture on the future of Papua New Guinea in 1947[11] — to matters of science — such as Sir Mark Oliphant's lecture on nuclear energy in 1953.[12]

By 1993, however, it seemed that the original lecture series had run its course. With a highly educated population, which now had ready access to public debate through the media, the concept of a public lecture seems to have gone out of vogue.

Thirty years later, however, in 2023, it was with great pleasure that I learned that the Law School of the University of Queensland was keen to revive this lecture series. This seemed to me to reflect a renewed appreciation — in both the universities and the community more generally — of the importance of real human engagement in a post-COVID world. After all, we all can, if we choose, remain in the quiet solitude of our own homes to read an article, or listen to a podcast, about matters such as the future of our Pacific neighbours or the merits of nuclear energy. But there is nothing quite like attending an event like this, along with others who share similar interests, to engage with a topic which a speaker feels strongly about.

The topic I feel strongly about is our system of legal education.

This may be thought an unusual choice of topic. After all, the focus of public debate at the moment is on weighty and seemingly insoluble issues — such as the state of international relations, the state of the climate, and the state of the economy. Why, then, does the state of legal education deserve our attention?

The key points, I think, are as follows.

It goes without saying that a high-quality system of education is one of the pillars upon which our society and our economy is founded. It is the system which continues to supply our community, year after year, with the doctors, nurses, engineers and other skilled workers which we all depend upon. So, in a society which is based upon the rule of law, it is our system of legal education which the community depends upon, to ensure that our legal system is replenished with skilled new practitioners, year after year, so as to also remain fit for purpose.

Unfortunately, our system of legal education is one which is generally taken for granted. It is just one of those mechanisms which is allowed to hum quietly in the background, in much the same way, year after year.

The problem is, however, that during recent years our society has not been standing still. On the contrary, there has been a distinct step change in the complexity of our society and the complexity of our economy, both of which have

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11 J K Murray, 'The Provisional Administration of the Territory of Papua-New Guinea – Its Policy and its Problems' (Speech, University of Queensland, 1949).

12 M L E Oliphant, 'The Creation and Disintegration of Matter' (Speech, University of Queensland, 1 and 2 September 1953).

put distinctly new demands on the legal system. In particular, these developments have led to a growing divide between what may be described as the mainstream of legal practice and a range of more challenging and specialised practice areas. These areas include modern corporate and trust law, intellectual property law, construction law, planning law, insolvency law, and resources and infrastructure law — together with the demands of very complex civil litigation and arbitrations arising from these areas.

In the past, mainstream practitioners may have felt sufficiently confident to venture into these areas. But all practitioners now are much more inclined to stay in their lanes. In part, this is because of the complexity of the legal and regulatory framework involved in these specialised areas. But it is also because of the extent of background industry or interdisciplinary knowledge which is also required. Put simply, it is hard to deal with technology contracts, without a working technical knowledge of the subject matter which is governed by these contracts. Similarly, it is hard to deal with construction contracts, without a working technical knowledge of how projects are designed, constructed, scheduled and managed. And similar issues arise in almost all of these specialised areas.

So the challenge, for our system of legal education, is to find an appropriate way to respond to these developments, so that we are not just replenishing the mainstream of the profession — but also properly educating the large number of practitioners who are needed to meet society's demands in these specialised fields.

These challenges are not insurmountable. But they do require a significant shift in thinking and approach — not just from the academic sector, but from the legal community as a whole.

My object, in this paper, is to seek to develop these ideas and suggest the approach that we, as a profession, can and should take to respond to these challenges.

II Community Expectations

The starting point, for this analysis, is to identify a little more clearly the changes in community expectations which our system of legal education is required to meet.

To understand these changes, I find it helpful to compare modern legal practice with what I first saw, as a vacation clerk, in a major law firm in Brisbane in 1978.

At that time, legal practice was largely concerned with relatively commonplace matters. It was concerned with people and houses and factories and farms and mines. It was concerned with local businesses and relatively common types of transactions — including those which had gone wrong.

Within the legal profession, it was still possible, and indeed unremarkable, for barristers to have a practice that spanned across all areas of the law — whether civil or criminal, or whether involving constitutional issues or personal injury claims.

Similarly, law firms were relatively modest in size and all locally based. Whilst there was a degree of specialisation within such firms, the partners tended

to develop a professional relationship with their clients, with an expectation that they would serve all the clients' legal needs — whether by preparing wills, acting in conveyances, or dealing with any kind of litigation which may arise.

To give you some idea of the relatively modest level of regulation during this period, one need only refer to Queensland statutes enacted in 1969[13]. It is true that this was a particularly quiet year in the Parliament, adding only about 200 pages of new legislation to the statute book of Queensland. But that wasn't so unusual. In every year in the 1970s and early 1980s, the additions to the Queensland statute book could still easily be captured in a single printed volume.

Since the 1990s, however, many things have changed.

First, the sheer volume of regulation has increased. Commencing in the 1990s, the annual additions to the statute book of Queensland have usually comprised not 200 pages, but over 3000 pages.

Secondly, this rise in regulation has mirrored the growing complexity of our society and economy — including the complexity which arose from the privatisation of much of the infrastructure which was previously under government control. Now, rather than simply dealing with matters of common experience, many lawyers are required to deal with highly complex and technical operations, such as the development and management of ports, rail systems, electricity grids, gas pipelines, and computer technology in all its forms.

Thirdly, and really as a consequence of these other developments, there has been a marked rise in specialisation — both at the Bar and in law firms. Now, for example, many law firms may have not only one tax or employment partner, but half a dozen — each with their own particular area of specialty.

Despite these changes, our legal system remains founded upon a number of core principles — principles which we all hold dear.

These include the principles:

- that our society is governed by the rule of law;
- that all members of our community have a legitimate expectation of having access to justice; and more broadly
- that all the legal needs of our community can and will be served by a learned profession — a profession which has the capacity to act with reasonable competence, knowledge, skill and diligence and without undue cost.

All of these core principles, however, are founded upon a common assumption. That assumption is that our system of legal education is actually capable of producing and maintaining a legal profession, in sufficient numbers and with sufficient knowledge and skill, to meet community expectations and carry these principles into effect.

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13 *Statutes of Queensland Passed During the Year 1969* (S G Reid Government Printer, 1969).

III Challenges of Legal Education

For a number of reasons, the challenges involved in meeting these community expectations are very significant indeed.

First, the focus of legal education at most universities is — as it must be — upon the provision of primary law degrees to students who are usually just out of school. So there are obvious challenges involved in trying to impart specialised legal skills and knowledge to a cohort of students who are unlikely to have the life experience, or background knowledge, required to easily grasp, absorb and retain what they are being taught.

Secondly, the object of the primary law degree is — as it must be — to provide students with a workable overview of the whole of the legal system and the basic legal skills required to research, analyse and write about legal issues. So the challenge here is to provide at least some coverage of the main elements of our legal system, but to do so within the limited time available. As you would expect, this is only practicable by strictly limiting the depth of study involved. Thus, whilst every law school will have a subject dealing with contracts, many of the key issues — such as contractual interpretation or the appropriate measure of damages — may need to be covered in a single lecture. Moreover, there may not be any time at all to deal with more specific topics — such as construction or insurance contracts — which are the focus of entire specialties in practice.

Thirdly, to make a university education economically viable and affordable — as it must be — primary law degrees are taught to a relatively large cohort of students by a relatively small cohort of academic staff. So one of the challenges here is to attempt to assemble a cohort of academic staff who have the diversity of interest and expertise required to cover the full scope of the curriculum. There is also the challenge of finding a viable way for this small cohort of staff to engage with individual students, to ensure that they are actually grasping and absorbing the materials they are studying.

Fourthly, to avoid putting undue stress upon students — as we must do — there is no final examination which tests their overall ability to practice as lawyers. Rather, the course is broken down into a series of sequential subjects. And each subject is itself likely to be broken down into sequential units of study — with each unit, in turn, being assessed, and then parked in the student memory bank. So the challenge here is to produce graduates who ultimately emerge with a working knowledge of all that they have studied — and not just the subjects which were most recently covered at the end of their degree course.

Finally, to ensure equity of access to legal qualifications — as there must be — a more flexible approach to study has been adopted. To enter a law degree course in Queensland, there is no universal standard of academic aptitude required. Then, when undertaking full-time legal studies, there is no general requirement that students attend classes or abstain from full-time work commitments. Nor is it

generally necessary for students to achieve any more than a bare 50% pass in the various subjects they undertake. So the challenge here is to ensure that, whilst promoting equity of access to legal education, our universities continue to provide sufficient quality assurance of the knowledge and skills of graduates.

These challenges are obviously very substantial. But may I say immediately that we can continue to be proud of the work of our Law Schools and the overall quality of the graduates they produce. Put differently, I think our Law Schools are continuing to achieve what has always been required of them — which is to produce graduates who have the basic intellectual toolkit required to take the next step and become competent practitioners.

This next step has always been difficult because being half-right, which may have been barely acceptable at Law School, falls far short of the standard of care required in practice.

