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## ARTICLES

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General queries about submissions may submitted by email to:

Dr Rebecca Ananian-Welsh
rebecca.aw@law.uq.edu.au

Dr Iain Field
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e.li@uq.edu.au

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### Articles

# Australian Law During COVID-19: Meeting the Needs of Older Australians?

Belinda Bennett,* Bridget Lewis,† Elizabeth Dickson,‡ Shih-Ning Then+ and Kelly Purser**

*This article focuses on the interests of older Australians during the COVID-19 pandemic. It analyses aspects of Australian law by considering the implications of the pandemic for older Australians in order to evaluate the adequacy of existing laws in meeting their needs. We begin by analysing two important challenges. First, although we focus on the interests of older Australians, defining what is meant by 'older' can be challenging. Second, although we adopt a rights-based approach to our analysis, we recognise that there is no convention on the rights of older persons that clearly articulates the rights of older persons. In the remaining parts of the article, we examine different areas of law (antidiscrimination laws, responses to social isolation, and participation in medical research of individuals where capacity has been lost or is diminishing) as examples through which to analyse the impact of the pandemic on older Australians and to provide insights into the adequacy of current Australian laws.*

## I Introduction

'We're all in this together' has been an often-used phrase during the COVID-19 pandemic. Certainly, the pandemic, and its consequences for health and economic well-being, has presented challenges for all members of the Australian community. However, the pandemic has also exposed the potential for diverse impacts upon different groups within the community, and the need for tailored responses to address these impacts.[1] COVID-19 has provided a crucible in which

* Professor of Health Law and New Technologies, School of Law, Member, Australian Centre for Health Law Research, Queensland University of Technology (QUT).
† Associate Professor, School of Law, Member, Australian Centre for Health Law Research, Queensland University of Technology (QUT).
‡ Senior Lecturer, School of Law, Member, Australian Centre for Health Law Research, Queensland University of Technology (QUT).
+ Associate Professor, School of Law, Member, Australian Centre for Health Law Research, Queensland University of Technology (QUT).
** Associate Professor, School of Law, Member, Australian Centre for Health Law Research, Queensland University of Technology (QUT).
We wish to thank Hannah Plater for her research assistance and the anonymous reviewers for their helpful comments and suggestions.
1 Nigel Stobbs, Belinda Bennett and Ian Freckelton, 'Compassion, Law and COVID-19' (2020) 27(4) *Journal of Law and Medicine* 865.

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Australian laws and policies on a range of issues have been tested. It has highlighted the tensions that can exist between protecting individuals and ensuring their ability to participate in the community, and between aspirational policies and the challenges of implementing them in practice.

In this article we focus on the interests of older Australians during the pandemic, analysing aspects of Australian law in the context of the particular ways that the pandemic has disrupted the lives of older members of the Australian community. As we argue below, a rights-based approach, which recognises that ageing occurs throughout the whole of life,[2] and that takes the differing abilities and needs of older persons as a starting point, can help to ensure that legal and policy responses to COVID-19 fully meet the needs of older members of the Australian community. This focus on the pandemic's impact on older persons is particularly important given that COVID-19 has been associated with an increased risk of serious outcomes and increased mortality for older persons.[3] Social distancing measures have also had a significant impact on older people, through social isolation at home or through restrictions on visits to aged care facilities. Furthermore, for some older persons, the pandemic-related social isolation may be exacerbated by a lack of access to technologies such as the internet, a lack of digital literacy, or through a choice not to engage with those technologies.[4] However, one consequence of the perceived vulnerability of older people to COVID-19 is a risk that they will be characterised as needing care, a view that risks ignoring their heterogenous abilities and needs and instead perpetuates harmful ageist stereotypes.[5] The World Health Organization has noted that '[a]geism refers to the stereotypes, prejudice and discrimination directed towards others or oneself based on age.'[6]

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2 Bridget Lewis, Kelly Purser and Kirsty Mackie, *The Human Rights of Older Persons: A Human Rights-Based Approach to Elder Law* (Springer, 2020) 9; World Health Organization, *Global Strategy and Action Plan on Ageing and Health* (Report, 2017) 21 <https://www.who.int/publications/i/item/9789241513500>; World Health Organization, *World Report on Ageing and Health* (Report, 2015) 14 <https://www.who.int/publications/i/item/9789241565042>. The World Health Organization has noted '[a]geing is a natural and lifelong process that, while universal, is not uniform': World Health Organization, *Global Report on Ageism* (Report, 2021) xix ('*Ageism*') <https://www.who.int/publications/i/item/9789240016866>.

3 Australian Government Department of Health and Aged Care, 'Coronavirus (COVID-19) Advice for Older People and Carers' (Web Page, 29 March 2022) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/advice-for-people-at-risk-of-coronavirus-covid-19/coronavirus-covid-19-advice-for-older-people> ('COVID-19 Advice for Older People and Carers').

4 For discussion, see Part V.

5 Hans-Joerg Ehni and Hans-Werner Wahl, 'Six Propositions against Ageism in the COVID-19 Pandemic' (2020) 32(4–5) *Journal of Aging & Social Policy* 515; Lewis, Purser and Mackie (n 2) chs 1, 4, esp 30. The United Nations has noted that '[e]fforts to protect older persons should not overlook the many variations within this category, their incredible resilience and positivity, and the multiple roles they have in society, including as caregivers, volunteers and community leaders. We must see the full diversity within the older persons category': United Nations, *The Impact of COVID-19 on Older Persons* (Policy Brief, May 2020) 2 <https://unsdg.un.org/resources/policy-brief-impact-covid-19-older-persons>.

6 World Health Organization, *Ageism* (n 2) xix.

By focussing on the impact of the pandemic on older Australians we aim to evaluate the adequacy of existing legal and regulatory frameworks and responses in meeting the needs of this section of the Australian community. However, a focus on older people also presents two main challenges. First is the challenge of defining the group of 'older people.' Unlike 'adulthood', which is achieved on reaching a specific age,[7] 'older age' lacks this specificity, with the potential for a definition based on a fixed age failing to appreciate the range of experiences — from healthy and active to those needing more support — constituting older age.[8] From a regulatory point of view, this lack of definitional clarity can present difficulties in defining the group to whom programs and support should be directed. As Mégret has noted, 'the first challenge of conceptualising the rights of the old is the difficulty of defining them as a distinct population'.[9] In Part II we analyse the challenges of defining 'older' while simultaneously recognising the importance of not homogenising the ageing experience.

A further aspect of the definitional challenge relates to whether the focus of analysis is on older people living in residential aged care, or whether it is on older people who live at home. In analysing the issues that may arise in responding to COVID-19, we focus our analysis in this article on the rights and interests of older Australians living in the community, rather than on the issues that may arise in relation to residential aged care. This is not to suggest that residential aged care is unimportant. Indeed, we recognise the challenges that COVID-19 has posed for residential aged care worldwide.[10] However, in choosing to focus on community-based ageing we also recognise that the majority of older Australians continue to live in the community. According to figures from the Australian Institute of Health and Welfare, in 2017–18 aged care services were received by more than 1.2 million people, of whom 7 per cent were living in residential aged care.[11] Twenty-two per cent of Australians aged over 65 years were receiving some home-based support or care, and 71 per cent were living at home without government-

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7 In Australia, the age of majority is 18 years, although decision-making capacity may be recognised at a younger age. For example, 'mature minors' may have capacity to make some medical decisions for themselves without parental consent: see *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, adopted by the High Court in *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 12.

8 For discussion, see Part II.

9 Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11(1) *Human Rights Law Review* 37, 42.

10 See, eg, *Royal Commission into Aged Care Quality and Safety: Care, Dignity and Respect* (Final Report, March 2021) vol 1 ('*Final Report Vol 1*'); *Royal Commission into Aged Care Quality and Safety: Aged Care and COVID-19* (Report, October 2021); William Gardner, David States and Nicholas Bagley, 'The Coronavirus and the Risks to the Elderly in Long-Term Care' (2020) 32(4–5) *Journal of Aging & Social Policy* 310; David C Grabowski and Vincent Mor, 'Nursing Home Care in Crisis in the Wake of COVID-19' (2020) 324(1) *JAMA* 23.

11 Australian Institute of Health and Welfare, *Australia's Welfare Snapshots* (Report, 2019) 175 <https://www.aihw.gov.au/getmedia/82f724a3-c82a-412f-bb7b-5424fcfe1a4e/Australias-welfare-snapshots-2019.pdf.aspx>.

supported aged care services.[12] Given that most older Australians are still living in the community rather than in residential aged care, it is both timely and important to consider the impact of the pandemic on their rights and interests.

The second challenge that arises in analysing the legal and regulatory responses to COVID-19 in terms of their impact on older Australians is in choosing the lens for the analysis. In this article we have chosen to use a rights-based approach through which to analyse the issues related to COVID-19 and older Australians. In adopting this approach, we seek to position the rights and interests of older people at the centre of our analysis. We believe that such an approach is important in order to be able to assess the impact of the pandemic, and the adequacy of legal and regulatory responses to it. In adopting a rights-based approach we recognise that there is, to date, no international convention on the rights of older persons ('CROP') that clearly articulates those rights. Australian human rights law is also not uniform, and although there is federal antidiscrimination legislation, only Victoria, Queensland and the ACT have human rights legislation.[13] In Part III, we analyse the literature around human rights law and older persons, and the growing recognition of the need to see older persons not only as passive beneficiaries of care, but as active holders of rights.[14] We also analyse the current patchwork of Australian human rights law and consider its relevance and application to the public health emergency posed by the COVID-19 pandemic.

Having analysed the definitional challenges (Part II) and the growing recognition of the rights of older people (Part III), the remaining parts of the article focus on areas of law as examples through which to illustrate the impact of the pandemic on older Australians, and through which to analyse the adequacy of legal and regulatory responses to it. In Part IV, we analyse the relevance of discrimination law for older people's access to goods and services. Although domestic discrimination law largely reflects the values and principles of international human rights, as our discussion in this Part shows, there are some challenges relating to its practical application, particularly in the complex situation posed by a pandemic. Part V considers the challenges posed by social isolation for older people during the pandemic and some of the legal responses to it. We also consider the potential role for technology as a tool for overcoming social isolation and the challenges this may present for older members of the community. In this Part, we also consider the role of technology and changes to Australian laws that have been made during the pandemic to support members of the Australian community in managing their legal affairs during the pandemic,

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12 Ibid.

13 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2019* (Qld); *Human Rights Act 2004* (ACT).

14 For example, the *Royal Commission into Aged Care Quality and Safety* has recommended a rights-based approach form the basis of new aged care laws in Australia: see *Final Report Vol 1* (n 10) 14, 79. See also Australian Commission on Safety and Quality in Health Care, *National Safety and Quality Health Standards* (Australian Commission on Safety and Quality in Health Care, 2nd ed, 2017) 18.

using valid will-making and estate planning as an example to illustrate these issues.

As a society, developing knowledge of COVID-19 and of possible treatments will be important aspects of responding to the pandemic. In this context, and given the increased risk of severe disease for older people with COVID-19, it will be important to ensure that older persons are included in research. In Part VI, we analyse the current law in this area and the challenges that may arise where capacity is lost or is diminishing. By illustrating the impact of the pandemic and legal responses to it in quite separate areas (including discrimination law, will-making and estate planning, and medical research) we aim to show the range of ways in which older people have been affected by the pandemic, and to provide insights into the adequacy of Australian laws to meet their needs in these areas. We conclude, in Part VII, that there is an opportunity to reflect upon the challenges and tensions highlighted by COVID-19, to ensure that the future development of Australian law takes into account the needs of older Australians.

## II Ageing: Definitions and Data

COVID-19 is especially dangerous for people over the age of 70 years or for those over the age of 65 years with chronic health conditions, as they have an increased risk of severe disease and mortality.[15] Outside the context of COVID-19, the chronologically-based definition of 'older' adopted more generally can vary anywhere from 50 years and over (for Aboriginal and Torres Strait Islander peoples), to 60,[16] or to 65 years and older.[17] Defining what we mean by 'older' is therefore necessary. It enables accurate data collection in relation to an identified cohort, which can then be used to inform appropriate policy responses, including in the legal and health fields.[18] Disaggregation of data, including by age, is an important aspect of data collection and analysis, and can help to monitor healthy ageing across the life course.[19] However, the very fact that ageing is a process increasingly recognised as occurring throughout the whole of the life course, can make separating out a category of 'older' persons problematic. A person can be 90 and in better health than a chronologically much younger person, and thus

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15 Australian Government Department of Health and Aged Care, 'COVID-19 Advice for Older People and Carers' (n 3).

16 United Nations Department of Economic and Social Affairs, Population Division, *World Population Ageing 2015: Highlights*, ST/ESA/SER.A/368 (2015) 4 ('*World Population Ageing 2015: Highlights*').

17 See, eg, Australian Institute of Health and Welfare, 'Older People: Overview' (Web Page, 30 September 2021) <http://www.aihw.gov.au/ageing/>.

18 In its policy brief, the United Nations noted that '[t]he unprecedented nature of the crisis has highlighted the invisibility of older persons in public data analysis. Innovative approaches, backed by evidence and data disaggregated by age, but also sex and relevant socio-economic characteristics, are essential to effective public policy making that is inclusive of older persons': United Nations (n 5) 4.

19 World Health Organization, *Global Strategy and Action Plan on Ageing and Health* (n 2) 21.

determining the notion of 'older' by number risks amplifying ageist stereotypes that accompany becoming 'old'.[20] Recognising that there are differences between older people, the category of 'old' is sometimes divided into the 'young old', the 'old old' and the 'oldest old'.[21]

The social discourses around ageing are complex. For example, as Fineman points out, older persons experience both positive and negative assumptions linked with age-related social security payments. On the negative side, older persons have often been seen as in 'need' of social security payments due to the unlikelihood of their employment and therefore probability of their poverty.[22] On the positive side, older persons have been seen as deserving of welfare payments, often predicated upon the contributions they made while in paid employment.[23] These views have been challenged in more recent years by the growing number of older persons continuing to work in paid employment after traditional retirement age, and by concerns over the impact of the ageing of society on future welfare budgets.[24] Furthermore, in a society that values autonomy and self-sufficiency, the vulnerability and dependency assumed to exist when a person becomes 'older' can be stigmatising.[25] Fineman has argued, however, that there is an 'inevitable' dependence that is universal and that arises from being human.[26] Fineman proposes '[t]he idea of a universal "vulnerable subject" to replace the universal liberal subject', arguing that '[e]very actual adult human being, no matter how strong and independent he or she may seem, is both presently and has been in the past reliant on others and on social institutions.'[27] The language used to describe older persons is also important, with some terms such as 'elderly' seen as 'invariably pejorative: who wants to buy an elderly car or travel in an elderly aeroplane?'[28] However, there may be cultural dimensions to these understandings.

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20 See, eg, SunLife, *Ageist Britain?* (Report, 2019) <https://www.sunlife.co.uk/siteassets/documents/ageist-report-2019.pdf>; Amelia Hill, 'Over A Third of Britons Admit Ageist Behaviour in New Study', *The Guardian* (online, 19 August 2019) <https://www.theguardian.com/society/2019/aug/19/over-a-third-of-britons-admit-ageist-behaviour-in-new-study>; Lewis, Purser and Mackie (n 2) ch 1; Kelly Purser and Karen Sullivan, 'Capacity Assessment and Estate Planning:The Therapeutic Importance of the Individual' (2019) 64 *International Journal of Law and Psychiatry* 88, 92; Australian Law Reform Commission, *Elder Abuse: A National Legal Response* (Report No 131, May 2017) 32, 34; World Health Organization, *World Report on Ageing and Health* (n 2) 7–8, 10–11.

21 See, eg, Adam J Garfein and A Regula Herzog, 'Robust Aging among the Young-Old, Old-Old, and Oldest-Old' (1995) 50B(2) *Journals of Gerontology: Social Sciences* S77.

22 Martha Albertson Fineman, '"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2012) 20 *Elder Law Journal* 71, 75–6.

23 Ibid.

24 Ibid 78–9. Fineman argues that '[t]he image of the elderly has devolved from those who have contributed, and thus are deserving, to those who are greedy and destructive': at 79.

25 Ibid 87.

26 Ibid 86.

27 Ibid 88.

28 Marianne Falconer and Desmond O'Neill, 'Out with "the Old," Elderly, and Aged' (2007) 334(7588) *British Medical Journal* 316, 316. We are grateful to Eliana Close and Tina Cockburn for bringing this article to our attention. See also World Health Organization, *Ageism* (n 2) xx: '[w]ords such as elderly, old or senior elicit stereotypes of older people as universally frail and dependent, and they are frequently used in a pejorative sense.'