But if law graduates start work with:

- a general overview of the law;
- an ability to read and construe legislation and other legal documents;
- an ability to efficiently to find the answer to legal issues they are unsure about; and
- the basic skills of legal analysis;

then the further skills required to excel in a mainstream practice area can usually be acquired — as they always have been — through supervised vocational experience.

The main reason why this is possible is because most mainstream practice areas deal with common fact patterns. Some of these fact patterns are quite simple and some more complex. However, they create a framework for a natural progression of work experience, which new graduates can steadily undertake. So, for example, if a graduate were to start in a conveyancing practice, they may well begin by acting in an unconditional sale of land. Then, over time, they could be assigned to increasingly more complex or varied transactions, so they gradually gain experience in dealing with leases, mortgages, easements and other more specific matters. The same vocational approach can be taken to most mainstream practices — in family law, in criminal law, in employment law, in wills and estates, and in personal injuries. These practices all generally include some simpler types of matters, in which graduates can safely develop their skills, before moving on to more complex matters.

However, this traditional model of vocational learning does not work quite so well in the more difficult areas of specialisation we have been discussing. The problem usually arises because, in practices which undertake this more complex work, the matters tend to arise out of unique transactions or disputes of a very challenging kind, and so cannot usually be undertaken without at least some level of specialist knowledge. Even in these areas, we all know that it is possible for

graduates to learn through work experience. After all, this is exactly how most of the leading members of our profession learned their craft.

The key point, however, is that this purely vocational approach is far from ideal.

First, this approach inherently lacks structure, consistency or rigour. In practice, matters tend to arise randomly — with the relevant tasks then being allocated to meet the client's needs, rather than the educational needs of younger staff members. So what this means, for an early career lawyer, is that the knowledge and skills they develop tend to be formed randomly — like a half-completed jigsaw puzzle — leaving gaps which may take some time to fill.

Secondly, the quality of the learning experience can also be uneven. It is true that, in many practices, senior practitioners feel an obligation to take the time required to provide explanations and mentoring to early career lawyers. But good mentoring of this kind cannot be assumed — largely because of the transient nature of the modern legal workforce. With early career lawyers being apt to move from city to city, or firm to firm, many practices simply lack the time, patience or incentive to devote too much individual effort towards staff training.

Thirdly, it is an approach which is just fundamentally inefficient for all concerned. It involves the idea that, year after year:

- a similar cohort of early career lawyers, across our whole profession, will struggle with similar issues;
- a corresponding cohort of more senior colleagues, across our whole profession, will devote at least some time to help them work through these same issues; and
- in the meantime, the many clients who are served by these practices will either be charged for the time involved in this process, or at least delayed in getting their work done whilst this learning experience occurs.

Fourthly, it is an approach which can come at a personal cost to the early career lawyer. Starting work as a law graduate is intimidating enough. But starting work in an area of specialty in which you have no understanding — and no path to obtain such an understanding — is particularly stressful and dispiriting. For some new graduates, it means working on relatively menial tasks, because the other tasks which would provide better experience are simply beyond the graduates' skills or abilities. Alternatively, if the graduate is actually given the chance to do more challenging work, it can result in errors which undermine their confidence and reputation within the firm.

IV Is There a Better Approach?

So the question becomes whether there is a better approach to deal with these challenges. Logically, there would seem to be three main options.

The first option would be to attempt to build more specialised content into the primary law degree course. For a number of reasons, however, this would not seem to be practical.

First, law schools are already struggling to find a way to fit existing content within the constraints of the course. So it is difficult to see how they could add a significantly deeper level of specialisation.

Secondly, to make the current staff-to-student ratios work — particularly in small or medium-sized law schools — there are likely to be real difficulties involved in finding specialised staff who could take responsibility for further subjects of this kind. To the extent that practitioners could assist as sessional lecturers, intractable difficulties arise in fitting teaching commitments into the ordinary demands of professional practice.

Thirdly, and perhaps more importantly, most undergraduate students are just not ready to be taught specialist content of this kind. To draw upon a potentially dubious analogy, I think there are some parallels between learning legal skills of this kind and learning any practical skill, such as the game of tennis. For someone who is keen to learn tennis, it is possible to give the student a reading list with the rules of the game, books of tips from the world's greatest players, and endless videos of great matches supported by classroom tutorials about the game's finer points. But until the student actually has a chance to pick up a racquet and try to play the game themselves, the information they have been given simply isn't meaningful to them. In my view, something similar can be said of legal education for specialised areas of practice.

In summary, the role of primary law degree course is to create foundational knowledge and skills. So for lawyers who are seeking to practice in complex areas of specialty, their primary law degree is just the beginning of their legal education and not the end.

So that brings me to the second option, which is for the professional associations, or the non-university sector, to develop their own post-graduate courses designed to give practical, vocational education in these specialised areas. In Queensland, this category of education includes the coursework Masters degree offered by the College of Law and the specialist accreditation offered by the Queensland Law Society.

In my view, this second option has a great deal to commend it. These courses are designed to be complementary to legal practice. In many respects, they reflect the way law was generally taught to earlier generations, under two or five year articles of clerkship. In general, these courses are designed by senior practitioners, taught by practitioners, and designed to serve the needs of early career practitioners. They also tend to be taught in a flexible way, which can be accommodated within the demands of practice. They can be taught through a course of tutorials, which are held outside work hours and wholly online. Alternatively, they can be offered without any formal teaching at all, but with students working through a reading list of materials on which they are examined.

For many early career practitioners, this model will be their preferred way to augment their knowledge and skills, in a more structured and efficient way.

However, there is a third option. This is to undertake a university-based Masters degree, which is not merely offered as an adventure in legal theory, but is designed to give early career lawyers a rigorous set of knowledge and skills which will enable them to excel in their chosen area of practice.

V Master of Laws Degrees

In Queensland, as in other jurisdictions, the Master of Laws degree is not a recent development. In the very first graduating class from the Law School of the University of Queensland, one of the four graduates was from the Masters programme. This was the young Reginald Francis Carter, who was later to make his name as the author of our leading text on the *Criminal Code1899* (Qld)[14] and as a long-serving Judge of the District Court[15]. Other early recipients of the degree included a future Chief Justice of Queensland, Sir Mostyn Hanger (1941), and a future Chief Justice of Australia, Sir Harry Gibbs (1946)[16].

Since this period, some hundreds of early career lawyers in Queensland have taken a similar path. For some, their preference was to undertake their Masters studies at a locally-based university. These include the current President of the Court of Appeal, the Honourable Justice Debra Mullins, and the former Chief Justice of Queensland, the Honourable Catherine Holmes. For others, their preference was to undertake their studies further afield. These include former Chief Justice of Australia, the Honourable Susan Kiefel, who studied at the University of Cambridge, and former Justice of the High Court of Australia, the Honourable Patrick Keane, who studied at the University of Oxford.

Some of these Masters degrees were by coursework, some by thesis, and some a mixture of both.

To examine how widespread the practice of undertaking Masters studies has become, I conducted a brief study of the qualifications of all current members of the Queensland Bar — which are readily accessible online. What I found was that currently about 24% of the Bar have a Masters qualification of some kind, of which:

- about half were from a university based in Queensland;
- about 15% were from universities elsewhere in Australia; and

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14 R F Carter, *Criminal Law of Queensland* (Butterworths, 1958).

15 Denver Beanland, *A Court Apart: The District Court of Queensland* (Supreme Court of Queensland Library, 2009) 150.

16 White (n 8) 2.

- about 30% were from overseas universities, mostly in the United Kingdom.

Over the years, I have asked many colleagues what they believed they gained from further studies of this kind. And their answers really aligned with my own experience.

First, of course, there was the opportunity to study their chosen area of interest or specialty in much greater depth than was possible in their primary law degree. For some, this involved studying a group of subjects within the one substantive area (eg tax or insurance). For others, like me, this involved studying a range of different subjects of a complementary kind. As someone who was hoping to practice at the commercial bar, my chosen subjects at the University of Oxford were Restitution, Trusts, Conflicts of Laws and Evidence.

Secondly, there was the opportunity to develop more sophisticated techniques of analysis, than had been acquired during undergraduate studies. These techniques would not come as any surprise to leading practitioners. But they certainly surprised me at the time. They included thinking about legal rules, not in a narrow way, but by reference to their history, by reference to their purpose, by reference to approaches in other common law systems, and by considering how the rules sit coherently within the law more broadly.

Thirdly, there was the opportunity to observe — from those presenting the course as well as from fellow students — the higher level of precision and rigour of thought which is required to excel in these difficult areas. In my case, I undertook my studies overseas at the same time, and at the same residential college, as two other young Queenslanders — Peter Applegarth and Shane Doyle. The opportunity to study with them — and under a team of remarkable academic staff — was perhaps the most valuable part of the experience.

Fourthly, and following on from the last point, there is the personal opportunity to get to know like-minded colleagues. After all, post-graduate students are a self-selected group. Unlike undergraduate students, they are choosing to undertake further study because of their genuine interest and enthusiasm. And in a close-knit legal community, as we have in Queensland, the opportunity to meet colleagues of this kind is particularly valuable because of the long-term connexions and friendships we are all likely to have.