In Aboriginal and Torres Strait Islander communities, Elders play an important role and are recognised and valued for their wisdom and experience.[29]

These definitional issues and social discourses are particularly important given the impact of the COVID-19 pandemic on older members of the community. This includes the impact of social isolation on those members.[30] Commentators have expressed concern over ageist discourses during COVID-19.[31] COVID-19 has been portrayed as a problem for older adults, with older adults characterised as 'vulnerable'.[32] However, '[y]ounger adults are not immune to this virus, and they share responsibility for its spread.'[33] Furthermore, although older people may have an increased physical risk of severe disease from COVID-19, it has been argued that their life experience may give them important psychosocial strength for coping with the uncertainties created by the pandemic.[34]

The challenges of ageism have been effectively and relentlessly highlighted by COVID-19 as evidenced by, for example, the responses adopted in certain countries in relation to the rationing of care or finite resources — often a decision (largely) predicated upon the age of the person.[35] Gender and race are also indicators of COVID-19 related risk, as are pre-existing compromised immune systems.[36] It has been argued that it would be intolerable to use any of these factors as determinants for resource rationing, as decisions about treatment must be made on a case-by-case basis having regard to all relevant factors.[37] This again highlights the pervasiveness of ageism throughout modern society. It also serves to highlight the lack of dedicated international protection for the rights of older persons, which will be the focus of the next Part.

## III Ageing and Human Rights

The COVID-19 pandemic has presented a complex picture of risk for older people, comprising the physical risk of severe disease, the risks of social isolation, and the

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29 Lucy Busija et al, 'The Role of Elders in the Wellbeing of a Contemporary Australian Indigenous Community' (2020) 60(3) *Gerontologist* 513.

30 Joanne Brooke and Debra Jackson, 'Older People and COVID-19: Isolation, Risk and Ageism' (2020) 29(13–14) *Journal of Clinical Nursing* 2044.

31 Ehni and Wahl (n 5); World Health Organization *Ageism* (n 2) 24–6; Sarah Fraser et al, 'Ageism and COVID-19: What Does Our Society's Reponse Say about Us?' (2020) 49(5) *Age and Ageing* 692.

32 Fraser et al (n 31) 693. See also Ehni and Wahl (n 5) 517–8.

33 Fraser et al (n 31) 693–4.

34 Majse Lind, Susan Bluck, and Dan P McAdams, 'More Vulnerable? The Life Story Approach Highlights Older People's Potential for Strength during the Pandemic' (2021) 76(2) *Journals of Gerontology: Psychological Sciences* e45.

35 Diana Popescu and Alexandru Marcoci, 'Coronavirus: Allocating ICU Beds and Ventilators Based on Age is Discriminatory', *The Conversation* (online, 22 April 2020) <https://theconversation.com/coronavirus-allocating-icu-beds-and-ventilators-based-on-age-is-discriminatory-136459>. See also Ehni and Wahl (n 5) 516–17.

36 Popescu and Marcoci (n 35); Australian Government Department of Health and Aged Care, 'COVID-19 Advice for Older People and Carers' (n 3).

37 Popescu and Marcoci (n 35).

risks of ageism. While this complex picture raises important issues about the rights of older people in the context of the pandemic, there are significant gaps in the contemporary legal frameworks through which those rights might be recognised. As noted earlier, there is no dedicated CROP. This is despite considerable advocacy by non-government organisations and scholars, and ongoing thematic work within the United Nations human rights network,[38] although the COVID-19 pandemic may provide an impetus for such a convention.[39] It has been argued by some that existing human rights laws are comprehensive enough to protect the rights of older persons, and that enacting a dedicated treaty for older persons would have the effect of singling them out or casting them as somehow 'other' in the eyes of international human rights law.[40] However, an analysis of existing human rights law shows that there are gaps that could be addressed through the enactment of a CROP. For example, existing laws do not recognise the particular ways in which older persons experience human rights violations flowing from ageism and elder abuse,[41] an issue spotlighted by responses to COVID-19 worldwide.

Rather than identifying older persons as having different entitlements from other people, a dedicated convention would instead emphasise that 'older' people are entitled to the very same rights as everyone else, while acknowledging the specific ways that human rights may need to be addressed as we age. Further, much as the *Convention on the Rights of Persons with Disabilities* ('*CRPD*')[42] did for persons with disability, a CROP would give flesh to the bones of the generalised human rights treaties and articulate the nature of states' obligations in relation to older persons.[43] However, as we argue below, in the absence of a dedicated CROP, there are still important human rights protections that are binding in Australia and which should inform our responses to COVID-19. While these protections will have general application, applying to all members of the community, it is this universality of rights that is important to addressing ageism in the context of the COVID-19 pandemic where older people are particularly at

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38 Mégret (n 9); Lewis, Purser and Mackie (n 2) 58–60; Israel Doron and Itai Apter, 'The Debate around the Need for an International Convention on the Rights of Older Persons' (2010) 50(5) *Gerontologist* 586; Marthe Fredvang and Simon Biggs, 'The Rights of Older Persons: Protection and Gaps under Human Rights Law' (Social Policy Working Paper No 16, Centre for Public Policy and the Brotherhood of St Laurence, August 2012); Benjamin Mason Meier, Victoria Matus and Maximillian Seunik, 'COVID-19 Raises a Health and Human Rights Imperative to Advance a UN Convention on the Rights of Older Persons' (2021) 6(11) *BMJ Global Health* e007710:1, 2–4; Rosa Kornfeld-Matte, *Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons*, 39th sess, Agenda Item 3, UN Doc A/HRC/39/50 (10 July 2018); *Report of the Open-Ended Working Group on Ageing on its Eighth Working Session*, UN Doc A/AC.278/2017/2 (28 July 2017).

39 Meier, Matus and Seunik (n 38).

40 Baroness Sally Greengross, 'Human Rights and Ageing: Are We Doing What's Right?' (Speech, Queensland Parliament House, 15 November 2019); Lewis, Purser and Mackie (n 2) 60–1.

41 Mégret (n 9) 44, 60-2; Lewis, Purser and Mackie (n 2) 60–1.

42 *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) ('*CRPD*').

43 Mégret (n 9) 65-6 For a more detailed analysis of existing human rights law, see Lewis, Purser and Mackie (n 2) ch 2.

risk of severe disease and have been particularly impacted by the need for social distancing.

### A *International Human Rights Law*

There is a substantial framework of international and regional treaties that protect human rights, and the fundamental notion that human rights are universal and inalienable means that these protections must be extended to older persons.[44] For example, the *Universal Declaration of Human Rights* states that '[a]ll human beings are born free and equal in dignity and rights',[45] and that '[e]veryone is entitled to all the rights and freedoms set forth in this Declaration'.[46] While older people are entitled to the full complement of interdependent and indivisible human rights, certain rights have a more obvious importance for the experiences of older persons during a global pandemic and are worth noting here. Human rights principles, such as those articulated in the *International Covenant on Civil and Political Rights* ('*ICCPR*')[47] and the *International Covenant on Economic, Social and Cultural Rights* ('*ICESCR*')[48] thus provide a framework for assessing what level of restrictions is appropriate in response to a pandemic such as COVID-19.

The *ICCPR* guarantees certain non-derogable rights, including: the rights to freedom from cruel, inhuman or degrading treatment; freedom from slavery and servitude; equal recognition before the law; and freedom of thought, conscience and religion.[49] These rights cannot be limited, even in a time of emergency. Another of these non-derogable rights is the right to life, which includes protection from circumstances that represent a threat to life,[50] such as a global pandemic on the scale of COVID-19. However, the *ICCPR* also provides that some rights can be restricted in an emergency through proportionate legal responses designed to give effect to a legitimate outcome.[51] Importantly, however, any

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44 World Health Organization, *World Report on Ageing and Health* (n 2) 5.

45 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) art 1 ('*Universal Declaration of Human Rights*').

46 Ibid art 2.

47 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 4(2) ('*ICCPR*'). For discussion, see Lawrence O Gostin, *Global Health Law* (Harvard University Press, 2014) 256.

48 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

49 *ICCPR* (n 47) art 4(2).

50 *ICCPR* (n 47) art 6; United Nations Human Rights Committee, *General Comment No 36*: *Article 6: Right to Life*, 124th sess, UN Doc CCPR/C/GC/36 (3 September 2019).

51 For example, *ICCPR* (n 47) art 4(1) states: '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not

limitations placed on human rights must be the least restrictive option available in the circumstances, and are only lawful as long as the need remains justifiable.[52] While restrictions on movement or interferences with privacy could therefore be justified in the name of curbing the spread of the pandemic, these measures must be lifted once the need for them is no longer apparent.

The *ICESCR* protects rights to an adequate standard of living and to the highest attainable standard of health (including access to health care services).[53] The *ICESCR* requires States Parties 'to take steps … with a view to achieving progressively the full realization of the rights recognized in the [*ICESCR*]'.[54] Under the *ICESCR*, limitations are permitted 'as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.[55] Again, the rights articulated in the *ICESCR* are critical to ensuring appropriate conditions of care within aged and health care contexts, and this extends both to specific medical responses to the pandemic and consequent impacts for healthcare services more broadly. In the early days of the COVID-19 pandemic, the United Nations special rapporteurs on human rights confirmed that:

> Everyone, without exception, has the right to life-saving interventions and this responsibility lies with the government. The scarcity of resources or the use of public or private insurance schemes should never be a justification to discriminate against certain groups of patients … Everybody has the right to health.[56]

Also relevant to the COVID-19 pandemic is the recognition in international human rights law of the finite nature of resources, and that choices to allocate limited health care services to some patients over others may be necessary. However, these choices cannot be made on discriminatory grounds, and a person's age alone would not be sufficient reason to deny them access to an ICU bed or ventilator.[57] The *ICESCR* also protects rights to employment and social security,

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inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.' For discussion, see Gostin (n 47) 256. For an analysis of these issues from a European perspective, see Audrey Lebret, 'COVID-19 Pandemic and Derogation to Human Rights' (2020) 7(1) *Journal of Law and the Biosciences* 1.

52 Office of the High Commissioner for Human Rights, *Emergency Measures and COVID-19: Guidance* (27 April 2020), 1-2.

53 *ICESCR* (n 48) arts 11, 12; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 22nd sess, Agenda Item 3, UN Doc E/C.12/2000/4 (11 August 2000) ('*General Comment No 14*').

54 *ICESCR* (n 48) art 2(1). See also Gostin (n 47) 251

55 Ibid art 4. See also Gostin (n 47) 256.

56 'No Exceptions with COVID-19: "Everyone Has the Right to Life-Saving Interventions": UN Experts Say', (Press Release, United Nations Human Rights Office of the High Commissioner, 26 March 2020) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E>.

57 Sarah Joseph, 'International Human Rights Law and the Response to the COVID-19 Pandemic' (2020) 11(2) *Journal of International Humanitarian Legal Studies* 249, 266.

and the right to participate in social and cultural activities,[58] all of which can be impacted by shut-down measures and the associated economic downturn.

In addition to these two core covenants, there are also treaties that protect the rights of particular classes of people, including the *CRPD* and the *Convention on the Elimination of All Forms of Discrimination against Women* ('*CEDAW*')[59] and *International Convention on the Elimination of All Forms of Racial Discrimination* ('*CERD*').[60] These instruments point to the need to recognise the impacts of structural and systemic discrimination or disadvantage on different groups' experiences of the pandemic and responses to it. Australia is a party to all of these treaties and is therefore obliged under international law to respect, protect and fulfil these rights for all people within its jurisdiction.

Underpinning the treaties discussed above are a number of fundamental principles, which ought to guide responses to the COVID-19 pandemic and other emergency situations. They represent both the core values that human rights law promotes through the protection of specific rights, as well as norms that shape the implementation of those protections. They can be particularly useful in complex situations where competing priorities make it difficult to discern the most human rights-compatible approach. These core values include respect for the dignity, autonomy and liberty of each individual, which are understood as the foundations of modern human rights law.[61]

In the context of developing responses to global pandemics, these principles demand that, in dealing with the health risks facing older persons, we do not overlook their agency in assessing and responding to those risks or enact policies that disproportionately restrict their liberty.[62] The fundamental principles underpinning human rights also include universality and non-discrimination, recognising that human rights belong to all people and must be guaranteed without discrimination.[63] Again, these principles have particular relevance for older persons, as they prevent the discounting of older persons' human rights simply on the basis of their age. This has a powerful resonance in relation to COVID-19, where there has been debate as to the degree to which social and economic activities should shut down in order to respond to the health crisis, which is frequently portrayed as being specifically intended to lower the risk to the older population. This then has the outcome of effectively pitting the health needs of older persons against the economic needs of younger generations who are less at risk from the health-related risks of COVID-19. Troubling arguments

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58 *ICESCR* (n 48) arts 6, 9, 15.

59 *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*').

60 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) ('*CERD*').

61 For more detail on the core values and principles underpinning a human rights-based approach, see the human rights framework developed by Lewis, Purser and Mackie (n 2) ch 3.

62 Ibid.

63 See *Universal Declaration of Human Rights* (n 45); Lewis, Purser and Mackie (n 2) 73–4, 77.

then subsequently arise, which claim that protecting older persons' lives is not an adequate justification for the economic and social costs of lock-down measures. Such arguments, however, represent a form of age-discrimination that is inconsistent with these fundamental principles of human rights.[64] They also have the potential to perpetuate ageist attitudes in the community, which contribute to other, more widespread violations of human rights.[65] As the United Nations Department of Economic and Social Affairs Programme on Ageing has noted, '[p]ublic discourses that focus on fatalities more than on infections portray COVID-19 as a disease of older people, leading to social stigma, discrimination and exacerbating negative stereotypes about older persons'.[66]

As we have argued above, the values and principles of international human rights law are directly relevant to the rights of older people in the context of the COVID-19 pandemic. However, these rights are generally articulated through treaties that have general application (such as the *ICCPR* and the *ICESCR*) or that have application to specific groups of which older people are a sub-group (such as *CEDAW*, which applies to women). To date, there is no international convention specifically addressing the rights of older people that could be used to guide the development of laws and policies that meet the needs of older people. In the next Part, we discuss the scope of domestic Australian human rights law.

## B *Australian Human Rights Law*

In Australia, only Queensland, Victoria and the ACT have enacted human rights legislation[67] (although, as a matter of international law, Australia is responsible for ensuring that all internal jurisdictions comply with its treaty obligations).[68] There are a number of features of these state and territory laws that are worth noting in relation to pandemic responses in Australia.

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64 Joseph J Amon and Margaret Wurth, 'A Virtual Roundtable on COVID-19 and Human Rights with Human Rights Watch Researchers' (2020) 22(1) *Health and Human Rights Journal* 399, 408. See also Daniele Carrieri, Fedro Alessandro Peccatori and Giovanni Boniolo, 'COVID-19: A Plea to Protect the Older Population' (2020) 19(1) *International Journal for Equity in Health* 72 ('COVID-19'); Lisa Rosenbaum, 'Facing Covid-19 in Italy: Ethics, Logistics, and Therapeutics on the Epidemic's Front Line' (2020) 382(20) *New England Journal of Medicine* 1873.

65 For a discussion on the links between ageism and human rights violations, see Lewis, Purser and Mackie (n 2) ch 5.

66 United Nations Department of Economic and Social Affairs, 'COVID-19 and Older Persons: A Defining Moment for an Informed, Inclusive and Targeted Response', *Ageing* (Web Page, 8 May 2020) <https://www.un.org/development/desa/ageing/news/2020/05/covid19/>.

67 *Human Rights Act 2019* (Qld); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic). For discussion, see Kylie Evans and Nicholas Petrie, 'COVID-19 and the Australian Human Rights Acts' (2020) 45(3) *Alternative Law Journal* 175; Michelle A Gunn and Fiona J McDonald, 'COVID-19, Rationing and the Right to Health: Can Patients Bring Legal Actions if They Are Denied Access to Care?' (2021) 214(5) *Medical Journal of Australia* 207.

68 *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN Doc A/RES/56/83 (28 January 2002, adopted 12 December 2001) annex art 4(1) ('*Responsibility of States for Internationally Wrongful Acts*').

First, the fact that only three jurisdictions have human rights law creates obvious gaps where human rights are not directly protected at the state or territory level. As discussed below in Part IV, all states and territories have anti-discrimination legislation that goes some way to protecting human rights, but this legislation is limited in terms of the protected attributes and contexts in which discrimination is prohibited.

Second, for the most part, these human rights laws only protect civil and political rights, not economic, social and cultural rights. Rights to health, housing, an adequate standard of living or social security are therefore not protected. The exception to this is the recently-enacted Queensland *Human Rights Act 2019*, which does protect the right to access health services, but which falls short of protecting the more comprehensive notion of the right to health found in international law.[69] By focussing on civil and political rights, domestic human rights law in Australia strongly focusses on 'negative' rather than 'positive' rights — it stresses governments' obligations not to interfere with liberties and freedoms, but imposes few positive obligations to support and promote the full enjoyment of human rights.

Third, the rights contained in these laws only create obligations for public entities (Parliament, government departments and private actors performing public functions);[70] they do not apply to private actors. In relation to older persons, this creates a significant gap given that the majority of aged care facilities are privately owned and operated. While under general principles of international human rights law governments are obliged to protect human rights by regulating the acts of corporations or other private entities, this is difficult to enforce domestically and, as the *Royal Commission into Aged Care Quality and Safety* found, breaches of human rights have occurred in aged care settings (even outside the context of the pandemic).[71] Furthermore, although significant government funding is dedicated to residential aged care facilities, most older Australians prefer to remain in their own homes and a large number (around one million people) receive aged-care services at home.[72] These services are delivered by a wide range of private providers, raising questions of how to ensure human rights standards are adhered to generally with homecare services and specifically how the human rights impacts of isolation can be addressed in the pandemic-era. It also highlights the need to ensure that government funding of aged care properly

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69 *Human Rights Act 2019* (Qld) s 37: '(1) [e]very person has the right to access health services without discrimination. (2) A person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.'

70 Ibid ss 9-10, 58; *Human Rights Act 2004* (ACT) ss 40–40B; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4, 38.

71 *Royal Commission into Aged Care Quality and Safety: Neglect* (Interim Report, 31 October 2019) vol 1 <https://agedcare.royalcommission.gov.au/publications/interim-report>; *Royal Commission into Aged Care Quality and Safety: Care, Dignity and Respect* (Final Report, 1 March 2021) vol 2, 91-99.

72 *Final Report Vol 1* (n 10) 24; Julie Power, 'Ageing at Home: Too Little Choice for Older Australians', *Sydney Morning Herald* (online, 16 August 2020) <https://www.smh.com.au/national/ageing-at-home-too-little-choice-for-older-australians-20200816-p55m5d.html>.

reflects the preference of most Australians to remain in their homes — a need that the Royal Commission has identified.[73]

A fourth key point to note is that human rights legislation in Australia offers few opportunities for legal action to be pursued to enforce the rights afforded. In Queensland, a complaint can be brought to the Human Rights Commission, which can conduct a conciliation conference to try to resolve the matter. Otherwise, the key enforcement mechanism is to 'piggy-back' a human rights claim onto another legal cause of action — there is no independent pathway to bring a human rights claim before a court or tribunal.[74] Without providing fully justiciable human rights, Australia's domestic legislative framework could be thought of as being more aspirational than legally enforceable. It should be noted, however, that these laws have had the effect of engaging legislatures with important questions of how to balance competing rights in responding to a complex pandemic situation.[75]

The experience of older people during the COVID-19 pandemic has highlighted some of the shortcomings in Australia's domestic protections of human rights. The layering of international and domestic human rights laws, along with the fundamental principles of human rights which underpin those laws, creates a detailed framework of obligations that can be used to assess the risks posed to individuals by pandemics and pandemic response measures, and to guide the implementation and revocation of those measures to ensure maximum enjoyment of human rights. We have seen legislatures give regard to these principles in devising and justifying many of their responses to the pandemic.

However, the lack of specific protections for older people's human rights at either the international or domestic level creates a risk that their rights will be overlooked or discounted. The COVID-19 pandemic exposed the prevalence of ageist attitudes in relation to many issues, including the question of what level of economic limitation on businesses and travel could be justified on the grounds of protecting more vulnerable members of the community. Without a dedicated international human rights treaty for older people, or specific age-based protections within domestic human rights laws, there is a risk that general human rights protections will be applied in a way that does not give adequate regard to

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73 *Final Report Vol 1* (n 10) 8, 55.

74 *Human Rights Act 2019* (Qld) s 59.

75 For example, the Commonwealth Parliamentary Joint Committee on Human Rights has been meeting regularly to scrutinise federal legislation for its impact on human rights: 'COVID-19 Legislative Scrutiny', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/COVID19_Legislative_Scrutiny>. State and territory legislation also requires that scrutiny processes be followed: see, eg, Statement of Compatibility, COVID-19 Emergency Response Bill 2020 (Qld) <https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2020/5620T638.pdf>; Human Rights Certificate, *Public Health (COVID-19) and Other Legislation Amendment Regulation 2020* (Qld) <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2020/5620T548.pdf>. For discussion, see Evans and Petrie (n 67).

older people's particular experiences. Ageist attitudes may still be present in the way that generalist protections and principles are applied.

Further, the framework of human rights laws in Australia generally requires only that legislatures and other decision-makers have regard to human rights; there are limited consequences or enforcement options if a law or regulation interferes with human rights. Although older people are covered by general human rights protections outlined above, the absence of specific protections relating to ageing and meaningful enforcement processes represents a significant gap in current laws, which should be addressed. In the following three Parts, we analyse different aspects of Australian law and evaluate their adequacy in terms of addressing the needs of older Australians during the COVID-19 pandemic. In the following Part, we continue our rights-based analysis by considering the scope and relevance of Australian anti-discrimination legislation.

## IV Ageing and Discrimination Law

Lockdowns and social distancing measures that aim to reduce the spread of disease within the community can affect the ability of individuals or groups to access goods and services. In this Part, we analyse the role of discrimination law in ensuring that access (or disruption of access) to goods and services is on a basis that is free of discrimination. As noted above, in Part III, as signatory to a range of international human rights instruments such as the *ICCPR* and *ICESR*, Australia is obliged to implement domestically its obligations under those instruments.[76] In Australia, anti-discrimination legislation has been deployed as a vehicle to implement those obligations;[77] it could be said that it puts human rights theory into practice. Analysis of how anti-discrimination law may apply in respect of COVID-19 related treatment of older Australians, however, is necessarily speculative in the absence of relevant case law guidance and will depend on the facts of the particular case. We begin in the next section by providing an overview of the legislative framework for anti-discrimination legislation in Australia.

### A *The Scheme of Australian Anti-Discrimination Legislation*

Although there is no international convention on the rights of older persons as discussed in Part III, Australian anti-discrimination law does provide protection from age discrimination. Each Australian state and territory has generic anti-discrimination or equal opportunity legislation, which also prohibits

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[76] See above n 68.

[77] See *Age Discrimination Act 2004* (Cth) s 10(7); *Disability Discrimination Act 1992* (Cth) s 12(8).

discrimination on the basis of age[78] and disability, or impairment.[79] Moreover, the Commonwealth has enacted a series of attribute-specific laws, relevantly the *Age Discrimination Act 2004* (Cth) ('*ADA*')[80] and the *Disability Discrimination Act 1992* (Cth) ('*DDA*').[81] It is axiomatic, and a corollary of the ageing human body, that older people are disproportionately affected by disability when compared with the wider Australian community.[82] While there is 'two-tiered' prohibition of discrimination at both Commonwealth and state or territory level, and choice as to jurisdiction for a complainant,[83] it is appropriate for this article to focus on the Commonwealth legislation as setting the benchmark for what is prohibited and what is authorised discriminatory conduct. The Commonwealth is, after all, the jurisdiction obliged by international law to protect human rights, and the *ADA* and *DDA* apply throughout Australia and bind even the Crown, including the Crown in right of a state.[84]

The *ADA* expressly provides that discrimination on the ground of age does not include discrimination on the ground of disability[85] — they are separate actions. An older person experiencing COVID-19-related discrimination may bring an action under either or both the *ADA* or *DDA*, depending on their personal circumstances and the nature of the discrimination.[86] An aggrieved person for the purposes of the *ADA* and the *DDA* must prove a relevant 'protected attribute'; age for the *ADA*, or disability for the *DDA*. The *ADA* contemplates that a group 'above a particular age'[87] may experience discrimination. The *DDA* defines disability widely to cover physical, intellectual, psychiatric, behavioural and sensory impairment.[88] An aggrieved person must demonstrate that the conduct they complain of has occurred in a 'protected area' of public life including

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78 *Discrimination Act 1991* (ACT) s 7(1)(b); *Anti-Discrimination Act 1977* (NSW) s 49ZYA; *Anti-Discrimination Act 1992* (NT) s 19(1)(d); *Anti-Discrimination Act 1991* (Qld) s 7(f); *Equal Opportunity Act 1984* (SA) s 85K; *Anti-Discrimination Act 1998* (Tas) s 16(b); *Equal Opportunity Act 2010* (Vic) s 6(a); *Equal Opportunity Act 1984* (WA) s 66V.

79 *Discrimination Act 1991* (ACT) s 7(1)(e); *Anti-Discrimination Act 1977* (NSW) s 49B; *Anti-Discrimination Act 1992* (NT) s 19(1)(j); *Anti-Discrimination Act 1991* (Qld) s 7(h); *Equal Opportunity Act 1984* (SA) s 76; *Anti-Discrimination Act 1998* (Tas) s 16(k); *Equal Opportunity Act 2010* (Vic) s 6(e); *Equal Opportunity Act 1984* (WA) s 66A.

80 *Age Discrimination Act 2004* (Cth) ('*ADA*').

81 *Disability Discrimination Act 1992* (Cth) ('*DDA*').

82 According to the Australian Institute of Health and Welfare, '50% of people aged 65 years and over have disability'. By comparison, '13% of people aged 15–64 years have disability': see Australian Institute of Health and Welfare, 'People with Disability in Australia' (Web Page, 2 October 2020) <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/people-with-disability/prevalence-of-disability>.

83 Note that 'double dipping' in respect of anti-discrimination complaints is barred: see, eg, *ADA* (n 80) s 12(4); *DDA* (n 81) s 13(4).

84 *ADA* (n 80) s 13(1); *DDA* (n 81) s 14(1).

85 *ADA* (n 80) s 6.

86 See *Australian Human Rights Commission Act 1986* (Cth) pt IIB for relevant procedural considerations.

87 *ADA* (n 80) s 5 (definition of 'age' example).

88 *DDA* (n 81) s 4 (definition of 'disability').

employment,[89] education,[90] goods, services and facilities,[91] access to premises[92] and the administration of Commonwealth laws and programs.[93] The conduct complained of must be discriminatory conduct within the meaning of the legislation. Both Acts prohibit direct discrimination,[94] that is, less favourable treatment on the ground of age or disability, and indirect discrimination,[95] that is, the imposition of a discriminatory requirement or condition that disproportionately disadvantages persons of a certain age or age group, or persons with a disability.

Even if a prima facie case of discrimination is proved, if the respondent can prove a relevant exemption contained in the *ADA* or *DDA*, or can prove, in the case of indirect discrimination, that the condition is reasonably imposed, then the complainant's case may nevertheless fail. Exemptions for prima facie unlawful discrimination differ for each Act. The High Court has held that what is 'reasonable' in respect of indirect discrimination is an objective test that takes into account all relevant circumstances.[96] It is a feature of the *DDA*, too, that it imposes a positive obligation to make reasonable adjustment for people with disability so as to avoid direct or indirect discrimination.[97] Similar considerations are relevant to proof of reasonableness here, as apply in respect of reasonableness for indirect discrimination.

## B *COVID-19 and Potentially Discriminatory Treatment of Older Australians*

It should be noted that older Australians have been the beneficiaries of more favourable treatment than younger Australians in the roll out of the COVID-19 vaccination program.[98] This prioritisation of older Australians over younger Australians is likely lawful under both the *ADA*, as 'positive discrimination',[99] and

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89 *ADA* (n 80) s 18; *DDA* (n 81) s 15.
90 *ADA* (n 80) s 26; *DDA* (n 81) s 22.
91 *ADA* (n 80) s 28; *DDA* (n 81) s 24.
92 *ADA* (n 80) s 27; *DDA* (n 81) s 23.
93 *ADA* (n 80) s 31; *DDA* (n 81) s 29.
94 *ADA* (n 80) s 14; *DDA* (n 81) s 5.
95 *ADA* (n 80) s 15; *DDA* (n 81) s 6.
96 *Waters v Public Transport Corporation* (1991) 173 CLR 349, 395–6 (Dawson and Toohey JJ), 383 (Deane J). While *Waters v Public Transport Corporation* interpreted the *Equal Opportunity Act 1984* (Vic), the test for reasonableness articulated in the case is applied in *DDA* (n 81) cases. For a recent example from the Full Federal Court, see *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, 267 [80] (Bromberg J, Griffiths J agreeing at 290 [179], Bromwich J agreeing at 303 [213]). As the indirect discrimination provision in the *ADA* (n 80) s 15 is drafted in substantially the same terms as the *DDA* (n 81), it is likely that should a relevant case proceed to trial, it, too, would be interpreted consistent with the approach in *Waters v Public Transport Corporation*.
97 *DDA* (n 81) ss 5(2), 6(2).
98 See Australian Government Department of Health and Aged Care, 'COVID-19 Vaccines' (Web Page) <https://www.health.gov.au/initiatives-and-programs/covid-19-vaccines>.
99 See *ADA* (n 80) s 33.

under the *DDA*, as a 'special measure',[100] for their benefit. However, examples of 'ageist' treatment of older Australians in relation to COVID-19 have been identified by the Australian Human Rights Commission ('AHRC').[101] For example, the AHRC has identified health care rationing proposals and the impact of COVID-19 responses by employers as problematic for older Australians.[102] Below we consider the relevance of anti-discrimination legislation to these areas.

### 1 *Health Care Rationing*

As the pandemic unfolded, and health service providers contemplated what they feared would be an inevitable shortage of hospital beds and ventilators, concerns were raised that hospital treatment may need to be rationed,[103] and that younger people might be given access before older people. A medical facility refusing access to an ICU bed or ventilator to a person aged over 70, for example, may amount to a case of direct discrimination on the ground of age in the protected area of goods, services and facilities. Similarly, it may be direct discrimination on the ground of disability to refuse access to an ICU bed or ventilator because a person had an underlying health condition consistent with being of an older age, such as high blood pressure or Type 2 Diabetes.

It should be noted, however, that the *ADA* s 42(3) expressly contemplates as lawful 'decision[s] relating to health goods or services or medical goods or services' if 'taking … age into account in making the decision is reasonably based on evidence, and professional knowledge, about the ability of persons of the … [relevant] age to benefit from the goods or services'.[104] The evidence that may be relied on for proof of this exemption is 'evidence that was reasonably available at the time the decision was made'.[105] Despite commentary suggesting that rationing is illegitimate, immoral and 'discriminatory',[106] this exemption suggests a possible defence to any allegation of discriminatory service rationing by a medical facility, especially had it been necessary in the early 'hurly burly' of the pandemic when compelling evidence quickly emerged that COVID-19

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100 See *DDA* (n 81) s 45.

101 See Kay Patterson, 'Ageism and COVID-19', *Australian Human Rights Commission* (Web Page, 5 May 2020) <https://humanrights.gov.au/about/news/ageism-and-covid-19>.

102 Ibid.

103 Ibid; Xavier Symons, 'Rationing Care to Cope with COVID-19 Should Never be Based on Age Alone', *Sydney Morning Herald* (online, 13 March 2020) <https://www.smh.com.au/national/an-icu-age-limit-rationing-lifesaving-care-to-cope-with-covid-19-is-an-ethical-minefield-20200313-p549qc.html>.

104 *ADA* (n 80) s 42(3). For further discussion of rationing, see Gunn and McDonald (n 70).

105 *ADA* (n 80) s 42(4).

106 See Popescu and Marcoci (n 35).

mortality rates increased with age.[107] We are fortunate in Australia that such tough decisions have not yet had to be made.[108]

The *DDA* does not have an equivalent exemption to *ADA* s 42 but does provide that it is not unlawful to discriminate in the areas covered by Division 2 of the Act, which includes goods, services and facilities, if to avoid the discrimination would impose unjustifiable hardship on the service provider.[109] A shortage of beds and equipment may trigger a claim of unjustifiable hardship. Proof would entail a weighing of the detriment to the complainant of being excluded from necessary health care (death?), against the benefit to other COVID-19 patients who would be given preferential access to health care (life?), and the effect of the disability of the complainant in increasing the likelihood of death from COVID-19 even with access to care.

### *2 Employment*

The potential for discrimination claims in the protected area of employment has also emerged as employers have taken steps to balance the need to minimise the risk of infection to staff against the need to maintain their business operations.