Fifthly, and this is not something people often speak about, there is an intangible gain in self-confidence that many experience when taking on further studies of this kind. Like many others, I initially felt somewhat overawed, commencing study at an overseas university, where everyone seemed so well-read and so confident in their views. But to successfully complete a Masters degree leads many students to gain the confidence required to deal with the challenges of practice.

Finally, there was the degree itself. In a world where we are so often judged on appearances, a Masters degree signals something of a person's drive,

determination and skills — and links each new graduate with the achievements of all others who have undertaken similar studies before them.

VI What is Missing?

As you may have gathered, I regard my own experience as a Masters student as the most valuable year of my legal education. I am also quite convinced that post-graduate studies of this kind provide the most efficient and appropriate way to prepare early career lawyers for the more challenging areas of practice.

So, to return to the topic of this lecture, what is our system of legal education missing?

In my view, the missing element is the critical mass of student numbers which are required to allow post-graduate courses of this kind to flourish.

Across Australia, our Law Schools are already structured to provide the kind of practitioner-focussed Masters programmes which are needed. They all offer a range of subjects which were chosen to meet the needs of early career lawyers. Most subjects have been designed to be taught in small seminar groups of only 15 to 25. Most subjects have also been designed to be taught outside normal work hours, through weekend or block intensives or evening classes. In most Law Schools, there is also the flexibility to allow these subjects to be taught either by existing academic staff, or suitably qualified sessional lecturers drawn from the profession or the judiciary who are free to teach outside normal work hours. Most importantly, the range of subjects being taught can be scaled up very quickly to meet student demand. That is because, from the university's perspective, the incremental cost of offering further subjects is quite modest, and so there is a reasonably low threshold for financial viability.

But even in Australia's largest jurisdictions, what is missing is:

- an established culture, amongst early career lawyers, of seeing a Masters degree, from a local university, as a natural and worthwhile step in their legal education; and
- a similar culture, within the legal profession more generally, of seeing the value of these degrees, and encouraging young lawyers to undertake further study.

The absence of this culture presently manifests itself, across Australia, in quite modest student numbers. To give you an idea of the challenges which arise from the current culture, the data from Australia's eight major universities is instructive.

All of these universities offer a Master of Laws programme. In the larger Law Schools, such as the University of Sydney and the University of Melbourne, these programmes have a particularly impressive array of subjects, which provide a full complement of practitioner-focussed subjects in a number of specialised areas,

including public law, taxation, employment law, intellectual property, and corporate law. But even with this impressive range of offerings, the size of domestic student enrolments is still quite modest. Across all these universities, the total annual number of new domestic enrolments in these programmes only amounts to about 130 full-time equivalent students — which, because of the prevalence of part-time study, can perhaps be translated into an annual intake of about 300 part-time domestic students. Indeed, even the most successful Masters programmes in Australia only attract about 30 new full-time equivalent students annually.

In Queensland, the position is even more constrained. At present, the Law School at the University of Queensland, ranks only fifth in its number of domestic Masters students. These numbers are still sufficiently strong to permit a reasonably wide range of practitioner-focussed subjects to be offered, including Advanced Studies in Contract, Advanced Law of Trusts, Interpretation of Statutes, Advanced Civil Litigation and the like. But the student numbers drawn from specialist practice areas are simply insufficient, at the moment, to support a full complement of subjects designed specifically to serve these areas.

This is a challenge of which all Law Schools are acutely aware. You will recall that I mentioned earlier the seemingly impressive figures of Masters-level qualifications held by members of the Queensland Bar. What I didn't mention was that almost all degrees from local universities were awarded by either the University of Queensland or Queensland University of Technology. However, we are now down to only one of these degree courses, because the challenges involved in providing a Masters programme caused the QUT course to be discontinued.

VII Proposed Solution

So what is to be done?

In my view, this is a problem which the Law Schools cannot solve on their own. If our profession more generally shares my views about the value and importance of the Masters programmes, then we have the power to enable them to flourish.

Most early career lawyers come to our profession with eagerness and enthusiasm — looking for some clue from their mentors as to how best to advance their skills and career. If we, as a profession, truly believe that our younger colleagues should be undertaking further studies at Masters level, we should all be doing what we can to encourage them to do so. This involves not merely words of encouragement, but also adopting practical policies within legal practices to:

- help fund the cost of appropriate Masters subjects;
- provide additional study leave to allow staff to make the most of their studies; and

- recognise the effort put into further studies, when it comes to performance reviews and promotions.

It also involves working more closely with the Law Schools to:

- advise them about the areas of practice which call for more specialised education at Masters level;
- help them devise groups of subjects, and course content, which actually deliver to early career lawyers the legal and interdisciplinary knowledge they need; and
- directly involve our leading practitioners in the teaching at Masters level, to ensure that the courses remain practically-focussed and relevant.

In part, these efforts are justified in the interests of our profession as a whole — but they are also justified by self-interest, as these courses provide the most efficient way for legal practices to train existing and future staff members to work with the level of skill desired.

To give you an idea of the difference even a small increase in student numbers could make, it probably only requires an intake of 15 new students annually, from any specialised practice area, to support a whole complement of Masters subjects which are dedicated to this area.

So the task is certainly not beyond us.

VIII Philanthropy

Which brings me back to where I began this lecture.

In 1925, it was the philanthropy of the Macrossan family which established this lecture series. In 1935, it was the philanthropy of a collateral branch of this same family — headed by TC Beirne — which finally enabled a Law School to be established at the University of Queensland.

But philanthropy in education is not just measured in money.

It is provided by every member of our profession who has ever mentored a student, encouraged them in their studies, and assisted any law school to deliver the kind of education our community needs and deserves.

I warmly encourage you to continue in this tradition.

JUSTIFIED HESITATION: CONSTRUCTIVE TRUSTS OVER COPYRIGHT IN AUSTRALIA AFTER *GAME MEATS V FARM TRANSPARENCY INTERNATIONAL*

JOSHUA YUVARAJ*

In August 2025, the Full Court of the Federal Court of Australia ruled that copyright in footage of a meat production company's premises and practices, surreptitiously obtained by animal rights activists, was held on constructive trust for that company. This meant that the activists could not legitimately publish or license that footage, even though the filmmaker is the 'author' under copyright law. It also meant the activists were required to transfer the copyright in the footage to the meat production company. This paper suggests four reasons why this finding may be premature: the tentative nature of previous High Court of Australia obiter dicta that 'opened the door' to a constructive trust being recognised over copyright, the distinct features and aims of copyright, the availability of other remedies, and the tension of the Court's approach with the moral rights authors have under copyright law. This analysis suggests there is good reason for courts to be hesitant to apply a constructive trust over copyright in the future.

I INTRODUCTION

Copyright law is designed to drive creativity and allow the public to access the products of that creativity.[1] Yet it has sometimes been used for reasons outside these ideals. *The Game Meats Co of Australia Pty Ltd v Farm Transparency International Ltd* ('*Game Meats*')[2] is a classic example. There, the Full Court of the Federal Court of Australia ruled that an animal rights organisation, Farm Transparency International ('FTI'), was prohibited from publishing surreptitiously obtained footage of the abattoir operations of Game Meats Co ('GMC'), and was required to

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1 Sabine Jacques, 'Platforms and Copyright in Creative Industries: A Tool for Inclusivity?' in Cristiana Sappa (ed), *Research Handbook on Intellectual Property Rights and Inclusivity* (Edward Elgar, 2024) 371.

2 (2025) 312 FCR 272 ('*Game Meats Full Court*').

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delete all such footage and assign the copyright in the footage to GMC, on the grounds that it held the copyright on constructive trust for GMC. FTI has been granted special leave to appeal to the High Court of Australia,[3] suggesting that there is value not just in the footage itself, but also in the broader question of whether a court can impose a constructive trust over copyright and thereby restrict the rights provided to a copyright holder by copyright law.

To that end, this paper critically examines the approach of the Full Court in applying a constructive trust as a remedy for the actions of FTI in securing the footage. Part II outlines Snaden J's hesitation at first instance to recognise a constructive trust over the copyright in the footage. Part III demonstrates how Jackman J (Burley J agreeing) and Horan J, overruling Snaden J's judgment, were much more confident. Part IV highlights the deficiencies in Jackman J's approach in relation to prior case law and the nature, aims and features of copyright in Australia. Part V concludes.

II Hesitation and Reticence: *Game Meats* at First Instance

The copyrighted works at issue in this dispute were videos obtained by surreptitious installations of cameras in an abattoir run by GMC in Victoria in 2024.[4] FTI sent footage to the Department of Agriculture, Fisheries and Forestry and subsequently to Channel Seven. When the footage was not published, FTI did so itself online.[5] Following interlocutory non-publication orders, and in addition to other causes of action in tort, GMC sought a permanent injunction against FTI to preclude it from publishing the footage and a mandatory assignment of the copyright FTI held in the footage to GMC.[6]

GMC argued[7] that its beneficial ownership of the copyright in the footage should be recognised, following the suggestion of Gummow and Hayne JJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* ('*Lenah*'),[8] another case in which a company running an abattoir sought to restrain the publication of surreptitiously obtained footage. There, Gummow and Hayne JJ suggested that where a film was made 'in circumstances involving the invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff', the maker could be regarded as holding the footage on constructive trust for the plaintiff, it potentially being 'inequitable and against good conscience … to assert ownership of the copyright against the plaintiff and to

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3 *Farm Transparency International Ltd v The Game Meats Co of Australia Pty Ltd* [2025] HCASL 293.