Circumstances surrounding individual workplaces and the variable nature of the work conducted at those workplaces makes it difficult to speculate on how any discrimination action may be decided. It should be noted, though, that where everyone is required to work from home, it may be difficult to prove direct discrimination — less favourable treatment. If only older workers or workers with disability are excluded, however, a direct discrimination claim may have better prospects of success. This is particularly the case where age is the ground for exclusion. Here age appears to be used as a proxy for objective vulnerability to infection and death. As noted above, an older person may be healthier than a much younger person, and objectively at lower risk of infection. A claim of direct disability discrimination may, of course, be countered by the 'defence' of unjustifiable hardship,[110] which would require a weighing of pros and cons and costs of inclusion and exclusion in the relevant work context. Government mandating of social distancing may also be a relevant circumstance to be taken into account in the unjustifiable hardship enquiry.

A requirement that a person must attend the workplace may be reasonable or unreasonable depending on the circumstances. If it is demonstrably possible to

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107 See, eg, Amitava Banerjee et al, 'Estimating Excess 1-Year Mortality Associated with the COVID-19 Pandemic According to Underlying Conditions and Age: A Population-Based Cohort Study' (2020) 395(10238) *Lancet* 1715.

108 See, for further information on health care rationing, Mohammed R Moosa and Valerie A Luyckx, 'The Realities of Rationing in Health Care' (2021) 17(7) *Nature Reviews Nephrology* 435.

109 *DDA* (n 81) ss 24, 29A. Note that in respect of Commonwealth anti-discrimination legislation, the unjustifiable hardship exemption is a feature particular to the *DDA* (n 81) and is not available under other Commonwealth Acts, including the *ADA* (n 80), to exempt treatment on the basis of other protected attributes, including age.

110 Ibid s 21B.

perform regular work from home it may be difficult to prove that a requirement of attendance at work is reasonable. Some jobs, however, cannot be performed remotely and, in those instances, even though an older person or a person with disability may choose to resign in order to protect their health, a requirement of attendance at the workplace may be reasonable. Both the *ADA* and the *DDA* also provide a possible defence for employers where a complainant cannot fulfil the 'inherent requirements' of the job they were hired to perform.[111] In that situation, an employer may be able to legitimately terminate the employment.

## C *Impediments to a Discrimination Claim*

While Australian law provides important protections from discrimination in access to goods and services, including protection from age-related discrimination, as we have argued above, it may provide limited protection in some situations in the context of a pandemic.

Even where there may be good prospects of a successful discrimination claim, it may be impractical or even impossible to proceed. A person who has been denied an ICU bed and a ventilator may have died and lost any opportunity to sue, or they may be too ill to bring a claim. Even though representative actions are available in such a situation,[112] and an interim injunction restraining a rationing decision may potentially be ordered,[113] in such a traumatic set of circumstances, legal action may be too late or not contemplated as a priority. While those who have been the victim of discrimination at work may consider suing, evidence suggests that most will not. A survey conducted by the Australian Human Rights Commission in July and August 2018 found alarming levels of age discrimination against older workers[114] — even without a pandemic — but low numbers of complaints of discrimination proceed to hearing. All in all, as a vehicle for protecting the rights and freedoms of older people, Australian anti-discrimination legislation is limited in its efficacy. Indeed, the relevant Commonwealth legislation promises to remove discrimination only 'as far as possible' and to ensure equal protection of rights only 'as far as practicable'.[115]

The COVID-19 pandemic has also had a significant impact on older people in terms of their social interaction. In the following Part we analyse the implications of social isolation for older people — a challenge that existed before the pandemic but that has been exacerbated by it — and the role that technology can play in supporting social interaction and legal decision-making during a pandemic.

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111 *ADA* (n 80) s 18(4); *DDA* (n 81) s 21A.

112 *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c).

113 Ibid s 46PP.

114 'Employing Older Workers (2018)', *Australian Human Rights Commission* (Web Page, 31 October 2018) <https://humanrights.gov.au/our-work/age-discrimination/publications/employing-older-workers-2018>.

115 See *ADA* (n 80) s 3(a),(b); *DDA* (n 81) s 3(a),(b).

## V Social Isolation, Technology and the Law

The concept of isolation (or 'iso') is unavoidable in the newly developed coronavirus lexicon, which has also seen the emergence of terms such as 'boomer remover' (used mainly by younger generations, again serving as an example of the inherent ageism, but also intergenerational tension, that is pervasive throughout society).[116] Isolation is mandated for those showing symptoms for COVID-19. At times it has also been recommended for 'older' people,[117] and in some jurisdictions aged-care facilities have gone into lockdown, with the associated social isolation for older people that accompanies such a measure.[118]

The effects of isolation are particularly important for older people given that ageing (and the amorphous concept of 'healthy' ageing) can be impacted by a person's exposure to social change, including through isolation.[119] Approximately one third of older Australians live alone.[120] Thus, the measures designed to protect from COVID-19 may actually have unintended negative consequences. The impact of isolation, and associated loneliness, on older people therefore has potentially substantial implications for their human rights.[121]

Even without a pandemic, older people can, and do, experience social exclusion, which can be for prolonged periods or more episodic in nature. Social exclusion is a complex process that generally involves the denial of goods and services as well as resources that are available to other cohorts within society more generally and which also endangers the human rights of older persons.[122] This can occur for a number of reasons including, for instance, physical, health,

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116 Kate Burridge and Howard Manns, '"Iso", "Boomer Remover" and "Quarantini": How Coronavirus is Changing Our Language', *The Conversation* (online, 12 May 2020) <https://theconversation.com/iso-boomer-remover-and-quarantini-how-coronavirus-is-changing-our-language-136729>. See also Brooke and Jackson (n 30).

117 See eg, Rob Harris and Fergus Hunter, 'Elderly Australians Told to Self-Isolate at Home, Outdoor Gatherings Restricted to Two People', *Sydney Morning Herald* (online, 29 March 2020) <https://www.smh.com.au/politics/federal/elderly-australians-told-to-self-isolate-at-home-outdoor-gatherings-restricted-to-two-people-20200329-p54f1g.html>.

118 Claire Moodie, 'Aged Care Operators Defend Coronavirus Lockdown as Premier, Prime Minister Urge Facilities to Relax Visit Bans', *ABC News* (online, 23 April 2020) <https://www.abc.net.au/news/2020-04-23/aged-care-providers-defend-coronavirus-lockdown-amid-criticism/12177096>.

119 United Nations Department of Economic and Social Affairs, 'Health Inequalities in Old Age' (Briefing Paper, April 2018) 1 <https://www.un.org/development/desa/ageing/wp-content/uploads/sites/24/2018/04/Health-Inequalities-in-Old-Age.pdf>; *World Population Ageing 2015: Report* (n 15) 90–1; Emilie Courtin and Martin Knapp, 'Social Isolation, Loneliness and Health in Old Age: A Scoping Review' (2017) 25(3) *Health and Social Care in the Community* 799.

120 Senator Anne Ruston, 'Supporting Isolated Senior Australians to Stay Connected' (Media Release, Minister for Families and Social Services, 28 May 2020) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7363490%22>.

121 World Health Organization, *World Report on Ageing and Health* (n 2) 74. See also Lewis, Purser and Mackie (n 2) 100.

122 Kieran Walsh, Thomas Scharf and Norah Keating, 'Social Exclusion of Older Persons: A Scoping Review and Conceptual Framework' (2017) 14(1) *European Journal of Ageing* 81, 83; Ruth A Levitas et al, *The Multi-Dimensional Analysis of Social Exclusion* (Report, Department for Communities and Local Government, January 2007) 9, cited in Lewis, Purser and Mackie (n 2) 99.

financial, social and structural considerations, and can result from, or be reinforced by, ageism. Social exclusion can have the effect of devaluing the contributions and potential contributions of older persons to their communities through limiting the ability to participate.[123] As Walsh et al have identified, social exclusion can negatively impact both the quality of life of the older person and the cohesiveness of the local community.[124]

Significantly, social exclusion, or isolation, can be linked to depression, which can be a factor in the assessment of capacity.[125] It is also a key risk factor for elder abuse, including the exertion of any undue influence.[126] The ageism prevalent in society further reinforces the opportunities for elder abuse to occur given that older persons are frequently invisible and devalued, with the same attitudes being displayed and/or taken advantage of by abusers. This was the case pre-pandemic and thus the effects of social exclusion — or isolation — have only been heightened by the current pandemic.

Kornfeld-Matte, the former Independent Expert on the Human Rights of Older Persons, has highlighted the nexus between social exclusion (and isolation) and, significantly in the context of COVID-19, the right to the highest attainable standard of health, including mental health.[127] As Kornfeld-Matte articulates, inclusion requires equal access to all goods, services and resources, with support given where necessary to facilitate the full participation of older persons (where they choose to do so) in all aspects of social life, including in the receipt of healthcare as well as, for example, accessing public spaces and buildings, and shopping.[128] Advancing a person's ability to genuinely participate in the social and cultural activities of their local community is therefore fundamental to respecting an individual's autonomy and dignity.

Ensuring that facilities and services are available for the general population on an equal basis that responds to individual needs is especially significant in the COVID-19 era. This speaks, not only to the need to address social exclusion resulting from isolation for older persons, and the associated health and mental health effects, but also to the need to keep the discriminatory effects of ageism at the front of our minds, particularly in relation to any rationing of care debates, as discussed in Part IV.

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123 Kornfeld-Matte (n 38) [25], cited in Lewis, Purser and Mackie (n 2) 99.

124 Walsh, Scharf and Keating (n 122) 83; Levitas et al (n 122) 9, cited in Lewis, Purser and Mackie (n 2) 99.

125 Jennifer Moye, Daniel C Marson and Barry Edelstein, 'Assessment of Capacity in an Aging Society' (2013) 68(3) *American Psychologist* 158, 162; Lewis, Purser and Mackie (n 2) 146.

126 Briony Dow and Melanie Joosten, 'Understanding Elder Abuse: A Social Rights Perspective' (2012) 24(6) *International Psychogeriatrics* 853, 854; Lewis, Purser and Mackie (n 2) 99.

127 Rosa Kornfeld-Matte, *Report of the Independent Expert on the Enjoyment of All Human Rights by Older Persons*, 27th sess, Agenda Item 3, UN Doc A/HRC/27/46 (24 July 2014); United Nations Committee on Economic Social and Cultural Rights, *General Comment No 4: The Right to Adequate Housing (Art. 11(1) of the Covenant)*, UN ESCOR, 6th sess, UN Doc E/1992/23 (13 December 1991); *General Comment No 14* (n 53); Lewis, Purser and Mackie (n 2) 100.

128 Kornfeld-Matte (n 38) [70], cited in Lewis, Purser and Mackie (n 2) 100.

Connected to this is the need to provide for culturally and ethnically appropriate initiatives, which should ideally foster the participation of members of specific cultural or ethnic groups to ensure authentic co-design and ongoing evaluation. The Political Declaration and Madrid International Plan of Action on Ageing recognises the need for such approaches respecting different cultural and religious traditions.[129] This is especially significant when viewed in terms of COVID-19 and the impacts of mandated isolation on older people from culturally and linguistically diverse backgrounds. It is important to note here, for example, the call for multilingual COVID-19 resources to effectively communicate to non-English speaking older people who may be at greater risk of contracting COVID-19 through a lack of understanding.[130]

The impact of isolation on older Australians, which has been so effectively highlighted by the pandemic, is so significant, in fact, that the Federal Government launched two new targeted initiatives in an attempt to combat loneliness (and its effects) arising from isolation.[131] Almost $5 million will be dedicated to expanding 'Friend Line', a national telephone support service. A further $1 million has been awarded in grants to 215 community organisations to provide digital devices — for instance, mobile phones and laptops — to 'at-risk' older people.[132] While any measure attempting to address the effects of isolation, both during and beyond the pandemic, is welcome, it is interesting that technology was seen as the 'solution' to addressing isolation and the resultant risk of social exclusion of older people. The objective to address isolation fulfils a human-rights-based approach in promoting participation and autonomy (to a degree). However, the use of any technological devices needs to be accessible and affordable. While the devices can incur a significant initial outlay, which these government initiatives are designed to address, there are ongoing and not insignificant associated costs in terms of other living expenses and, for example, the current rate of the aged pension. This is also assuming that reliable telephone and internet services are available, which may not be the case, especially in geographically remote areas or for those on lower-incomes.[133] Educational, social and cultural factors can also influence the uptake of such devices and thus need to be considered, including respecting an individual's wish to engage, or not to engage, with technology on an individual level representative of that person's

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129 United Nations, 'Political Declaration and Madrid International Plan of Action on Ageing' (Declaration and Plan of Action, Second World Assembly on Ageing, 8–12 April 2002) [115].

130 Tasha Wibawa, 'Push for Multilingual COVID-19 Resources to Help Elderly People Who Don't Speak English', *ABC News* (online, 21 March 2020) <https://www.abc.net.au/news/2020-03-21/coronavirus-information-limited-language-cald-australia/12063104>.

131 Ruston (n 120).

132 Ibid.

133 Bridget Lewis et al, Submission to Australian Human Rights Commission, *Human Rights and Technology Issues Paper* (2 October 2018) 12.

level of comfort.[134] Older people may thus experience a 'double burden of social and digital exclusion'.[135]

One example in a legal context where technology has been used in an attempt to address the effects of pandemic-related social isolation is in the area of wills and estate planning more broadly. The pandemic has produced an increased focus on mortality. The need for isolation, social distancing, remote working arrangements and restrictions on movement presented challenges for compliance with the traditional formalities required for valid will-making, notably the requirement for two adults to be 'in the physical presence of the testator' with respect to witnessing or attesting the testator's signature.[136] Valid witnessing of other documents frequently employed in estate planning, such as enduring powers of attorney ('EPAs'), has also been made more difficult in the light of social isolation and other restrictions imposed as a result of COVID-19. Given the significance of the impact on will-making and executing EPAs, emergency measures were introduced in many jurisdictions internationally, including in Australia, to enable electronic witnessing to facilitate the valid execution of testamentary and substitute decision-making documents during the pandemic.[137] Queensland, for instance, also restricted the witnessing role to specific categories of witness, such as a lawyer, and included a sunset clause for the emergency provisions.[138] The emergency measures in relation to will-making and executing enduring documents in Queensland expired on 1 July 2021.

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134 Jessica Francis et al, 'Aging in the Digital Age: Conceptualizing Technology Adoption and Digital Inequalities' in Barbara Barbosa Neves and Frank Vetere (eds), *Ageing and Digital Technology: Designing and Evaluating Emerging Technologies for Older Adults* (Springer, 2019) 35; 'Australian Digital Inclusion Index', *Digital Inclusion Index* (Web Page) <https://digitalinclusionindex.org.au/>; Lewis, Purser and Mackie (n 2) ch 4.

135 Alexander Seifert, Shelia R Cotten and Bo Xie, 'A Double Burden of Exclusion? Digital and Social Exclusion of Older Adults in Times of COVID-19' (2021) 76(3) *Journals of Gerontology: Social Sciences* e99, e99.

136 Bridget J Crawford, Kelly Purser and Tina Cockburn, 'Wills Formalities in a Post-Pandemic World: A Research Agenda' (2021) *University of Chicago Legal Forum* 93, 93, 111–121 ('Wills Formalities in a Post-Pandemic World'); Kelly Purser, Tina Cockburn and Bridget J Crawford, 'Wills Formalities Beyond COVID-19: An Australian-United States Perspective' (2020) 5 *University of New South Wales Law Journal Forum* 1, 1–14 ('Wills Formalities Beyond COVID-19'). On the traditional role of the formalities in will-making, see, eg, Kelly Purser and Tina Cockburn, 'Wills Formalities in the Twenty-First Century: Promoting Testamentary Intention in the Face of Societal Change and Advancements in Technology: An Australian Response to Professor Crawford' [2019] (4) *Wisconsin Law Review Forward* 46; Bridget J Crawford, 'Wills Formalities in the Twenty-First Century' [2019] (2) *Wisconsin Law Review* 269, 271; David Norton and Reid Kress Weisbord, 'COVID-19 and Formal Wills' [2020–2021] 73 *Stanford Law Review Online* 18, 18–27.

137 *Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020* under the *Electronic Transactions Act 2000* (NSW); *COVID-19 Emergency Response Act 2020* (Qld); *Justice Legislation (COVID-19 Emergency Response — Documents and Oaths) Regulation 2020* (Qld); Supreme Court of Queensland, *Amended Practice Direction No 10 of 2020: Informal Wills/COVID-19*, 3 November 21. See also Purser, Cockburn and Crawford, 'Wills Formalities Beyond COVID-19' (n 136); Crawford, Purser and Cockburn, 'Wills Formalities in a Post-Pandemic World' (n 136).

138 *COVID-19 Emergency Response Act 2020* (Qld); *Justice Legislation (COVID-19 Emergency Response — Documents and Oaths) Regulation 2020* (Qld) s 5.