4 *The Game Meats Co of Australia Pty Ltd v Farm Transparency International Ltd* (2024) 186 IPR 261, 265 [6]–[7] (Snaden J) ('*Game Meats Trial*').

5 Ibid 265 [9].

6 Ibid 265 [10]–[11].

7 Ibid 291 [152].

8 (2001) 208 CLR 199 ('*Lenah*').

broadcast the film'.[9] Gummow and Hayne JJ concluded that those circumstances would occasion orders declaring the existence of the trust and requiring the assignment of the copyright to the plaintiff.[10]

While Snaden J ordered FTI to pay damages of $130,000 for the trespass ($30,000 in general damages and $100,000 in exemplary damages),[11] his Honour rejected the constructive trust argument. Justice Snaden was sympathetic to the view that equity should intervene in circumstances where 'the footage was the prize that FTI obtained as the intended result of the trespasses that were committed in its name [and] ... were committed so that FTI could obtain footage that it could, at its discretion, later use against GMC'.[12]

Nevertheless, Snaden J declined to apply the approach suggested by Gummow and Hayne JJ in *Lenah*. His Honour considered that the facts here were similar enough to *Windridge Farm Pty Ltd v Grassi* ('*Windridge*'),[13] where Hall J of the Supreme Court of New South Wales rejected an argument for recognising a constructive trust over copyright in footage and images that the defendants had surreptitiously obtained by trespassing onto the premises of a piggery. In both cases, the wrongdoer 'intentionally infringed upon the plaintiff's rights with a view to obtaining information that they otherwise would not have been able to obtain; and did so intending that it should be used to the plaintiff's prejudice'.[14]

Justice Snaden also considered that there were factual similarities with *Smethurst v Commissioner of Police* ('*Smethurst*'),[15] in which the High Court considered the seizure of property belonging to the journalist Annika Smethurst. In that case, 'the trespass ... was also deliberately (though not knowingly) committed with the intention of obtaining information for later use against ... its victim'.[16] Yet, a constructive trust was only discussed tangentially and not applied.[17]

Justice Snaden suggested that the lack of any clear distinguishing facts in *Game Meats* should make the court 'slow to favour a result that deviates from what transpired in those cases'.[18] Further, Snaden J gave weight to what he considered a lack of precedent for recognising a constructive trust over copyright, which, in his Honour's view, warranted 'caution' when a court is faced with the choice of 'recognis[ing] such circumstances for the first time'.[19] The fact that Snaden J was dealing with the matter at first instance made his Honour more willing to 'leave

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9 Ibid 246–7 [102].
10 Ibid.
11 *Game Meats Trial* (n 4) 311 [264].
12 Ibid 296 [176].
13 (2011) 254 FLR 87 ('*Windridge*').
14 *Game Meats Trial* (n 4) 297 [179].
15 (2020) 272 CLR 177 ('*Smethurst*').
16 *Game Meats Trial* (n 4) 297 [180].
17 See *Smethurst* (n 15) 216 [84] (Kiefel CJ, Bell and Keane JJ).
18 *Game Meats Trial* (n 4) 297 [180].
19 Ibid 297 [181].

[the matter] for higher consideration'.[20] As such, while FTI was liable to pay damages to GMC, no order was made as to the copyright in the footage.

III (Over?) Confident Application: *Game Meats* in the Full Court

On appeal, the Full Federal Court found that a constructive trust over the copyright in the footage *did* exist and made the orders sought by GMC: a permanent injunction restraining FTI from publishing the footage, an order that FTI delete all footage of GMC's business, a mandatory assignment of the copyright in that footage to GMC, and damages of $130,000.[21] Justice Jackman (writing the main judgment, with which Burley J agreed) based his reasoning on (a) the fact that it was open to courts to find a constructive trust in copyright by reasoning from cases involving other types of property, and (b) Snaden J's undue hesitation in applying a clear principle proffered by the High Court in *Lenah* in very similar circumstances.

A *Justifying the Possibility of a Constructive Trust in Copyright*

Justice Jackman considered that there were multiple lines of authority that could be used to justify the application of a constructive trust in a situation like this, where the parties had no pre-existing fiduciary relationship. The first was the application of constructive trusts to property acquired by way of theft or fraud.[22] His Honour considered that FTI's behaviour was similar to fraud in that FTI 'engaged in a surreptitious intrusion onto and within GMC's property to gain an advantage which was not lawfully available to it, and to cause detriment to GMC'.[23] Ultimately, 'the ends do … not justify the means', however 'noble' the cause.[24]

The second was the application of constructive trusts to payments made to one party by another by mistake, the trust arising 'once the recipient knows of the mistake'.[25] Justice Jackman regarded this as 'a weaker case for constructive trust than the circumstances of the present case' given the passivity of the recipient of mistaken funds[26] — the implication being that if a constructive trust is applied in the mistaken payment case, it follows *a fortiori* that one should also be imposed in the present case.

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20 Ibid.

21 Interest was awarded on the $30,000 component of the damages award that constituted compensatory damages: see *Game Meats Full Court* (n 2) [52] (Jackman J).

22 Ibid 278 [17].

23 Ibid 278 [18].

24 Ibid.

25 Ibid 278–9 [19].

26 Ibid 279 [20].

These two lines of enquiry dealt with *pre-existing* property held by the plaintiff, rather than property *created by* the defendant.[27] A cinematograph film is a work in respect of which copyright subsists, and subsists in the maker in the first instance, whatever the circumstances of its creation (save for limited exceptions for works made in the course of employment or subject to a commission).[28] In making the film, FTI therefore created new rights of which it became the owner.

Nevertheless, Jackman J considered that the lack of pre-existing property was no barrier to the application of a constructive trust. His Honour referred to *Pallant v Morgan*[29] and later cases discussing it, including *Banner Homes v Luff*[30] and *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* ('*John Alexander's Clubs*').[31] In *Pallant v Morgan*, a pre-auction agreement between two potential bidders as to how ownership of the property would be distributed if one party won was held to give rise to a constructive trust despite not being contractually binding at law, even though at the time of the agreement, neither party had a pre-existing interest in the property in question.

The FTI-GMC situation was 'fundamentally different' given that FTI did not voluntarily create 'an expectation … that it would confer a benefit' on GMC by its conduct, namely the copyright in the footage in question.[32] Justice Jackman used this line of cases, however, to illustrate that the lack of a pre-existing fiduciary relationship or proprietary interest — neither of which was present in *Game Meats* — is no barrier to the application of a constructive trust. Further, Jackman J noted that the moral quality of FTI's behaviour in securing the footage was analogous to that of a thief or fraudster, in respect of whom courts have traditionally imposed a constructive trust so that they do not profit from their misbehaviour.[33]

B *Why the Full Court Imposed a Constructive Trust over Copyright*

A constructive trust being potentially available in these circumstances, then, Jackman J considered Snaden J's reasoning for refusing to recognise one. Jackman J was critical of Snaden J's reliance on a lack of precedential authority for his decision not to impose a constructive trust over copyright. There was no reason for a primary judge to be reticent about applying this remedy. In *Lenah*, Gaudron J and Callinan J both agreed with Gummow and Hayne JJ on this point, and in doing so 'were not expressing merely theoretical possibilities but a realistic outcome in an appropriate

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27 Ibid 279 [21].
28 *Copyright Act 1968* (Cth) s 98.
29 [1953] Ch 43.
30 [2000] Ch 372.
31 (2010) 241 CLR 1 ('*John Alexander's Clubs*').
32 *Game Meats Full Court* (n 2) 280–1 [28].
33 Ibid. See further at 284 [41] for a dismissal of other arguments by FTI, which are less relevant to this paper.

case'.[34] Justice Jackman considered that the situation in *Game Meats* was one of the clearest examples of the potential application of this rule.[35]

Justice Horan also considered that a constructive trust should apply, noting that the copyright 'was created in circumstances involving an invasion of the legal or equitable rights of [GMC], including [GMC's] right to exclusive possession of its premises', making it 'inequitable and against good conscience for FTI to assert ownership of the copyright against GMC'.[36]

IV Unresolved Tensions between Copyright Law and Equity when Recognising Constructive Trusts

The readiness with which Jackman J and Horan J recognised a constructive trust over the copyright in the footage in favour of GMC can be challenged. Their Honours proceeded on the basis that a constructive trust *was* available in circumstances like the present under the majority's reasoning in *Lenah*, and because there was a documented, unauthorised invasion of GMC's proprietary rights by way of trespass, the constructive trust automatically meets those criteria.