In relation to valid will-making, the Australian Council of Human Rights Authorities ('ACHRA') notes that there has been a reported increase in the number of requests by older people for legal assistance to make a will since the onset of the pandemic given the heightened 'family and financial pressure[s]'.[139] ACHRA further highlights the need to ensure that any testamentary instruments 'are truly reflective of the testator's wishes'.[140] Such a comment highlights the necessity not only of fulfilling the formal requirements to make a valid will, but also the mental requirements, particularly issues of capacity and its assessment, knowledge and approval, as well as the absence of suspicious circumstances and undue influence.[141]

The restriction of eligible witnesses to certain categories, such as lawyers, was designed, in part, to address some of these concerns, particularly in relation to attempting to ensure satisfactory capacity assessments and in identifying elder financial abuse.[142] The effectiveness of such measures remains to be seen, however, especially considering the difficulties faced with satisfactorily assessing capacity under 'normal conditions', let alone during and post-pandemic.[143] The restriction of witnesses to eligible categories also raises issues of access to justice — that is, the ability to both access and afford appropriate advice.[144] Pre-pandemic, older persons in regional, and especially rural and remote, areas, may not have had 'easy' access to a solicitor. The restrictions arising as a result of the pandemic heighten these issues, although the use of virtual witnessing may be suggested as a solution, both during and post-pandemic. However, as discussed above, this is predicated upon having the means to access quality internet and the appropriate devices.[145] Furthermore, technology does not necessarily address broader challenges for wills and estate planning, particularly in relation to ensuring the mental elements necessary for, for example, executing a valid will.[146]

As the discussion above indicates, technology can help to address social isolation during the pandemic. In addition, as the wills and estate planning example shows, measures such as virtual witnessing of documents may assist older people — and indeed people of all ages — to manage important aspects of their lives during periods of social isolation. However, technology is unlikely to provide a total solution to the issues discussed above and should not be blindly

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139 Australian Council of Human Rights Authorities, 'Statement: April 2020' (28 April 2020) <https://antidiscrimination.nsw.gov.au/anti-discrimination-nsw/about-us/news/2020/australian-council-of-human-rights-authorities-statement---april.html>.

140 Ibid.

141 On these, see, eg, *Nicholson v Knaggs* [2009] VSC 64.

142 Purser, Cockburn and Crawford, 'Wills Formalities Beyond COVID-19' (n 136) 9.

143 On capacity assessment in this context see, eg, Kelly Purser, *Capacity Assessment and the Law: Problems and Solutions* (Springer, 2017); Purser, Cockburn and Crawford 'Wills Formalities Beyond COVID-19' (n 136).

144 Purser, Cockburn and Crawford, 'Wills Formalities Beyond COVID-19' (n 136) 1.

145 Ibid 10.

146 Ibid 13.

assumed to do so without first establishing a relevant evidence-base.[147] Following the pandemic, it will be important to critically assess all initiatives introduced during the pandemic in response to the effects of social isolation.

As is clear from the discussion above, the COVID-19 pandemic has had a significant impact on the lives of older Australians. Vaccines and treatments for COVID-19 will play an important role in enabling the easing of social distancing and other restrictions. Given the increased risk to older people of severe disease and mortality from COVID-19, including older people in medical research of vaccines and treatments will be important.[148] In the following Part we analyse the legal frameworks in Australian law for conducting research with older people.

## VI Conducting COVID-19 Research with Older People

There has been a global race to research the origins, physiological trajectory, and the best forms of symptomatic management of COVID-19. As at July 2022, in addition to vaccines already in use, there were over 168 possible vaccines under clinical evaluation (and over 198 in preclinical evaluation)[149] and many other treatments now being investigated. Much of this biomedical research, all aimed at minimising the harms of the pandemic in the human population, requires people to act as research participants. In this Part, the law on capacity to consent and substitute decision-making is examined in the context of COVID-19 research. Given the disproportionate effects of COVID-19 on older people, it is likely that the research participants sought will include a number of older people, some of whom will have lost decision-making capacity. We examine the sometimes competing human rights issues that need to be considered when there is a request to include an older person in medical research related to COVID-19 — particularly participation in clinical trials and experimental health care to treat COVID-19.

### A *Human Rights in Research*

In the medical research context, tensions exist between protecting against harm and providing potentially vulnerable participants with a 'voice' to allow altruistic participation.[150] This is unsurprising given the historical atrocities that have been carried out against the most vulnerable groups in society in the name of

147 Ibid 11–13; Crawford, Purser and Cockburn, 'Wills Formalities in a Post-Pandemic World' (n 136).

148 Sarah J Richardson et al, 'Research with Older People in a World with COVID-19: Identification of Current and Future Priorities, Challenges and Opportunities' (2020) 49(6) *Age and Ageing* 901.

149 World Health Organization, *COVID-19 Vaccine Tracker and Landscape* (Report, 19 July 2022) <https://www.who.int/publications/m/item/draft-landscape-of-covid-19-candidate-vaccines>.

150 See Adrian Treloar and Claudia Dunlop, 'Research on Patients with Dementia' in Charles Foster, Jonathan Herring and Israel Doron (eds), *The Law and Ethics of Dementia* (Hart Publishing, 2014) 169, 169–75 (in the context of people with dementia).

advancing science.[151] While older people as a group should not simply be categorised as 'vulnerable',[152] the older person with COVID-19 surely can. With no cure, and significant morbidity and mortality, older people with COVID-19 are likely to be scared, vulnerable and physically isolated from friends and family. In this context, the question of how to involve such a person in medical research and maintain their human rights is an important one. Here, the focus is on the legal position of an older Australian with COVID-19 who has diminishing or else lost decision-making capacity, but who had previously expressed a wish to participate in research. Can such a person participate in COVID-19 medical research and, if so, in what circumstances?

Legally, there are a variety of ways in which a person who has declining decision-making capacity, or who has lost that capacity entirely, can be authorised to take part in research. These may include advance consents (made prior to the loss of decision-making capacity) in the form of an advance care directive or, more commonly, substituted consent from a legally recognised substitute decision-maker. Differences arise in the law regarding substitute decision-making across Australia and the national ethical guidelines for research produced by the National Health and Medical Research Council (NHMRC) need to be adhered to by human research ethics committees (HRECs) approving research and researchers themselves.[153]

Currently, as research is urgently needed and collaboration with large data sets is likely to yield the best results, there is a strong utilitarian argument to involve as many participants as possible in research. However, in Australia, differing laws may provide a significant barrier to this type of rapid research.

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151 See, eg, James H Jones, 'The Tuskegee Syphilis Experiment' in Ezekiel J Emanuel et al (eds), *The Oxford Textbook of Clinical Research Ethics* (Oxford University Press, 2008) 86, 94; Thomas R Frieden and Francis S Collins, 'Intentional Infection of Vulnerable Populations in 1946–1948: Another Tragic History Lesson' (2010) 304(18) *JAMA* 2063.

152 See Part II above.

153 National Health and Medical Research Council, *National Statement on Ethical Conduct in Human Research: 2007 (Updated 2018)* (Statement, 2018) <https://www.nhmrc.gov.au/about-us/publications/national-statement-ethical-conduct-human-research-2007-updated-2018> ('*National Statement on Ethical Conduct*'). See also National Health and Medical Research Council, 'COVID-19: Guidance on Clinical Trials for Institutions, HRECs, Researchers and Sponsors', *Information for the Health and Medical Research Sector in Response to the COVID-19 Pandemic* (Statement) <https://www.nhmrc.gov.au/research-policy/COVID-19-impacts#download>. For discussion of these guidelines in the context of COVID-19 medical research, see Ian Freckelton, 'Clinical Research without Consent: Challenges for COIVD-19 Research' (2020) 28(1) *Journal of Law and Medicine* 90.

## B *Capacity to Consent: The Older Person with COVID-19*

### 1 *Direct Consent and Supported Decision-Making*

Some older people with COVID-19 will be capable of making their own decisions. Just because a person may have a particular condition, this does not automatically mean they lack decision-making capacity. This much is legally uncontroversial, although in practice, ingrained bias, ageism and other factors can lead people (including researchers) to make assumptions about an older person's decision-making capacity — particularly where they have a debilitating condition.[154] Any person with COVID-19 who retains decision-making capacity is able to decide whether they participate in medical research.

Some people with COVID-19 may have declining or fluctuating capacity due to their symptoms or pre-existing co-morbidities. In these circumstances, rather than assume an inability to make decisions, supported decision-making may help to extend that individual's decision-making capacity and autonomy. The *CRPD* imposes duties on States to change their law and practice to recognise supported decision-making.[155] This concept aims to support people with cognitive impairment to continue to make their own decisions. While it has no fixed definition, supported decision-making is part of a process undertaken prior to any permitted determination of incapacity and turning to a substitute decision-maker.[156] When practised, this process more fully respects the rights of adults who can be supported to make decisions. While the notion of supported decision-making is well known in the human rights literature, how that concept should operate in the research context is less well explored.[157]

Victoria is the only jurisdiction that recognises a legally appointed supporter[158] (despite calls from most law reform commissions to implement this in other Australian jurisdictions).[159] Queensland has also incorporated principles that require attempts at supported decision-making before turning to a substitute decision-maker.[160] In theory, being able to appoint a medical support

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154 Megan S Wright, 'Dementia, Autonomy, and Supported Healthcare Decisionmaking' (2020) 79(2) *Maryland Law Review* 257, 273–7 (in the context of dementia).

155 *CRPD* (n 42) art 12; Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, UN Doc CRPD/C/GC/1 (19 May 2014, adopted 11 April 2014).

156 Shih-Ning Then et al, 'Supporting Decision-Making of Adults with Cognitive Disabilities: The Role of *Law Reform Agencies*' (2018) 61 *International Journal of Law and Psychiatry* 64, 64–75.

157 Nola M Ries, Elise Mansfield and Rob Sanson-Fisher, 'Ethical and Legal Aspects of Research Involving Older People with Cognitive Impairment: A Survey of Dementia Researchers in Australia' (2020) 68 *International Journal of Law and Psychiatry* 101534 (who make this comment in relation to participation in dementia research).

158 *Medical Treatment Planning and Decisions Act 2016* (Vic) pt 3 div 3; *Powers of Attorney Act 2014* (Vic) pt 7; *Guardianship and Administration Act 2019* (Vic) pt 4.

159 Then et al, (n 156) 64–75; Tasmanian Law Reform Institute, *Review of the* Guardianship and Administration Act 1995 *(Tas)* (Final Report No 26, December 2018).

160 *Guardianship and Administration Act 2000* (Qld) s 11B(3) (General Principle 10); *Powers of Attorney Act 1998* (Qld) s 6C (General Principle 10).

person — as in Victoria — may mean access to greater individualised assistance to understand and make decisions about participating in research. However, empirical evidence demonstrating this benefit is lacking.

### 2 *Substituted Consent — Making Decisions in Accordance with an Older Person's Preferences*

One mechanism whereby an older person with COVID-19 who lacks decision-making capacity may become a research participant is when authorisation is provided by a substitute decision-maker. The NHMRC *National Statement on Ethical Conduct in Human Research: 2007 (Updated 2018)* anticipates substitute decision-making occurring on behalf of some research participants.[161] Here, the focus is on substitute decision-makers appointed by the person prior to a loss of decision-making capacity (eg enduring attorneys, enduring guardians) and default decisions-makers (eg statutory health attorneys, persons responsible, medical treatment decision makers, etc).

### 3 *Substitute Decision-Maker Appointed by the Person with COVID-19*

Most jurisdictions in Australia provide for a person with decision-making capacity to self-appoint a substitute decision-maker (eg enduring attorneys, enduring guardians), who is empowered to make decisions on that person's behalf during periods when they lack decision-making capacity. Relevantly in some jurisdictions, a substitute decision-maker may be appointed with authority to make medical decisions including participation in medical research.

In Victoria, Western Australia and the ACT, the appointment of substitute decision-makers is dealt with explicitly by legislation.[162] Appointed substitute decision-makers with authority to make research decisions are required to consider a range of factors before making a decision.[163] Relevant to the COVID-19 pandemic, appointed decision-makers can make research decisions including participation in clinical trials or experimental health care.[164]

In other Australian jurisdictions, the situation is more complex with different constraints on appointed substitute decision-makers and different pathways for authorising participation in medical research depending on whether

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161 *National Statement on Ethical Conduct* (n 153) chs 4.4–4.5.

162 *Powers of Attorney Act 2006* (ACT) pt 4.3A; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 75; *Guardianship and Administration Act 1990* (WA) pt 9E.

163 *Powers of Attorney Act 2006* (ACT) s 41B–41D; *Medical Treatment Planning and Decisions Act 2016* (Vic) s 77; *Guardianship and Administration Act 1990* (WA) pt 9E div 2.

164 This is sometimes referred to as 'health care that has not yet gained the support of a substantial number of practitioners in that field': *Guardianship and Administration Act 1990* (WA) s 3AA(2)(c). See also *Powers of Attorney Act 2006* (ACT) s 41A(2)(a)(i) (definition of 'experimental health care'). In Victoria, a medical research procedure includes 'procedure[s] carried out … as part of a clinical trial': *Medical Treatment Planning and Decisions Act 2016* (Vic) s 3(1)(a) (definition of 'medical research procedure').

the research is classified as a clinical trial or experimental health care. Both may be relevant to COVID-19 research. Furthermore, in some jurisdictions, medical research is only able to be authorised if it comes within the ambit of general health care.

### *(a) Clinical Trials*

In NSW and Queensland, if the research is a clinical trial with human research ethics approval, specific approval from the relevant Civil and Administrative Tribunal is required before participants who lack capacity can be recruited.[165] Once this approval is given, a substituted decision-maker appointed in relation to health care can generally provide consent on behalf of a proposed participant to participate in that clinical trial.[166] A similar situation exists in the Northern Territory but, unlike NSW and Queensland, there appears to be no need for tribunal approval. Instead, an 'approved clinical research' is carved out of the definition of restricted health care allowing an appointed decision-maker to authorise participation.[167]

### *(b) Experimental Health Care*

In these three jurisdictions, different authorisation pathways exist for health care that are experimental or 'new health care of a kind that is not yet accepted as evidence-based, best practice health care by a substantial number of health care providers specialising in the relevant area of health care'. This type of research is also relevant to COVID-19 research where there is a limited and emerging, established evidence-base.

In NSW, this pathway is classified as 'special treatment' and can only initially be consented to by the NSW Tribunal, although the Tribunal can give authority for subsequent consent to a substitute decision-maker.[168] A similar situation exists in Queensland regarding 'special medical research or experimental health care'.[169]

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165 *Guardianship and Administration Act 2000* (Qld) s 74C; *Guardianship Act 1987* (NSW) pt 5 div 4A. For a recent case brought before the NSW Civil and Administrative Tribunal for authorisation to conduct a clinical trial related to COVID19 treatment see *Re STC3141* [2020] NSWCATGD 16, discussed in Freckelton (n 153) 103-106.

166 However, the NSW Tribunal can choose to retain this function: *Guardianship Act 1987* (NSW) s 45AB.

167 See *Advance Personal Planning Act 2013* (NT) s 25; *Advance Personal Planning Regulations 2014* (NT) reg 4. Note, guardians appointed by the tribunal in the Northern Territory are not authorised to consent to restricted health matters including health care provided for medical research purposes or new health care of a kind that is not yet accepted as evidence-based, best practice health care by a substantial number of health care providers specialising in the relevant area of health care: *Guardianship of Adults Act* (NT) ss 8(d)–(e), 23(2); *Guardianship of Adults Regulations 2016* (NT) reg 3(a).

168 *Guardianship Act 1987* (NSW) ss 45(3), 45A.

169 *Guardianship and Administration Act 2000* (Qld) ss 68, 72, 74.

In the Northern Territory, a substitute decision-maker cannot make these types of decisions and the Tribunal cannot empower them to provide subsequent consent in the same way.[170] The Tribunal's power to authorise research where it cannot be construed as a 'health care action' also seems limited.[171]

### *(c) When Research is Not Mentioned in Legislation*

In South Australia and Tasmania, the legislation does not mention medical research. Therefore, for a substitute decision-maker to lawfully consent on behalf of an adult who lacks capacity to consent to participation in COVID-19 related research, that research must be categorised as a form of 'health care'.[172] A substitute decision-maker in South Australia would need to try to make a decision that reflects what the person would have decided if they had capacity, whereas in Tasmania they would need to be satisfied that the research would be in the person's best interests.[173] Current Tasmanian legislation has led to uncertainty regarding who can authorise participation in research and in what circumstances.[174] For example, it could be argued that participation in a COVID-19 clinical trial or in experimental health care may fall within the broad ambit of making a medical decision on behalf of the person who lacks decision-making capacity. COVID-19 is a relatively new condition and treatment options are still developing, with much experimentation in management occurring globally. However, this claim may seem disingenuous — particularly in phase 0/1 clinical trials where benefit is not anticipated or very rare.