Their Honours' reasoning raises four issues which suggest that courts should be cautious about whether to recognise a constructive trust over copyright: (a) the questionable nature of the *Lenah* 'precedent'; (b) the specific features and aims of copyright arising from its statutory framework; (c) the availability of other remedies; and (d) the difficulties in application caused by copyright's moral rights regime.

A *The Questionable Nature of the Lenah 'Precedent'*

Justice Jackman dismissed Snaden J's hesitation about the precedential value of Gummow and Hayne JJ's statements in *Lenah* because *Lenah* 'recognised the principled nature of the constructive trust over copyright which is sought in the present case'.[37] This statement is questionable. While other recent Federal Court authority also appears to have acknowledged this avenue as a valid remedial pathway,[38] the High Court in *Smethurst* appeared to consider that Gummow and Hayne JJ were suggesting it as a *possibility* only: '[t]heir Honours considered that a basis in principle *might* be found in the imposition of a constructive trust'.[39] Academic commentary also suggests that Gummow and Hayne JJ's statements in

34 Ibid 283 [37].
35 Ibid.
36 Ibid 287 [54].
37 Ibid 282–3 [35]–[36].
38 *Watson Webb Pty Ltd v Comino* [2025] FCA 871, [423] (Halley J).
39 *Smethurst* (n 15) 216 [84] (Kiefel CJ, Bell and Keane JJ) (emphasis added).

Lenah should be regarded as obiter and tentative, rather than authoritative statements of law.[40]

At best, then, it was potentially *open* for a constructive trust over copyright to be recognised in *Game Meats*. However, Jackman J appears to have unduly rushed from that point to the conclusion that it *must* be applied if the facts were similar to *Lenah*.

B *Copyright's Distinct Features and Aims*

However, even assuming *Lenah* is binding authority for the application of a constructive trust over copyright, neither the purported moral equivalence between FTI's behaviour and theft/fraud, nor the factual similarities between *Lenah* and *Game Meats necessarily* justify the imposition of a constructive trust over copyright. Gummow and Hayne JJ's reasoning suggests a constructive trust may be imposed where it would be 'inequitable and against good conscience' to allow copyright to be asserted. It is not clear whether this is intended to be a separate element after an 'invasion of the legal or equitable rights of the plaintiff or a breach of the obligations of the maker to the plaintiff' are made out, or that this would be automatically shown *if* such an invasion/breach was made out.[41] However, given Jackman J considered that it is a threshold test,[42] the rest of the analysis proceeds on that basis.

How then should a court determine whether this test is met? *Game Meats* and prior cases dealing with the constructive trust-copyright angle tend to emphasise inequity and unconscionability in relation to the *behaviour of the alleged wrongdoer*. Whether the facts in *Lenah* would have met these criteria and therefore given rise to a constructive trust over copyright in the abattoir footage was not pleaded and therefore not decided. In *Windridge,* Hall J, expanding on Gummow and Hayne JJ's comments, indicated that the circumstances supporting a constructive trust would 'include matters which constitute either an invasion of

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[40] Jani McCutcheon and Jordan Leahy, 'Illegal Copyright Works and the Remedial Discretion of the Court' (2019) 9(3) *Queen Mary Journal of Intellectual Property* 326, 340 ('Illegal Works and Remedial Discretion'); Jordan Leahy and Jani McCutcheon, 'Do Wrongs Make a (Copy)right? Illegal Works and Copyright Subsistence under Australian Law' (2019) 30(2) *Australian Intellectual Property Journal* 78, 87 ('Illegal Works and Copyright Subsistence'); William M Heath, 'Possum Processing, Picture Pilfering, Publication and Privacy: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*' (2002) 28(1) *Monash University Law Review* 162, 175 n 88; Daniel Stewart, 'Protecting Privacy, Property, and Possums: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*' (2002) 30(1) *Federal Law Review* 177, 198.

[41] By analogy consider how the High Court considers the description of 'unconscionable' as one that refers to the overall result, rather than as a separate element: see eg, *Kramer v Stone* (2024) 281 CLR 484, 503 [41] (Gageler CJ, Gordon, Edelman and Beech-Jones JJ).

[42] *Game Meats Full Court* (n 2) 276 [10]: '[T]he passage [in *Lenah*] indicates that there is no objection in legal principle to the imposition of a constructive trust over the relevant copyright which was created by means of unlawful conduct if the circumstances show that it is inequitable and against good conscience for the maker of the film to assert the copyright conferred by statute.'

the legal or equitable rights (such as the right to confidentiality) of the owner or occupier of premises or facts that establish a breach of any equitable obligation operating between [the parties] … at the time the film and the photographs were made or taken'.[43] In *Game Meats*, Jackman J considered that FTI's behaviour was analogous to theft/fraud, and to a lesser extent, the receipt of a mistaken payment, to be sufficient to ground the application of a constructive trust.

The thread running through all of these cases is ultimately whether the legal owner of the copyright (here, FTI) should 'in good conscience retain the beneficial interest',[44] by reference to the other party's behaviour. Yet such a broad-brush approach neglects a *copyright-oriented* approach taking into account its distinct features as a type of property. Copyright is personal property; it is, however, a creature of statute.[45] The scope and extent of proprietary protection is governed by the *Copyright Act 1968* (Cth) ('*Copyright Act*'), and that protection has several distinct features.

For example, unlike other personal and real property, copyright is necessarily limited in duration. Rights are granted over original literary, dramatic and musical works for 70 years following the author's death,[46] while, for films and sound recordings, the period is 70 years after making or publication.[47] Copyright will not subsist unless the work is 'reduced to writing or to some other material form'.[48] Copyright is *limited*: outside what is specified (eg the right to make a copy of the film, to publish the film or communicate it to the public) the author has no enforceable rights.[49] Copyright is also fundamentally a right to *prevent* others from exercising certain statutory rights.[50] Last, copyright is subject to numerous exceptions which allow others to behave in ways that would otherwise infringe copyright — for example, by fairly using material for criticism or review, or for parody and satire.[51] These distinctions are material when compared to the ownership of other real or personal property, in respect of which the owner often has far broader rights which can be enforced in perpetuity.

Accordingly, it is not coherent to adopt a broad-brush approach to what is inequitable or against good conscience when it comes to the application of constructive trusts to copyright. What may have been inequitable in the case of

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43 *Windridge* (n 13) 104–5 [129] (Hall J); *Lenah* (n 8) [102].

44 *Beatty v Guggenheim Exploration Co*, 122 NE 378, 380 (NY, 1919) (Cardozo CJ), quoted in RP Meagher and WMC Gummow, *Jacobs' Law of Trusts in Australia* (Butterworths, 6th ed, 1997) 306 [1301], in turn quoted in *Lenah* (n 8) 315 [297] (Callinan J).

45 *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* (1970) 121 CLR 154, 158–9 (Barwick CJ).

46 *Copyright Act 1968* (Cth) s 33.

47 Ibid s 93.

48 Ibid s 22(1).

49 Ibid s 87.

50 Cathay YN Smith, 'Weaponizing Copyright' (2021) 35(1) *Harvard Journal of Law and Technology* 193, 228.

51 *Copyright Act 1968* (Cth) ss 103A–AA.

the theft of money (which, save for illegal purposes, has very few restrictions on what the owner can use it for) should not *automatically* be regarded as inequitable or against good conscience so as to automatically justify the imposition of a constructive trust over *copyright*, as Jackman J and Horan J appeared so ready to do in *Game Meats*.

Further, even if the behaviour may *in isolation* be considered inequitable or against good conscience, that alone should not *mandate* the imposition of a constructive trust over copyright, influential though it may be in the determination. The fact that copyright is a creature of statute — and therefore a manifestation of parliamentary intention — means the question should be whether the behaviour *so justifies the effective removal of* copyright protections *specifically*.[52] That determination should take into account the aims of copyright law in granting that limited bundle of property rights.

The High Court has acknowledged that copyright law has at least two public policy goals: 'encouraging creativity and … permitting certain uses on some reasonable basis'.[53] Justice Kirby has also noted that

> [c]opyright law aims to promote innovation and creativity by protecting new works, according temporary exclusive rights in respect of them, particularly against deliberate uncompensated invasions for the profit of strangers, who have made no arrangement for compensation to the copyright owner, but instead seek financial gain of their own from facilitating deliberate copying of the original works of others.[54]

In light of copyright's goals, then, whether to apply a constructive trust over copyright is about whether the behaviour occasioning the creation of that work is inequitable or against good conscience in a way that justifies overriding the goals of promoting creativity or permitting uses of copyright-protected works on a reasonable basis.

It is arguable that in most cases, this calculation will lead to a conclusion that a constructive trust should not be imposed. This is because a constructive trust interferes with copyright ownership in a way Parliament arguably never intended. Under the *Copyright Act*, copyright subsists in works, and authorship and ownership are attributed, with no regard for ethical considerations. This reflects an implicit recognition that the *substance* of creative works is regulated in other areas of law (consumer protection, human rights law, constitutional law), but that such regulation does not affect whether and in whom copyright subsists. The market may also contribute to regulation by refusing to publish material that offends public sensibilities. But none of those areas of regulation interfere with the *ownership* of the copyright in the way that the Full Federal Court did via the constructive trust doctrine in *Game Meats*: namely, to introduce a normative 'qualifier' between the

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52 McCutcheon and Leahy, 'Illegal Works and Remedial Discretion' (n 40) 339.