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170 *Advance Personal Planning Act 2013* (NT) s 25(2)(d); *Advance Personal Planning Regulations 2014* (NT) reg 4.

171 *Advance Personal Planning Act 2013* (NT) ss 3, 44. (Note, s 3 defines the following terms: '"health care action" for an adult, means commencing, continuing, withholding or withdrawing health care for the adult'; '"health care" means health care of any kind, including: (a) anything that is part of a health service, as defined in section 5 of the Health Practitioner Regulation National Law; and (b) the removal of tissue from a person's body in accordance with Part 2 of the *Transplantation and Anatomy Act 1979*').

172 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14(1): definition of 'health care' 'means any care, service, procedure or treatment provided by, or under the supervision of, a health practitioner for the purpose of diagnosing, maintaining or treating a physical or mental condition of a person'; *Guardianship and Administration Act 1995* (Tas) s 3: definition of 'medical or dental treatment' includes '(a) medical treatment (including any medical or surgical procedure, operation or examination and any prophylactic, palliative or rehabilitative care) normally carried out by, or under, the supervision of a medical practitioner; or (b) dental treatment (including any dental procedure, operation or examination) normally carried out by or under the supervision of a dentist'.

173 *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14C. Cf *Guardianship and Administration Act 1995* (Tas) s 43.

174 See, eg, Tasmanian Law Reform Institute (n 159) 303–14 [13.7].

### *(d) Legislative Default Substitute Decision-Maker*

In all jurisdictions (except the Northern Territory), legislation provides for someone to act as a substitute decision-maker for health decisions in the absence of a formal appointment (here referred to as the 'default decision-maker').[175] The relevant question is whether the legislative 'default decision-maker' for health care can make decisions regarding participation in medical research. In Western Australia and Victoria, the legislation authorises a person to act as a decision-maker for research decisions in the absence of an appointed substitute decision-maker or a tribunal/court appointed guardian.[176] The legislation differs in the specific factors that need to be considered by the default decision-maker prior to consenting. Western Australia, for example, has recently instituted a number of requirements including the need to obtain independent medical advice.[177] In contrast, the ACT's equivalent default decision-maker is not able to authorise participation in 'medical research' (including experimental health care and clinical trials), and is instead only able to consent to the lesser and much smaller category of 'low-risk research' where the person would benefit from participating.[178]

In Queensland, NSW, South Australia and Tasmania the same limitations appear to apply to the default decision-maker (known as the 'statutory health attorney' or 'person responsible') as to an appointed substitute decision-maker (discussed in the previous section). These inconsistencies and uncertainties present significant challenges for COVID-19 research participation by Australians.

### *(e) Decision-Making Principles*

Where a person is authorised to make a substituted decision for participation in research, increasingly legislation requires a substitute decision-maker to take into account the human rights of the individual. Modern substitute decision-making legislation has been heavily influenced by the *CRPD* and this is reflected

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175 Ben White, Lindy Willmott and Shih-Ning Then, 'Adults who Lack Capacity: Substitute Decision-Making' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 3rd ed, 2018) 208, 261–3.

176 *Medical Treatment Planning and Decisions Act 2016* (Vic) ss 75, 77; *Guardianship and Administration Act 1990* (WA) ss 110ZP, 110ZQ, 110ZR.

177 *Guardianship and Administration Act 1990* (WA) pt 9E div 2. See also, eg, *Medical Treatment Planning and Decisions Act 2016* (Vic) s 77.

178 See *Guardianship and Management of Property Act 1991* (ACT) s 32D; *Powers of Attorney Act 2006* (ACT) s 41A(1): the definition of 'low-risk research, in relation to a person — (a) means research carried out for medical or health purposes that — (i) poses no foreseeable risk of harm to the person, other than any harm usually associated with the person's condition; and (ii) does not change the treatment appropriate for the person's condition; but (b) does not include any activity that is part of a clinical trial'. Appointed substitute decision-makers are given wider powers to make decisions in relation to medical research: see *Powers of Attorney Act 2006* (ACT) pt 4.3A.

in the principles that must be followed by decision-makers, which prioritise the person's will and preferences.[179]

The usual driver for participation in research is often an altruistic desire to contribute to a greater common good. While this altruistic motivation can be accommodated within the human rights principles of recognising a person's 'will and preferences', there can be difficulties for substitute decision-makers where a person's wishes appear to conflict with the person's other 'rights', for example, to avoid unnecessary medical intrusion or pain associated with administering treatment in a clinical trial. Acting as a substitute decision-maker is not an easy task and many may feel underprepared for the role.[180]

### C *Participating in COVID-19 Research in Australia*

In summary, in some Australian jurisdictions, confusion exists and/or barriers prevent older Australians with diminishing or no decision-making capacity from participating in research, even in circumstances where they may have wished to do so.

Current global research efforts have thrown into sharp relief the domestic regulatory barriers for older Australians to participate in medical research. Given the ongoing nature of urgent medical research both now and post-pandemic, state and territry governments should consider re-examining these regulatory barriers to participation in medical research by older Australians. Allowing Australians with diminished capacity or who lack capacity to participate in research when they wish to do so may be a significant way to respect that person's autonomy. Clarification of substitute decision-makers' legal authority to consent to such research — in circumstances where they know that a person would want to participate — is sorely needed in some Australian jurisdictions. In the absence of immediate legal reform, more practical guidance is needed to navigate the complexities of the legal framework for researchers, human research ethics committees and substitute decision-makers who are involved in deciding when older Australians can participate in COVID-19 related research. Until research provides solutions, older Australians are likely to continue bearing the brunt of this pandemic.

## VII Conclusion

The challenges posed by COVID-19 have and will continue to test Australian law and policy in a wide range of areas impacting older persons. As we move towards living with COVID-19, it will be important to reflect upon the role of law in

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179 See, eg, *Medical Treatment Planning and Decisions Act 2016* (Vic) s 77.

180 Freckelton (n 153) 106.

supporting the lives, health and social connectedness of 'older' Australians. It will be important to do so respecting both human rights and principles, while also remembering that 'older persons' are not a homogenous group. Whereas older people have been at increased risk of severe illness and mortality associated with COVID-19,[181] automatically conceptualising them as vulnerable based on age alone risks perpetuating damaging and ageist stereotypes running counter to a human rights-based approach. Significantly, in this context, although international human rights law sees older people as active holders of rights, as discussed in Part III, there is, to date, no international convention that specifically addresses the rights of older people. Such a convention would help to guide the development of Australian laws and policies in this area. With or without an international convention, human rights laws should be enacted in all Australian jurisdictions to provide greater guidance for balancing competing rights-based claims in the context of public health responses. Further, these laws should clarify the obligations of private actors, such as aged-care service providers, and ensure adequate enforcement processes are available in the event that a breach of human rights occurs.

Even in the area of discrimination law, which does provide protection from age discrimination, as our discussion in Part IV illustrated, the definitions and scope of the relevant Acts may present practical challenges in addressing the issues raised in the context of COVID-19. It is a particular deficiency of the *DDA* and *ADA* that, even when there is clear evidence of discrimination, a remedy may be difficult to pursue.

As our analysis in this article also shows, in some areas, such as wills and estate planning, discussed in Part V, Australian law has proved adaptable, utilising technology to respond to the challenges posed by, for example, social distancing and isolation requirements, although, as discussed, it must be recognised that technology is unlikely to be a total solution to these challenges. In other areas, such as the regulation of medical research, discussed in Part VI, the pandemic has highlighted the complexity of existing regulatory frameworks, which may potentially be a barrier to participation in research by those who have expressed a wish to participate but now have diminished capacity or lack capacity. It will be important to ensure that our laws provide appropriate legal mechanisms for decision-making, consistent with the wishes of individuals, regarding participation in research.

Understanding that the experience of ageing 'while universal, is not uniform',[182] can help to inform analysis of the rights and needs of older Australians. While COVID-19 has so effectively highlighted the importance of these issues, their recognition should remain an on-going priority for Australian law and any potential future law reform agendas.

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[181] See (n 15).

[182] See World Health Organization, *Ageism* (n 2) xix. See also Part II.

# Access to Anthropological Evidence and Documents Created in Native Title Litigation

Aaron Moss*

*Documents are critical in native title litigation. This article explores the different methods of, and common problems encountered when, accessing such documents for the purposes of other litigation (whether native title or otherwise). By examining recent decisions dealing with the* 'Hearne v Street *obligation', non-party access requests and legal professional privilege, this article explores how courts have grappled with the translation of general principles of practice to the unique context of native title litigation. It observes that courts have refused to create special rules for native title, but rather have pragmatically applied general principles to native title matters on a case-by-case basis. Accordingly, close attention to these judicial developments is necessary, lest the interests of one's clients, or of First Nations persons, be adversely affected by inappropriate document disclosure.*

## I Introduction

Native title litigation indisputably ranks amongst the most evidentially dense and complex forms of modern civil litigation in Australia. While lengthy days of oral evidence and on-country hearings in remote parts of Australia come to mind for many, documentary evidence has always played a critical role in native title litigation. Within the category of documentary evidence 'invariably'[1] adduced in modern native title litigation, expert evidence — predominantly anthropological evidence, but also that of 'historians, archaeologists, linguists'[2] and other similar experts — looms large.

With a particular emphasis on such expert evidence, this article is a consolidated exploration of the mechanisms through which persons may seek to access documentary evidence generated in native title proceedings for use in other litigation (whether native title litigation or otherwise) and considers some

* Senior Lawyer, Clayton Utz, Sydney; Adjunct Researcher, Faculty of Law, University of Tasmania. This is a revised version of a paper delivered at the Federal Court of Australia's NSW Native Title Users Group Forum on 17 March 2021. The author thanks Samuel Walpole, James Walker, Douglas McDonald-Norman, and Michael Olds for their proofing and comments, as well as Registrar Katie Stride for inviting me to deliver the paper in the first instance. Particular thanks are also extended to my wonderfully supportive and encouraging partner William Burdett, the anonymous reviewers, and the editorial team of the *University of Queensland Law Journal*.

1 Justice Graham Hiley, 'Trial by Peers?' (Speech, JCA Colloquium, 7–9 June 2019).

2 *Sampi v Western Australia* [2005] FCA 777, [951] (French J) ('*Sampi*').

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of the problems that may be encountered in doing so. While such a topic inevitably is skewed towards matters of practice and procedure, the application of fundamental legal principles in the unique context of native title raises complex and difficult questions of broader and deeper theoretical interest.

Part II of the article aims to contextualise these questions by exploring the nature and importance of documentary evidence in native title litigation. Parts III to V of the article then explore, in order of increasing 'compulsion', the chief legal mechanisms by which parties may seek access to native title evidentiary material: by consent; from the court; and by way of subpoena or notice to produce. While this legal architecture must be considered as a whole, each of the specific mechanisms discussed raises unique procedural and conceptual challenges, which this article explores.

Specifically, in Part III's discussion of access by consent, difficulties arising from the operation of the obligation in *Hearne v Street* are explored.[3] In Part IV, the judiciary's response to the complex exercise of balancing the competing principles of privacy, 'open justice', First Nations self-determination, and public education and reconciliation, is explored. In Part V, the article encounters legal professional privilege and settlement/'without prejudice' privilege, and asks, 'who is the client?' and 'when will I waive privilege by disclosing a document?'.

Finally, in Part VI, the article consolidates the preceding analysis by extracting some key lessons for those responsible for drafting the creation, management, control of and access to documents in native title litigation. While these observations are inevitably coloured by their context, the analysis in this part is likely to be of general interest to those involved in civil litigation, whatever its form.

## II Anthropological Evidence in Native Title Litigation

Expert evidence is of fundamental importance in native title litigation. As French J acknowledged in *Sampi v Western Australia*:

> The historical reality of an indigenous society in occupation of land at the time of colonisation is the starting point for present day claims for recognition of native title rights and interests. The determination of its composition, the rules by which that composition is defined, the content of its traditional laws and customs in relation to rights and interest in land and waters, the continuity and existence of that society and those laws and customs since colonisation, are all matters which can be the subject of evidence in native title proceedings.[4]

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3 (2008) 235 CLR 125.

4 *Sampi* (n 2) [951].

Second only to evidence of First Nations peoples themselves,[5] expert evidence is therefore a key method of proving 'the content of pre-sovereignty laws and customs and the continuous acknowledgment and observance of those laws and customs down to the present day'.[6]

Anthropological and related expert evidence thus plays both a direct and indirect role in resolving the facts in issue in native title proceedings, whether by consent[7] or judicial determination. In addition to bearing directly upon the matters that native title claimants are required to establish, anthropological evidence is also often of great 'indirect' relevance and assistance. This 'dual' function of anthropological evidence was captured by Mansfield J in *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory*, where his Honour explained:

> [A]nthropological evidence may provide a framework for understanding the primary evidence of Aboriginal witnesses in respect of the acknowledgment and observance of traditional laws, customs and practices … Not only may anthropological evidence observe and record matters relevant to informing the court as to the social organization of an applicant claim group, and as to the nature and content of their traditional laws and traditional customs, but by reference to other material including historical literature and anthropological material, the anthropologists may compare that social organization with the nature and content of the traditional laws and traditional customs of their ancestors and to interpret the similarities or differences. And there may also be circumstances in which an anthropological expert may give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear.[8]

Concomitantly, access to expert evidence prepared for, and adduced in, native title proceedings is of obvious importance for those parties who are, or are likely to be, engaged in native title litigation: claim groups, named applicants, state/Commonwealth government respondents and other respondent parties, as well as their legal representatives (be they lawyers, representative bodies, and/or Registered Native Title Bodies Corporate ('RNTBC'). Anthropological and other evidence generated in the course of native title litigation may also be of strategic significance to parties in other litigation — native title or otherwise.

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5 See, eg, ibid [48] (French J), cited in *Sampi v Western Australia* (2010) 266 ALR 537, 556 [57] (North and Mansfield JJ) (Federal Court of Australia — Full Court); *Graham v Western Australia* [2012] FCA 1455, [46] (Marshall J).

6 Vance Hughston and Tina Jowett, 'In the Native Title "Hot Tub": Expert Conferences and Concurrent Expert Evidence in Native Title' (2014) 6(1) *Land, Rights, Laws: Issues of Native Title* 1, 1, citing *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539, 562 [89] (Federal Court of Australia) ('*Alyawarr*'). See also *Jango v Northern Territory* (2006) 152 FCR 150, 279–80 [462] (Sackville J) (Federal Court of Australia).

7 See, eg, *Brooks v Queensland [No 3]* [2013] FCA 741, [46] (Dowsett J).

8 *Alyawarr* (n 6) 562 [89]. See also *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228, 240–1 [68]–[71] (Mansfield J) (Federal Court of Australia) and the cases cited therein.

However, this far from exhausts the list of parties potentially interested in accessing native title evidentiary materials. The volume and nature of the evidentiary material required in native title proceedings means that the Federal Court has accumulated 'an enormous number of records that contain information about many thousands of Aboriginal and Torres Strait Islander persons, both living and deceased'.[9] Estimates suggest that even the Federal Court's collection is likely dwarfed by the collections of evidence held by state/Commonwealth government respondents, whose roles in negotiating consent determinations mean they will undoubtedly hold a vast volume of evidentiary material never ultimately put before the court.[10]

As McGrath explains, 'the onerous evidentiary requirements of the *Native Title Act* have resulted in, albeit unintentionally, one of the most substantial government-sponsored research efforts ever undertaken with Indigenous Australians'.[11] It is difficult to over-emphasise the size, or the importance, of these evidentiary collections, or the attendant information management difficulties which they present.[12] In terms which justify quotation at length, McGrath continues:

> As legal records, they are an account of the administration of justice, but they also have broader historical and cultural importance. Collectively, they tell the story of the implementation of one the most significant political interventions in colonial relations since 1788, when Arthur Phillip planted a British flag on the land of the Eora Nation at the place now known as Sydney Cove. Perhaps more importantly, they contain extensive documentation of Aboriginal and Torres Strait Islander peoples' families, histories and cultural practices in relation to land, tendered as proof of asserted rights and interests, and constitute a unique body of research that is not available elsewhere. …
>
> Far from being neutral documents, the collective knowledge they contain about country, culture, kin and the impact of colonial settlement affords them a degree of emotional and political power that resonates well beyond their original purpose. Their contents have the potential to confirm or deeply disturb an individual's fundamental sense of self and where they belong in the world, generating joy, grief, shame, anger and argument in turn and altering both an individual and shared sense of social reality.[13]

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9 Pamela McGrath, 'Providing Public Access to Native Title Records: Balancing the Risks Against the Benefits' in Ann Genovese, Trish Luker and Kim Rubenstein (eds), *The Court as Archive* (ANU Press, 2019) 213.