53 *Copyright Agency Ltd v New South Wales* (2008) 233 CLR 279, 296–7 [48] (The Court).

54 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 250 [199] (Kirby J).

creation of a work and the contemporaneous attribution of ownership in that work based on an ethical assessment of how that work was created.

Consider a book glorifying racial discrimination, for example. Content in the book may well contravene laws regulating hate speech and defamation. It may so offend public sensibilities as to be quickly removed from shelves upon public outrage. Those outcomes are reasonable. Yet what is not generally considered is removing the author's copyright or ordering the author to assign it as in *Game Meats*. Ultimately, the author will retain the bundle of rights provided under copyright law, assuming the requirements for copyright to subsist are satisfied (the work is original, it is fixed in a material form, etc).[55] The author is then entitled to enforce those rights if, for example, the book is adapted or reproduced without authorisation. Further, they are entitled to license or sell those rights, subject to court orders directing the proceeds of works created to exploit their criminal behaviour.[56] While they may incur penalties under other areas of the law (eg fines under criminal law) for their behaviour, copyright law imposes no normative qualifications for the enforcement of their rights. As McCutcheon and Leahy note in relation to copyright in what they define as 'illegal' works:

> [D]enying [works that are illegal by content or process] copyright subsistence would be problematic. It would invariably be based on subjective decisions dependent on the decision-maker's personal values concerning illegality, and thus the copyright status of many works would be inherently uncertain. It would also require continuous alteration to copyright statutes to specify exclude[d] works and capture changing social attitudes.[57]

In the same way, opening the constructive trust door in the copyright context risks allowing parties to whom creators owe no contractual or fiduciary obligations to restrain the expression of creativity in ways that the *Copyright Act* is not intended to support. The application of constructive trusts over copyright may also have a chilling effect on creativity, particularly in a society where there is at least theoretical freedom to challenge norms, institutions, corporations and other large organisations through art. Copyright is a property right given to incentivise the production of creative works for the public good. Allowing corporations to effectively lock away works due to purported 'inequitable' behaviour leading to the creation of those works patently undermines this aim. It also has an impact on the broader public by reducing access to creative works for consumption, innovation and the development of knowledge and culture.

Further, imposing a constructive trust over copyright arguably contravenes the principle, articulated by a unanimous five-Justice bench of the High Court in *John Alexander's Clubs*, that 'a constructive trust [should not] … be declared in a

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55 McCutcheon and Leahy, 'Illegal Works and Remedial Discretion' (n 40) 330.

56 *Proceeds of Crime Act 2002* (Cth) ss 152–79.

57 McCutcheon and Leahy, 'Illegal Works and Remedial Discretion' (n 40) 331 (citations omitted). See also Leahy and McCutcheon, 'Illegal Works and Copyright Subsistence' (n 40) 89–91.

manner injurious to third parties merely because the plaintiff has no other useful remedy against a defendant'.[58] There is a strong argument that the public would be deprived of access to knowledge and culture in this instance given GMC's interest in suppressing the footage and FTI's corresponding interest in publishing it. Accordingly, it is at least arguable that the trust mooted would be 'injurious' to third parties, even excluding the public interest considerations arising from the subject matter at hand.[59]

None of the above suggests that a constructive trust should *never* be imposed over copyright. However, it does suggest that when situations arise in which that option is mooted, a copyright-centred approach should be taken. In light of copyright's features and aims, it is likely that in many cases a constructive trust will not be justified.

C *The Availability of Other Remedies*

The nature and aims of copyright may well be of less relevance if a constructive trust over copyright was the only effective remedy against plainly tortious, and in some cases, criminal behaviour leading to the creation of works like the footage in *Game Meats*. Yet other remedies are clearly available to GMC; the sufficiency of those other remedies is a relevant factor in determining whether to recognise a constructive trust. As Liew notes, the High Court has 'repeatedly … said that the constructive trust is to be imposed only as a last resort, that is, after other "lesser" — personal — remedies have been considered and found to be wanting in a particular case'.[60] Justices Jackman and Horan were noticeably less reticent than Snaden J to apply the remedial constructive trust, but did not appear to consider other remedies *not* arising from the constructive trust that could potentially have addressed any perceived loss suffered by GMC.

For instance, surreptitiously placing cameras in a private enterprise to collect footage without authorisation, with the knowledge and/or intention that the release of that footage would harm the business, would potentially have justified findings of trespass and breach of confidence, though the latter would require showing the information was 'private'.[61] Injunctions against publication of media

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58 *John Alexander's Clubs* (n 31) 46 [129] (The Court).

59 For more on the argument for a public interest defence, see eg, Michael Handler, 'Reconsidering the Need for Defences to Permit Disclosures of Confidential Copyright Material on Public Interest Grounds' (2018) 12(2) *Journal of Equity* 195, 211.

60 Ying Khai Liew, *Rationalising Constructive Trusts* (Bloomsbury, 2017) 245 [11.2.2.2.1]. But see Ying Khai Liew, 'Constructive Trusts and Discretion in Australia: Taking Stock' (2021) 44(3) *Melbourne University Law Review* 963.

61 *Lenah* (n 8) 221 [25]–[26], 225–30 [39]–[52] (Gleeson CJ).

in the context of breach of confidence can achieve much the same effect.[62] Damages may also be adequate. As mentioned, the Full Court in *Game Meats* upheld an award of $130,000, including an exemplary damages award of $100,000, to reflect the brazen, flagrant nature of the trespass. The new statutory tort of privacy provides another potential cause of action to vindicate individuals who may or will suffer loss due to the exposure of private information.[63] The availability of remedies like these designed to achieve similar, or identical impacts as a constructive trust (as a remedy for illegitimately procured footage) suggests that Snaden J's cautious approach to recognising such a trust over copyright is justified.

D *The Challenge of Moral Rights*

Lastly, if a court still considers that a constructive trust should be recognised over copyright (taking all the issues above into account), it must deal with the ramifications of such an order posed by Australia's moral rights regime. The moral rights provisions in the *Copyright Act* suggest that constructive trusts over copyright are, at best, an inelegant tool against inequitable behaviour.

In addition to the 'economic rights' mentioned above, the *Copyright Act* also gives individuals[64] moral rights in works they create. In Australia, these are: (a) the right to be attributed as the author; (b) the right against false attribution of someone else as the author; and (c) the right for their work not to be treated in a derogatory fashion.[65] For films, moral rights are provided to the director and screenwriter rather than any company they are employed by.[66] Moral rights are designed to reflect the link between the work and the personality of the author rather than to provide any economic benefit. As such, they cannot be assigned at law, with the only agreement permitted by the *Copyright Act* being an agreement between co-authors not to exercise the right against derogatory treatment in respect of a film or an underlying original work without the agreement of all authors.[67] Thus, even if FTI complied with the Full Court's orders, the director or screenwriter would retain their moral rights for the duration of copyright in the footage.

Accordingly, recognising a constructive trust over copyright (as a precursor to a mandatory assignment) could unreasonably fragment the protection of copyright in works like the footage at issue. GMC would own the economic rights,

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62 See, eg, *Giller v Procopets* (2008) 24 VR 1; *Wilson v Ferguson* [2015] WASC 15; Michael Douglas, 'Characterisation of Breach of Confidence as a Privacy Tort in Private International Law' (2018) 41(2) *University of New South Wales Law Journal* 490. See also *Smethurst* (n 15) 239 [150] as to the potential for injunctive relief in the case of unlawful seizure of intangible property to encompass the delivery up or destruction of copies.

63 *Privacy Act 1988* (Cth) sch 2 s 7.

64 *Copyright Act 1968* (Cth) s 190.

65 Ibid ss 189–195AZR.

66 Ibid s 191(3).

67 Ibid s 195AN(3)–(4).

but the director/screenwriter, or any other person to whom the *Copyright Act* applies authorship under the moral rights regime, would still have enforceable moral rights over that footage. Of course, this would be the same for anyone who assigned or licensed their economic rights, which is likely to be most creators seeking to disseminate or monetise their works. However, such situations, at least initially, involve a general coalescence between the economic and moral rights regimes; that is, the publisher or other exploiter disseminates the work in keeping with the moral rights (eg publishing the book with the author's name) so that both parties can benefit from that dissemination. In *Game Meats*, however, there was a fundamental conflict between what the holder of the economic rights via constructive trust wanted to do (suppress the work) and what the holder of the moral rights wanted to do (publish the work).

This conflict could lead to an unplanned outcome where GMC becomes liable for a moral rights infringement by virtue of non-publication (even though that is the point of seeking a constructive trust declaration). The claim would be that keeping that footage hidden constitutes 'doing' something that is 'prejudicial to [FTI's] … honour or reputation'.[68] 'Doing' is 'an open and inclusive provision that does not appear to have any restrictions'.[69] Meanwhile, 'honour' imports both subjective and objective considerations.[70] The Federal Court suggests that the use of a musician's work 'without permission to promote political values which they find repellent' could impinge on their honour.[71]

In the same vein, it remains possible that suppressing footage which the public knows exists could be deemed to prejudice the honour of the filmmaker, particularly if there is widespread public support for the relevant cause (in this case, drawing attention to alleged animal cruelty in meat production facilities) *and* the author has been required by the court to delete all other copies of the work. This is of course an open question on which reasonable minds may disagree. The point, however, is that the *Copyright Act* and case law are ambiguous enough to leave the scope of the moral rights regime unclear on potential claims like this.

A court could seek to overcome the disjuncture between a constructive trust over copyright and moral rights by ordering an author to 'consent' to derogatory treatment as a way of pre-empting interference with the property.[72] However, the fact the moral rights framework exists to protect authors suggests that it will be a rare situation where the court could justify forcing them to effectively waive these rights.

In any case, the presence of the moral rights issue highlights the unintended consequences that can arise from recognising a constructive trust over copyright in particular, given its particularities and statutory regime —

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68 Ibid s 195AL.

69 Rita Matulionyte, 'Can AI Infringe Moral Rights of Authors and Should We Do Anything About It? An Australian Perspective' (2023) 15(1) *Law, Innovation and Technology* 124, 134.

70 *Boomerang Investments Pty Ltd v Padgett* (2020) 383 ALR 202, 286 [401] (Perram J).

71 Ibid 287 [403].

72 *Copyright Act 1968* (Cth) ss 195AW, 195AWA.

consequences that arguably do not affect other types of real or personal property to anywhere near the same degree. This is not to say a constructive trust over copyright will never be an appropriate remedy. However, courts should consider the practical implications of such an order, including the impact of the moral rights regime on its purported efficacy.

V Conclusion

Game Meats raises an important question: should a constructive trust over copyright be available as a remedy for tortious or criminal behaviour that leads to the creation of original literary, dramatic, musical or artistic works? At first instance, Snaden J was noticeably hesitant to take such a step, while the Full Court took the opposite approach. Jackman J suggested that it was only logical to recognise such a trust because, in *Lenah*, four justices of the High Court had already set out, or agreed with, the principles for doing so, and the cases had critical factual similarities.

This article suggests that Jackman J's reasoning should be scrutinised for a number of reasons. Justices Gummow and Hayne's suggestion in *Lenah* that a constructive trust might be available over copyright remains just that; it does not *mandate* the application of a constructive trust, even in factually similar circumstances. Copyright has distinct features as a creature of statute with particular aims, which arguably conflict with the application of a constructive trust in most cases. Of course, a constructive trust may be applicable if it is the only viable remedy, but that is far from certain given the availability of other remedies (eg injunctions and damages). And even if a constructive trust is issued, the presence of statutory moral rights may impact its efficacy.

Nothing in the analysis above precludes courts from applying Gummow and Hayne JJ's reasoning in *Lenah* and finding a constructive trust exists over copyright due to the author's behaviour. There may well be situations in which such a remedy is justified. However, this article highlights the importance of adopting a posture of justified hesitation when considering whether to recognise a constructive trust over copyright, ultimately grounded in an understanding of what copyright is, how it is intended to be used, and what impacts it is intended to have on authors, publishers, and the public at large. Proceeding with such hesitation is likelier to preserve the utility of constructive trusts as a remedy on the one hand, and the role of copyright in encouraging creativity for public benefit on the other.

Book Review

Export Restrictions and Export Controls: From WTO to the Realm of Global Security

(Edward Elgar, 2023) ISBN 9781800889811, 390 pp

By Umair Hafeez Ghori

Export restrictions and export controls have long been tools wielded by governments worldwide to pursue policy objectives, adopted for a multitude of reasons and rooted in a long-standing history. In recent years, however, there has been a notable trend towards the strengthening of export restrictions and controls, which are now widely employed by countries and regions. Umair Hafeez Ghori's new book *Export Restrictions and Export Controls: From WTO to the Realm of Global Security* is a focused study on export restrictions and controls against this background. Drawing on his personal experience of living in a developing country and his exhaustive research into the history of globalisation, Ghori undertakes an in-depth exploration of the evolution and reform of international economic law. As Professor Mary E Hiscock of Bond University aptly remarks, the book 'opens an entire field'. [1] This new book employs a diverse range of analytical methodologies, including literature reviews, case studies, comparative analysis, and historical research, and is supported by exceptionally rigorous evidential materials, thereby offering considerable informational value to its readership.

Ghori opens by addressing the conceptual ambiguity surrounding the two core terms. Export controls and export restrictions are broad and overlapping terms for measures to manage commodity outflows from one economy to another with the aim of achieving specific policy goals. Employing historical semantic analysis, he traces the evolution of these terms to highlight their distinct legal foundations, policy aims, and differing relationships with the General Agreement on Tariffs and Trade ('GATT') and the World Trade Organisation ('WTO') rules. According to the author, export restrictions fall within the remit of international economic law, as set out in GATT art XI and its exceptions. Export controls, by contrast, are grounded in domestic law, public international law, or international relations, and primarily serve national security and foreign policy objectives.

Chapter 1 offers a systematic review of existing scholarship on the subject, thereby defining both the research problem and the analytical framework for the whole book. In its first section, chapter 1 undertakes a detailed examination of the historical development and contemporary features of export restrictions,

[1] Umair Hafeez Ghori, *Export Restrictions and Export Controls: From WTO to the Realm of Global Security* (Edward Elgar, 2023) ix.

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synthesising WTO disciplines and the existing academic literature on the topic. Initially, Ghori considers whether export restrictions constitute a novel or long-standing unresolved issue. Jacob Viner's observation in 1926 remains valid today: 'where a national monopoly is being exploited at the expense of the foreign consumer and under government auspices, the method used is usually the establishment of restrictions on export'.[2] This confirms that export restrictions are a long-standing phenomenon. Ghori adds that today's primary export controls and restrictions differ from their historical counterparts in that the restricted items have shifted from raw materials and basic manufacturing technologies to advanced technologies such as rare earths and semiconductors.[3] An analysis of the WTO's history reveals that it focused on reducing import tariffs and enhancing market access rather than regulating exports.[4] Consequently, despite numerous rounds of negotiations, WTO provisions governing export controls remain notably underdeveloped — a gap that lays the groundwork for the book's subsequent analysis. The chapter's second section turns to national security, another key basis for export controls. The national security concern compels policymakers to adopt measures that do not conform to the basic values of free trade, as discussed in chapters 2 and 3. The book divides national security into four realms: war, pre-war, competition, and governance, to analyse the varying intensity of national security policies. The extent to which national security justifications excuse non-compliance with WTO rules depends on the factual context.

Chapter 2 addresses controversies over WTO export restrictions, and its core content lies in presenting 'three lessons' for how export restrictions should be formulated under WTO law.[5] First, prior to imposing export restrictions, WTO Members must ground them in GATT arts XX or XXI and interpret such legal notions as 'necessary' and 'essential' in accordance with WTO jurisprudence. Second, according to recent WTO cases on China's natural resource export restrictions, the Appellate Body effectively endorsed an approach that requires proving exhaustibility and critical importance purely from a preservation point of view and not from a developmental one. Third, while the WTO encourages downstream development to benefit developing and least-developed Members, the use of export restrictions to establish downstream sectors receives scant backing from the WTO. GATT arts XVII 4(a) and (b) allow early-stage economies to make temporary rule deviations. However, part IV of the GATT — devoted to trade and development, and aimed at expanding market access for primary and processed goods from developing or least-developed countries — does not encompass the use

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2 Jacob Viner, 'National Monopolies of Raw Materials' (1926) 4(4) *Foreign Affairs*, 585, 587.

3 Ghori (n 1) 4.

4 Mitsuo Matsushita et al, *The World Trade Organization: Law, Practice, and Policy* (Oxford University Press, 3rd ed, 2015) 535–6.

5 Ghori (n 1) 50.

of export restrictions to kick-start downstream industrial development.[6] In the context of WTO rules, developing countries' policymakers cannot reserve policy space for domestic industry development, and any preferential policies favouring an inward diversion strategy may face challenges before the WTO dispute settlement mechanism. These 'three lessons' summarise the key takeaways from GATT/WTO case-law for developing countries' policymakers to avoid retaliatory action by resource-importing countries, and delineate the policy space within which states may operate. Yet addressing the practical policy needs of developing countries will likely necessitate further reform of the WTO.

Chapter 3 sets out the key concept of 'local challenge' and argues that, within the WTO framework, sovereign states lack sufficient competence to address such challenges. 'Local challenges' encompass, inter alia, a nation's economic progress, job creation, environmental protection, and sovereignty maintenance. Such challenges primarily relate to economic, national, and climate security. Ghori coined the term to recognise that countries face unique local challenges due to their specific socio-economic and political environments when implementing development strategies. Ghori employs a structured analysis to show how WTO law often impedes the progress of developing countries, while the restrictive exception clauses within the WTO system are ill-suited for implementing development policies. A key focus of chapter 3 is the developmental space afforded by emergency measures and general exception clauses under WTO law, and how this space conflicts with the development needs of poorer nations. Taking the electric vehicle battery sector as a case study, the author argues that most commodity-dependent developing countries need the freedom to implement export restrictions to transform their development models. However, developed economies oppose such measures, citing WTO rules.