10 Ibid 213 n 2.

11 Ibid 214.

12 As to the latter, see generally Pamela Faye McGrath, Ludger Dinkler and Alexandra Andriolo, *Managing Information in Native Title (MINT): Survey and Workshop Report* (Report, 1 November 2015); Grace Koch, *The Future of Connection Material held by Native Title Representative Bodies* (Final Report, 11 March 2008) <https://aiatsis.gov.au/sites/default/files/2020-09/future-connection-material-final-report.pdf>.

13 McGrath (n 9) 214, 221.

Understood in that light, access to native title evidentiary materials is clearly a matter of public importance. The richness and wealth of the information contained in those records means that they are a resource of great importance for a wide range of academic, social, cultural, historical, and political purposes, in addition to the deeply personal significance attached to much of their contents. It is undoubtedly for these reasons that the Federal Court of Australia has established a records authority, providing that all native title files held by it are to be retained as 'national archives', subject to the operation of the *Archives Act 1983* (Cth).[14] Similar provisions apply to certain records held by RNTBCs,[15] and under state and territory records legislation.[16]

Even more fundamentally, the establishment, maintenance of and access to native title records and archives is also a direct expression of First Nations peoples' rights to self-determination. Article 13 of the *United Nations Declaration on the Rights of Indigenous Peoples*,[17] endorsed in 2009 by Australia after initial opposition,[18] provides: 'Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.' Further, art 31 provides:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

States are obliged to take 'effective measures' to ensure each of these rights is protected.[19]

Based upon these provisions, a rich jurisprudence championing the concept of 'Indigenous data sovereignty' has begun to emerge in Australia.[20] Domestically, such notions emerge from official sources as early as 1997, with the

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14 See especially ss 19–20, 24. See also Federal Court of Australia, *Records Authority 2010/00315821* (19 October 2011).

15 Koch (n 12) 1–2.

16 See generally, eg, *Territory Records Act 2002* (ACT); *State Records Act 1998* (NSW); *Information Act 2002* (NT); *Libraries Act 1988* (Qld); *State Records Act 1997* (SA); *Archives Act 1983* (Tas); *Public Records Act 1973* (Vic); *State Records Act 2000* (WA).

17 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('*DRIP*').

18 See, eg, 'Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights', *United Nations* (Web Page, 3 April 2009) <https://news.un.org/en/story/2009/04/295902-experts-hail-australias-backing-un-declaration-indigenous-peoples-rights>.

19 *DRIP* (n 17) arts 13(2), 31(2).

20 See generally Tahu Kukutai and John Taylor (eds), *Indigenous Data Sovereignty: Towards an Agenda* (ANU Press, 2016).

landmark 'Bringing Them Home' Report recommending government agencies record, preserve, index and administer access to personal, family and community records of, or concerning, First Nations peoples.[21] Article 32 of the 1999 *Burra Charter,* adopted by Australia International Council on Monuments and Sites ('ICOMOS') as guidelines for the conservation and management of cultural heritage, similarly recommends that records associated with the conservation or history of places 'should be protected and made publicly available, subject to requirements of security and privacy, and where this is culturally appropriate'.[22]

More recently, the Maiam nayri Wingara Indigenous Data Sovereignty Collective developed an Australian set of 'Indigenous Data Governance protocols and principles', following the inaugural 'Indigenous Data Sovereignty Summit' in 2018. These principles, which provide for First Nations peoples to '[e]xercise control of the data ecosystem including creation, development, stewardship, analysis, dissemination and infrastructure', recognise the need for data and data management that is 'relevant', 'empowers sustainable self-determination and effective self-governance', that is 'accountable to Indigenous peoples and First Nations' and which 'is protective and respects [their] individual and collective interest'.[23]

Commitment to careful and sensitive management of data and information about indigenous people thus is not merely a hortatory statement or theoretical matter of aspiration; it is also of significant, enduring, and tangible importance for First Nations peoples. As McGrath explains:

> Breaches of traditional law and custom in relation to cultural information may result in pain, anxiety, illness and, potentially, death, and the people deemed responsible for a breach may be punished by their community. The loss of information and authority in relation to both culture and country, in turn, undermines an individual's cultural status and impedes their ability to reproduce their traditions and, therefore, themselves in very fundamental ways.[24]

It is in this context, and towards these goals, that the procedural provisions raised in the remainder of this article ought properly to be understood.

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21 See Human Rights and Equal Opportunities Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 2 August 1995) recommendations 1, 21, 22a, 22b, 23.

22 See Australia ICOMOS, *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance 1999* (Charter, 2000), art 32 <https://australia.icomos.org/wp-content/uploads/BURRA_CHARTER.pdf>.

23 'Indigenous Data Sovereignty Principles', *Mayi Kuwayu: The National Study of Aboriginal & Torres Strait Islander Wellbeing* (Web Page, 2022) <https://mkstudy.com.au/indigenousdata sovereigntyprinciples/>.

24 McGrath (n 9) 230.

## III Access by Consent

When considering how native title documents may be accessed, the simplest and least compulsive method is often overlooked: access by consent. As Blackstone observed, it is a deeply-rooted principle of the common law that persons who have rights or interests in an object (ie proprietary rights) may use, enjoy or dispose of that object as they wish, 'without any control or diminution, save only by the laws of the land'.[25] So it is in relation to documents: subject to an existing rule of law or practice providing otherwise, the default position is that it is open to a person to grant access to a document in their possession, and to distribute, publish or disseminate it, as they wish. As a result, and subject to a contrary rule of law or practice, the easiest and most straightforward way — at least in theory — of accessing documents held by another person is to reach agreement with them in relation to that access.

Such agreements are in keeping with both the *Native Title Act 1993* (Cth) ('*NTA*') and the rules of the Federal Court. The Preamble to the *NTA* explicitly provides that the Act creates a 'special procedure … for the just and proper ascertainment of native title rights and interests which … if possible … is done by conciliation'. It is 'designed to encourage parties to take responsibility for resolving proceedings without the need for litigation'.[26] Similarly, the 'overarching purpose' of civil procedure in the Federal Court includes the just resolution of disputes 'as quickly, inexpensively and efficiently as possible', and with the 'efficient use of the judicial and administrative resources available for the purposes of the Court' and 'at a cost that is proportionate to the importance and complexity of the matters in dispute'.[27] Plainly, resolving document access issues by consent, between the parties, and without the need for curial intervention promotes all of these objectives. It is surely for these reasons that consensual resolution of document access disputes is also the option preferred by the court.[28] Furthermore, from the perspective of Indigenous data sovereignty, consensual dispute resolution enables First Nations peoples to have the greatest role in managing the dissemination of their information, and most fully manifests the principles of self-determination that underpin this notion.

However, to state that consensual resolution is the preferred and 'easiest' model in theory is not to deny the significant number, and the complex nature, of the rules of law and practice that may prohibit such agreements from being reached. Without seeking to be exhaustive, such rules might include:

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25 William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol 1.134.

26 *Lovett v Victoria* [2007] FCA 474, [36] (North J).

27 *Federal Court of Australia Act 1976* (Cth) ss 37M(1)(b), (2)(b), (2)(e).

28 See Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management*, 20 December 2019, para 10.3.

1. extant suppression or non-publication orders under Part VAA of the *Federal Court of Australia Act 1976* (Cth);[29]
2. orders restricting disclosure of or access to documents under s 92 (prohibition of disclosure of evidence given to an assessor) or s 155 (prohibition of disclosure of evidence given to the Tribunal) of the NTA, or r 34.120 of the *Federal Court Rules 2011* (Cth) ('*Federal Court Rules*');
3. restrictions on the access to, or publication of, gender- or other culturally-restricted evidence under s 17(4) under Part VAA of the *Federal Court of Australia Act 1976* (Cth);[30]
4. contractual restrictions on disclosure or dissemination of documents (eg in an expert's retainer);
5. equitable obligations of confidentiality that attach to particular documents;
6. principles of customary law that apply to, and govern, the actions of First Nations peoples; and
7. the *Hearne v Street* obligation.[31]

To such a list may also be added the myriad individual factors of morality, prudence, and strategic concern (eg cultural respect, privacy, risks of harm, risk of intra-mural disputes, and likelihood of adverse consequences if disclosed). Although these matters are not directly enforceable at law, they may nevertheless weigh just as heavily, if not more so, in the consideration of whether to disclose particular documents by agreement. This is because, as Mortimer J explained in *Booth v Victoria [No 3]* ('*Booth*'):[32]

> It is a feature of native title proceedings that a great deal of highly personal information is relevant to the determination of claims for native title. Peoples' family histories, which can sometimes involve traumatic events such as acts of sexual violence and removal, become part of the narrative presented to the Court. Genealogies play a large role in such proceedings.
>
> Producing genealogies for Aboriginal and Torres Strait Islander people may mean, because of the history of oppression, violence and dislocation experienced by them after European arrival, that some of this genealogical information reveals matters about people's families that they would otherwise never share, and would certainly not share with strangers, or with those with whom they may have disputes. On any view, and even if they do not concern this kind of very private information, all genealogical information is personal to the families and individuals concerned; and is

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29 See, eg, *Booth v Victoria [No 3]* [2020] FCA 1143 ('*Booth*').
30 See generally *Western Australia v Ward* (1997) 76 FCR 492 (Full Court).
31 *Hearne v Street* (n 3).
32 *Booth* (n 29).

> not usually the kind of information which would be readily distributed to all and sundry, to be used for whatever purposes anyone wished.
>
> … [I]t is also a fact of native title proceedings that people must share their traditional law and custom and their stories of connection to country, again doing so with a much wider audience than would usually be the case under those traditional laws and customs.[33]

In circumstances where — as will be seen — these matters are neither decisive, nor necessarily relevant to, the questions of access that the court has been called on to determine, the importance of these matters to First Nations peoples, and the relationship of these matters to the principles of Indigenous self-determination and data sovereignty, further stress the importance of resolution of disputes by agreement.

## A *The* Hearne v Street *Obligation*

The final legal rule outlined in the previous section — the *Hearne v Street* obligation (also known as the '*Harman* undertaking'[34]) — requires further analysis. As explained by Hayne, Heydon and Crennan JJ, in the eponymous case:

> Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Piller* order, witness statements served pursuant to a judicial direction and affidavits.[35]

The obligation also applies to third parties who receive documents in the course of litigation, including documents received by both lay and expert witnesses.[36] Therefore, the *Hearne v Street* obligation prima facie applies to the vast majority of documents, and the information contained therein, exchanged in the course of a native title proceeding, including most expert reports.[37] It does not, however, apply to documents that exist and are exchanged independently from the coercive process of the court. Such documents may be used and disclosed freely, subject to any supervening legal obligations governing such use (such as those listed above).

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33 Ibid [35]–[37].

34 But see *Treasury Wine Estates Ltd v Maurice Blackburn Pty Ltd* (2020) 282 FCR 95, 108 [39] (Jagot, Markovic and Thawley JJ) ('*Treasury Wine*').

35 *Hearne v Street* (n 3), 154–5 [96] (citations omitted).

36 *Gall v Domino's Pizza Enterprises Ltd* [2019] FCA 1799, [17] (Murphy J).

37 *Booth* (n 29) [35]–[37] (Mortimer J).

In the Federal Court, where it applies, the *Hearne v Street* obligation no longer operates in two scenarios:

1. if the document 'is read or referred to in open court in a way that discloses its contents', rule 20.03 of the *Federal Court Rules* provides that the obligation no longer applies to the document, unless the Court orders otherwise;[38] or
2. if the Court exercises its discretion to release a party from the obligation with respect to one or more documents.

When seeking a release from the *Hearne v Street* obligation, a party must demonstrate that 'special circumstances' exist.[39] While it is 'neither possible nor desirable to propound an exhaustive list' of the factors that may constitute '"special circumstances"',[40] 'good reason must be shown why' the obligation needs to be lifted, recalling that the court's 'discretion is a broad one and all the circumstances of the case must be examined'.[41]

Recently, these matters came before the Federal Court for determination in a dispute that gives some guidance as to the application of the 'exceptional circumstances' test in the native title context. In *Glencore Coal Pty Ltd v Franks*,[42] the Full Court (Reeves, Perry and Abraham JJ) dismissed an appeal against the decision of Katzmann J,[43] refusing to release Glencore from the *Hearne v Street* obligation in respect of an expert report produced in native title proceedings. Glencore sought relief from the *Hearne v Street* obligation attaching to an anthropologist's report, filed pursuant to court order (but not tendered into evidence) in native title proceedings brought by the Plains Clans of the Wonnarua People, so as to enable Glencore to use that document in the making of representations to the Minister in relation to an application for an order protecting or preserving a specified area from injury or desecration under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).[44]

At first instance, Katzmann J accepted (and it was not disputed) that the *Hearne v Street* obligation would restrain Glencore's proposed use of the report.[45] However, her Honour was not satisfied that 'special circumstances' justifying the release of the obligation existed. Katzmann J acknowledged three features that supported Glencore's case. First, her Honour accepted that there was 'at least a

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38 See also *Treasury Wine* (n 35) 118–23 [79]–[92] (Jagot, Markovic and Thawley JJ) and the authorities referred to therein.

39 See generally ibid 124–5 [96]–[100] and the authorities cited therein.

40 *Springfield Nominees Pty Ltd v Bridgelands* (1992) 38 FCR 217, 225 (Wilcox J) (Federal Court of Australia).

41 *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283, 289–90 [31] (Branson, Sundberg and Allsop JJ) (Federal Court of Australia — Full Court) (citations omitted).

42 (2021) 284 FCR 622 ('*Franks Full Court*').

43 *Glencore Coal Pty Ltd v Franks* [2020] FCA 1801 ('*Franks First Instance*').

44 Ibid [4]–[5], [9]–[31]; *Franks Full Court* (n 43) 624 [1].

45 *Franks Full Court* (n 43) 627 [16].

real prospect' that the anthropologist's report might have been admitted into evidence. Second, her Honour observed that there was no 'commercially sensitive material or personal data' in the report. Third, her Honour accepted there were 'some common features' between the native title proceeding and the proposed use of the report.[46]

However, weighing against those matters, her Honour observed that the report was prepared for (although not restricted for use in) a native title mediation. In her Honour's view, the court ought to be 'cautious' in releasing the *Hearne v Street* obligation in this context, as to do so 'could conceivably affect the willingness of First Nation peoples to cooperate with, or participate in, the court's processes'.[47] Secondly, her Honour noted that the contents of the report were 'sensitive and controversial', addressing questions including 'whether certain people were "Wonnarua people"',[48] and identified that the authors of the report appeared to be 'uncomfortable' with disclosure, such that it might risk embarrassment and prejudice to the authors if the report was to be put to Glencore's proposed use.[49]

Noting that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) did not require proof of connection in the sense required under the *NTA*, her Honour concluded that the evidentiary value of the report would be low in the context of its proposed use by Glencore, as it appeared to 'have little, if any, relevance to any of the matters the reporter is required to consider'.[50] Finally, her Honour noted that Glencore's 'largely unexplained' delay of 12 months in bringing its application for relief raised potential for unfairness, inhibited the ability of third parties to make representations, and weighed against the grant of relief sought.[51] Accordingly, her Honour refused to release Glencore from the *Hearne v Street* obligation.

On appeal, the Full Court rejected Glencore's challenge to Katzmann J's decision in almost its entirety.[52] Notably, the Court placed weight on the fact that the decision-making process in which Glencore sought to use the anthropological report was not 'judicial' but 'an exercise of executive power … of such breadth and nature as to have an essentially political character'.[53] In the Full Court's view, the weight afforded to 'the relevance of the [expert] report to the discharge of the s 10 function' was tempered by the various other considerations identified by the Court.[54]

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46 *Franks First Instance* (n 44) [38].
47 Ibid [39].
48 Ibid [16], [40].
49 Ibid [41]–[42].
50 Ibid [43]–[44].
51 Ibid [40].
52 See *Franks Full Court* (n 43) 634–5 [37]–[41] (Reeves, Perry and Abraham JJ).
53 Ibid 629 [23].
54 Ibid 629 [23]–[25].