Notably, developed countries' efforts to control the narrative and pace of climate change negotiations, while retaining priority access to resources critical for emissions reduction, effectively constitute a new form of 'climate colonialism'.[7] This concept thereby exposes the predicament facing developing countries in pursuing green development: one rooted in their disparate developmental stages and unequal discursive authority within the existing international legal order. Although both developed and developing states undoubtedly share a responsibility to pursue a more sustainable global trajectory, the latter need greater policy space and a stronger voice in international forums if international law is to embody a genuinely collective vision of sustainable development. Only such a reorientation can ensure that future growth is substantively equitable. The author further examines the challenges and

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6 Julia Ya Qin, 'Reforming WTO Disciplines on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection' (2012) 46(5) *Journal of World Trade* 1147, 1169.

7 John Letzing and Minji Sung, 'What Does Colonialism Have to Do with Climate Change?', *World Economic Forum* (Commentary, 9 September 2022) <https://www.weforum.org/stories/2022/09/colonialism-climate-change-pakistan-floods/>.

opportunities that climate change brings to industrial development, pointing out that the WTO rules' regulatory rigidities make it difficult for developing countries to establish clean energy bases. He also discusses potential solutions, such as green subsidies, plurilateral agreements within the WTO framework, and a specialised export or tax agreement — none of which has yet garnered consensus.

Chapter 4 focuses on vaccine protectionism. It explores global supply chain security issues related to export controls and the production of essential medical/health products for developing and least-developed countries reliant on vaccine imports and local licensed production. Following a detailed analysis of the WTO's general and security exception clauses, Ghori highlights a systemic flaw in the WTO's exceptional clauses. While such clauses may justify WTO members' regulatory actions, a critical problem emerges: if all members invoke this framework to defend export restrictions, no state would be adequately equipped with medical supplies for future pandemics.[8] Ghori also questions the effectiveness of the WTO system, given that regional trade groups or blocs are increasingly raising the possibility of replacing the WTO in the global trade order — a trend that could lead to even more discriminatory export restriction measures.[9]

Chapter 5 explores export restrictions such as export bans, compulsory licensing, and prohibitively high levels of export taxes from the global food security perspective. In contrast to developed nations, agriculture and food security represent critical existential concerns for most developing countries and are fundamental to their national security.[10] Factors such as rising food prices, climate change, resource nationalism, and the adverse impacts of conflict, the COVID-19 pandemic, and natural disasters have all heightened countries' anxieties about food supply stability. Drawing on a brief overview of the WTO's framework governing export restrictions and agriculture, Ghori assesses the effectiveness of WTO rules in regulating export restrictions on agricultural products and staple crops, as well as previous efforts to reform the relevant WTO provisions. He then employs two case studies on export restrictions imposed on rice and wheat during the COVID-19 pandemic to demonstrate how major exporting countries disrupted global staple food markets. Furthermore, the author focuses on the Bali Peace Clause, linking it to India's rice export restrictions and highlighting its lack of effectiveness due to loopholes in WTO rules. Finally, based on projections regarding the impact of climate change on major food categories such as grains, meat, fruits and vegetables, oilseeds, and legumes, the author reiterates the need for reforming WTO rules.

Chapters 4 and 5 analyse WTO members' export restrictions on medical supplies and agricultural/food products during the COVID-19 pandemic from the

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8 Ghori (n 1) 152.

9 Ibid 186–7.

10 Raj Bhala, 'National Security and International Trade Law: What the GATT Says, and What the United States Does' (1998) 19(2) *University of Pennsylvania Journal of International Economic Law* 263.

dual perspectives of health and food security. For developing countries, threats to health and food security are acute national security priorities. While the cases examined by Ghori are not all the most recent or ongoing, they effectively expose the inadequacy of WTO rules in addressing these priorities; it may therefore be essential to look outside the WTO framework for complementary guarantees under international law to safeguard health and food security.

Unlike the preceding chapters, chapter 6 examines export controls that are invoked as a pretext for national security — rather than being driven by genuine national security concerns — against the backdrop of the ongoing trade war between the United States and China. Ghori argues that national security is clearly the justification for the growing push to impose additional export controls and restrictions, which aim to prevent strategic rivals from accessing advanced technologies. Masked by this pretext, such measures can be further deployed to advance the foreign policy interests of the implementing state and its allies. The author explores different dimensions of national security measures, dividing them into internal and external ones. The internal dimension is more secretive, as countries only consider domestic or perceived national security interests when applying export controls. The external dimension is broader and can be used to achieve common security goals of allies. This chapter focuses on the *Russia – Traffic in Transit* case to explore the historical evolution and latest dispute settlement practices of GATT art XXI (the 'security exception'), emphasising the use of export controls on weapons and dual-use items. Chapter 6 also offers an in-depth analysis of the sanctions and counter-sanctions between the United States and China, highlighting that export controls have evolved from a purely international trade tool to a means of shaping new paradigms of globalisation and national security. It reveals the risk that overusing or abusing export controls may yield short-term political and economic gains, but will ultimately weaken the integrity of the global trade system, undermine WTO rules, and erode the existing international economic order.

Reforming the WTO is now a top priority in international economic law. Ghori's volume innovatively proposes reform initiatives from the perspective of export restrictions and controls, and its research yields two key conclusions. First and foremost, WTO rules and exceptions afford scant latitude for developing countries to pursue industrial transformation and upgrading. This even undermines their national security and fuels a legitimacy crisis for the WTO among Global South states. Emerging challenges such as climate change and pandemics further underscore the urgency of WTO reforms to address practical global challenges. Second, export controls are shaping new paradigms of globalisation and national security. The global security environment is now being redefined by 'geo-economics': economic interdependence fostered by globalisation is increasingly perceived as a vulnerability, which in turn redefines national security and challenges the WTO's existing security exception provisions. While the WTO must respond to these practical needs, it also has the

potential to drive reforms to the international economic order. Nevertheless, the divergent interests and priorities of developed and developing countries regarding export restrictions and controls constitute a barrier to WTO reform.

This book presents a rigorously argued and evidence-rich study of considerable scholarly value. By engaging extensively with WTO panel and Appellate Body jurisprudence, Ghori vividly illuminates the practical application of WTO disciplines on export controls and exposes the rigidity of existing WTO rules in affording policy space. Against this regulatory backdrop, the book provides states with a practical guide for designing lawful measures. The author also adopts a Global South perspective on the issues addressed, and the sympathetic stance towards developing countries in his arguments aligns with the United Nations ('UN')-endorsed Sustainable Development Goals — thus positioning the integration of developing-country priorities as a core priority for future WTO reform.

While the volume offers an incisive account of the predicaments besetting WTO disciplines on export controls, and documents how certain members resort to such measures for diplomatic purposes, it is somewhat lacking in constructive proposals: it neither elaborates a detailed blueprint for reforming the relevant WTO rules nor advances effective mechanisms to curb the abuse of such measures. Nevertheless, these shortcomings do not diminish its value, as the book provides a thorough analysis of export controls and restrictions under WTO rules amid current geopolitical tensions —offering rich insights for scholars, practitioners, and international trade law policymakers alike. The subjects explored by Ghori are of paramount importance and acute contemporary relevance in an era of intensifying global geopolitical rivalry. Through a comprehensive, multi-faceted analysis of the latest trends in export control and export restriction measures, the volume rigorously exposes the inherent limitations of the WTO legal framework — filling a notable gap in existing theoretical research. Crucially, as WTO reform has increasingly become an international consensus, the book's analysis — anchored in the perspective of export control — provides a conceptual framework for understanding gaps in WTO rules and for charting their subsequent refinement.

Against this backdrop, reforms to WTO rules governing export restrictions and controls should adhere to at least two fundamental principles: first, fairness, equality, and appropriateness must be placed at the core of WTO reforms. The goal of free trade cannot be divorced from industrial development, climate change considerations, and resource-owning states' right to freely utilise their resources. This is critical to maintaining the WTO's legitimacy and effectiveness. The second principle is that export restrictions and controls must not be overused; otherwise, the WTO system and the global economic order risk unravelling. We submit that the refinement of WTO rules on export controls admits of multiple pathways, which must simultaneously preserve adequate policy space for developing countries and curtail the abusive invocation of those rules, lest export controls be converted into instruments of unilateral economic

coercion. On the one hand, the WTO Secretariat and the UN Conference on Trade and Development could issue non-binding recommendations on export controls. This would steer the progressive development of such disciplines while enhancing the policy autonomy of developing members. On the other hand, bodies such as the International Law Commission could provide authoritative, albeit non-binding, interpretations of general international law that clarify the lawful limits of unilateral sanctions and alleviate the distortive effects of such measures. These interpretations would help uphold the original policy rationale of export controls, namely the protection of essential national security interests.

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