Indeed, the Full Court went further than the primary judge in some respects, departing from Katzmann J's finding that the report could have been expected to enter the 'public domain' at some point in the future. In that respect, the Court observed that the report 'contained information of a personal kind such as family histories, places and dates of birth, the names of deceased members of the native title group, and the like', and reasoned that this information likely 'would have been subject to confidentiality orders in whole or in part' were it tendered in the native title proceedings.[55] In support of this conclusion, regard was had to the Court's broad powers to take account of cultural and customary concerns under s 82(2) of the *NTA*. The Full Court also had regard to the statutory scheme pursuant to which the mediation was conducted, and concluded that 'there is a strong public interest in ensuring that Aboriginal peoples are not deterred in the future from agreeing to the use of court processes, … to assist in resolving their claims because of the potential for any resulting report to be used for ulterior purposes by non-indigenous parties'.[56]

Although the proceeding has passed largely unnoticed by commentators, it provides a clear indication of the court's approach to the *Hearne v Street* obligation in a native title context. Chiefly, the decisions (both at first instance and on appeal) demonstrate the strictures of the obligation and emphasise that applications for release from that obligation face a substantial hurdle — after all, 'special circumstances' are required. The Full Court's recourse to the unique procedures and statutory context of the *NTA* emphasise that these matters are not irrelevant to the exercise of the court's discretion but must be expressly grappled with. This is particularly the case where, as is likely to be common, the documents in issue were created for the purpose of mediation, negotiation, or preparation for a consent determination under the guidance of the court and pursuant to the various provisions of the *NTA.*

As a result, and consistently with the comments of Mortimer J in *Booth*, the impacts of release of the obligation on affected First Nations peoples and communities are likely to be a key concern for the court. In this regard, while the Court did not expressly have recourse to the term, the principles of data sovereignty referred to in Part I above may provide a useful prism through which to approach such applications. As a result, persons seeking release from the *Hearne v Street* obligation for native title documents may need to identify and provide evidence to the court of procedures for document management and confidentiality (for example, by way of contractual or other undertakings of confidentiality and non-publication), which will minimise or obviate such harms occurring.[57] By incorporating these factors into its 'exceptional circumstances' analysis, the *Franks* judgments also provide a glimpse of the ways in which

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55 Ibid 634 [38].
56 Ibid 636 [45].
57 See, eg, *Burragubba v Queensland [No 2]* [2018] FCA 1031, [57] (Robertson J) ('*Burragubba*').

Indigenous data sovereignty principles may be promoted through the court's analysis.

## IV Access From The Court

The next least-compulsive method of accessing documents of interest is to obtain those documents from the Court. Under r 2.31(a) of the *Federal Court Rules*, all documents filed in proceedings in the Court are held in the custody of, and subject to the control of, the relevant District Registrar. From there, and in addition to the formal procedure for producing documents held in the custody of the Court,[58] r 2.32 of the *Federal Court Rules* provides a series of rules, which govern the rights of both parties to proceedings, and non-parties, to access documents filed in the Court's proceedings.

### A *Documents Entitled to be Accessed*

For any access applicant who is not a party to the proceedings in which the documents were filed (a question that itself has raised some concern in the Court),[59] and assuming that the litigation is not one of the few especially high-profile matters where the Court creates a public case file,[60] access to court documents depends upon the nature of the material sought and the way in which it was used in the litigation.

Rule 2.32(2) of the *Federal Court Rules* provides that, subject to extant confidentiality orders, non-publication orders, or orders restricting the use of evidence,[61] non-parties may access copies of pleadings, orders, transcripts, judgments, notices relating to representation and addresses for service, and — uniquely to native title matters — Forms 1–4 (as applicable) and accompanying affidavit material,[62] or the extract from the Register of Native Title Claims received by the Court from the Native Title Registrar. Leave of the Court is not required to access the documents, and persons are entitled to be given copies of documents upon payment of the authorised fee (excepting transcripts, which must generally be purchased separately from the Court's official transcript provider, Auscript).[63] Additionally, many of these materials are made freely

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58 See *Rules* (n 30) rr 24.12(2)(b), 24.24.

59 *Hughes v Western Australia [No 3]* [2019] FCA 2127, [16] (Mortimer J) ('*Hughes*').

60 See generally 'Public Interest Cases (Online Files)', *Federal Court of Australia* (Web page, 2021) <https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files>.

61 *Rules* (n 30) r 2.32(3). But see Jagot J's discussion of the first limb of this rule in *Porter v Australian Broadcasting Corporation* [2021] FCA 863, [87]–[97].

62 *Hughes* (n 60) [19] (Mortimer J).

63 *Rules* (n 30) r 2.32(5); *Hughes* (n 60) [20] (Mortimer J).

available via the Court-administered Commonwealth Courts Portal and Federal Law Search databases.[64]

The justification for this right is that the public is broadly entitled to know and to access documents that record the nature of the dispute, the stage of its progress, how it is resolved, and how to formally contact the parties if required. Such rights are a necessary aspect of justice being conducted publicly and being seen to be done by the public. Importantly, as this is an entitlement vested by the *Federal Court Rules*, it does not matter *why* a person is seeking access to the materials, nor what they propose to do with them afterwards, and they need not give any such information when requesting access.

### B *Documents For Which Leave Is Required*

Rule 2.32(4) of the *Federal Court Rules* provides that, for all other documents (ie 'document[s] that the person is not otherwise entitled to inspect' under r 2.32(2)), persons may apply to the Court for leave to inspect those documents. Ordinarily, the Court will seek the views of the parties as to disclosure prior to deciding whether or not to grant an access request, often with a preliminary view on the request.[65] However, the ultimate decision is one for the Court alone, with the grant or refusal of leave a discretionary decision to be made in the context of the particular access request,[66] and in accordance with the Court's establishing statute, the *Federal Court Rules*,[67] and the *Access to Documents and Transcripts Practice Note (GPN-ACCS)*, the latter of which provides that all such requests must be construed in the context of a general, but qualified, commitment to 'open justice'.[68]

There is a burgeoning collection of jurisprudence relating to the circumstances in which non-parties may (or may not) be granted access to a 'restricted' document, and the factors that will bear upon the Court's discretion.[69] However, in a number of recent decisions, the Court has considered these matters in the context of gaining access to evidence and expert reports filed in native title matters and made a number of observations of note.

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64 Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)*, 25 October 2016, paras 3.1–3.4.

65 See, eg, *Hughes* (n 60) [4] (Mortimer J); *Dallas Buyers Club, LLC v iiNet Limited [No 1]* [2014] FCA 1232, [16] (Perram J).

66 *Hasna v Crown Melbourne Limited* [2021] FCA 1066, [25] (Mortimer J).

67 See *Oldham v Capgemini Australia Pty Ltd* (2015) 241 FCR 397, 401 [24] (Mortimer J) (Federal Court of Australia) ('*Oldham*').

68 Federal Court of Australia, *Access to Documents and Transcripts Practice Note (GPN-ACCS)*, 25 October 2016, paras 2.1–2.4.

69 See generally *Oldham* (n 68); *Deputy Commissioner of Taxation v Hawkins* (2016) 341 ALR 255; *Dallas Buyers Club, LLC v iiNet Limited [No 1]* [2014] FCA 1232; *Baptist Union of Queensland – Carinity v Roberts* (2015) 241 FCR 135; *Deputy Commissioner of Taxation v Shi [No 2]* [2019] FCA 503.

First, according to these authorities, the beginning of the inquiry into granting access is whether the documents were 'read' or otherwise admitted into evidence. Evidence that has been so used and not otherwise restricted is 'in no different position to oral evidence-in-chief given by a witness' (ie recited in open court, before the public) and is thus 'consistent with inspection of transcript being available without leave'.[70] In those circumstances, 'open justice' principles weigh heavily in favour of the grant of leave to inspect.[71] Where documents are not formally admitted into evidence (eg reports 'marked for identification' but not ultimately tendered), 'open justice' principles do not have the same weight.[72]

Importantly, this applies equally to the often voluminous and deeply personal evidence put before the Court in support of a consent determination under ss 87 or 87A of the *NTA*.[73] Access to such documents is justified on the basis that their contents provided the basis on which the Court was satisfied that the making of an *in rem* determination was appropriate.[74]

Second, provided the document has been admitted into evidence, it is generally no answer to an inspection request that material may be exposed to a broader number or range of individuals than initially envisioned, nor that the viewers of the document may misunderstand or misinterpret its contents. This is because, as Robertson J stated in *Nicholls,* '[t]he exchange of information and ideas is not limited to those who may be thought to adequately or best understand them, and access to the courts and what occurs in the course of court proceedings is not to be so limited.'[75]

Importantly, in *Champion v Western Australia* ('*Champion*'),[76] Bromberg J emphasised that such principles applied to expert anthropological reports notwithstanding that they were 'replete with private or personal information about the native title claimants, their families and their ancestors' and contained 'highly sensitive spiritual information of a private nature'.[77] While acknowledging that any 'harmful disclosure' ought to be avoided if possible, his Honour observed that once the material was admitted into evidence, discussed in open court and analysed in a judgment (without any confidentiality or non-publication orders having been made), 'open justice' considerations outweighed any discomfort or objection that First Nations people may have to the subsequent

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70 *Burragubba* (n 58) [46] (Robertson J), citing *Oldham* (n 68) 401 [26]–[27] (Mortimer J); *Nicholls v A-G (NSW) [No 2]* [2019] FCA 1797, [16] (Robertson J) ('*Nicholls*'); *Champion v Western Australia* [2020] FCA 1175, [19] (Bromberg J) ('*Champion*').

71 *Nicholls* (n 71) [8], [11]–[14] (Robertson J).

72 *Champion* (n 71) [17] (Bromberg J).

73 *Nicholls* (n 71) [6], [17]–[18] (Robertson J).

74 *Anderson v Queensland [No 3]* [2015] FCA 821, [153] (Collier J); Justice J A Dowsett, 'Beyond Mabo: Understanding Native Title Litigation through the Decisions of the Federal Court' (Speech, LexisNexis National Native Title Law Summit, Brisbane, 15 July 2009).

75 *Nicholls* (n 71) [7].

76 *Champion* (n 71).

77 Ibid [25].

distribution of those documents.[78] Principles of Indigenous data sovereignty no longer necessary weigh against disclosure, as the (informed) act of filing, relying upon, and admitting documents into evidence is construed by the Court as a release of those documents 'to the world', as it were.

*Champion* provides a useful example. In that case, it was not to the point that the proposed use of the anthropological report went beyond the use 'expected' by First Nations persons.[79] This is because, once admitted into evidence, 'the prospect of the information being made accessible to persons unassociated with the proceeding in which it was tendered or being used in a different proceeding is real even though it may not be substantial'.[80] As his Honour emphasised, it is incumbent upon lawyers and advisors to 'be clear about the potential for disclosure of that information including the risk that the information may be used for purposes beyond the instant litigation'.[81] The Court's power to make orders on conditions[82] may be a valuable way through which cultural and customary concerns of indigenous groups may be managed by the Court.

Third, unlike the entitlement to inspect materials under r 2.32 of the *Federal Court Rules*, the motive, reasons or purpose for inspecting restricted documents 'may provide a powerful discretionary consideration' either for or against the grant of leave.[83] Similarly, 'the identity of the non-party, and the use to which the material may be put, might be highly relevant to the Court's exercise of power'.[84] For example, in *Hughes v Western Australia [No 3]* ('*Hughes*'), Mortimer J proposed to grant an access request lodged by a common law native title holder and director of an Aboriginal Corporation holding native title on trust only once evidence was filed demonstrating that existing gender-restriction orders could be complied with.[85] Notably, her Honour also indicated that principles of indigenous data sovereignty, like those outlined above, were relevant to the exercise of the Court's discretion, stating:

> It is important that, going forward, the Court not place undue restrictions on claim groups, who secure a determination of native title, ultimately being able to reclaim their own evidence, and evidence about them and their connection to their country, which was placed on the Court file. It is their knowledge, and their history. Therefore, provided the Court is satisfied of the consent of the common law holders as a group, through a mechanism such as the one used here of consulting the elders of the common law native title holding group, as well as the statutory entity charged to hold

78 Ibid [27]–[30], [37].
79 Ibid [38]–[39].
80 Ibid [38]–[40].
81 Ibid [40].
82 *Rules* (n 30) r 1.33.
83 *Burragubba* (n 58) [47] (Robertson J). See also *Champion* (n 71) [33]–[34] (Bromberg J).
84 *Hughes* (n 60) [25] (Mortimer J).
85 Ibid [28]–[30].

> their native title in trust, in my opinion it is appropriate for the Court to give favourable consideration to access requests such as the one made [in *Hughes*].[86]

*Hughes* therefore stands as a salutary example of the way in which the Court has been willing to construe and apply its 'ordinary' rules of procedure in the light of the unique nature and demands of native title matters. This flexibility ought to be encouraged, as it is through this means that principles of Indigenous data sovereignty can be balanced against the principles of 'open justice', and therefore given their fullest possible effect in the circumstances.

Finally, it ought to be noted that the often voluminous and aged nature of many native title files held by the Court mean that considerations of cost and time efficiency, and the overarching objective provisions of ss 37M–37N of the *Federal Court of Australia Act 1976* (Cth), may weigh against granting access to certain documents notionally held by the Court.[87] As Robertson J has recognised, this may involve an assessment of the request's 'proportionality', in the sense of the likely expenditure of time, money and effort, in the light of the asserted purpose and benefit to be gained from the request.[88] Such an enquiry bears some resemblance to the existence of a 'practical refusal reason' by reason of a substantial and unreasonable diversion of resources from an agency's operation in the *Freedom of Information Act 1982* (Cth) ss 24–24AB.

## V Access via Compulsive Process

Finally, it may also be possible to obtain access to documents of interest via some compulsive process, such as subpoenas, notices to produce and orders for discovery.[89] Due to their potential costs and their burdensome nature, such modes are considered 'last resorts' by the Court.[90] The general principles and operation of each of these methods of access are well-known and need not be repeated here.[91] For present purposes, it suffices to observe that the existence of either legal professional privilege or 'without prejudice' (or settlement) privilege in a document provides a valid basis on which to resist the compulsory production of a document under a subpoena, notice to produce, or order for discovery.[92] In this

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86 Ibid [27].
87 Ibid [23].
88 *Burragubba* (n 58) [53]–[55].
89 See generally *Rules* (n 30) pts 20 (discovery and inspection of documents), 24 (subpoenas).
90 See, eg, Federal Court of Australia, *Subpoenas and Notices to Produce Practice Note (GPN-SUBP)*, 25 October 2016, paras 2.3–2.4, 6.15.
91 See generally Bernard Cairns, *Australian Civil Procedure* (Lawbook, 10th ed, 2014) ch 10; Adrian Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis, 2018) ch 15.
92 See *Rules* (n 30) r 20.02; *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646, 654–5 [5], 657–8 [16] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) ('*Glencore*'); *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285, 291 (Dixon CJ, Webb, Kitto and Taylor JJ) ('*Field*').

regard, two unique issues regarding privilege have arisen in the native title context, warranting further examination.

### A *Legal Professional Privilege: Who Is The 'Client'?*

Legal professional privilege may be understood as that species of privilege that ordinarily entitles a person 'to resist the giving of information or the production of documents which would reveal [confidential] communications *between a client and his or her lawyer* made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings'.[93] The privilege extends to protect communications with an independent expert, provided that they are undertaken for the dominant purpose of conducting legal proceedings or obtaining legal advice.[94]

However, in the native title context, a foundational question has raised some difficulties: who is the lawyer's 'client'? The question is not an arid one. Legal professional privilege exists to protect the interests of the client[95] and belongs to that client.[96] Therefore, privilege may only be claimed, or waived, by that client or their successors in title.[97] As Mortimer J observed in *Tommy v Western Australia [No 2]* ('*Tommy*'),[98] '[i]dentifying the relationship, the parties to it, and the specific circumstances are all critical to resolving how any privilege is said to arise, whether in fact it does arise, who holds it, and indeed whether it attaches at all to the communications asserted to be protected by it.'[99]

In *Tommy,* one of two competing claim groups was granted leave to issue a subpoena to the Yamatji Marlpa Aboriginal Corporation, seeking production of certain specified anthropological reports.[100] Despite considering themselves a mere 'custodian' of the documents, the Yamatji Marlpa Aboriginal Corporation nevertheless objected to production, arguing that the reports were the subject of legal professional privilege, settlement privilege or both.[101] In overruling the Yamatji Marlpa Aboriginal Corporation's objections, Mortimer J held that the 'the holder of the relevant privileges' in the present case was not the Corporation, but rather 'the applicant in a proceeding for a determination of native title, or, post-determination, the prescribed body corporate holding the native title on trust (or

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93 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552 [9] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (emphasis added).
94 *Wyman v Queensland* [2012] FCA 397, [26] (Reeves J) and the authorities cited therein.
95 *Glencore* (n 93) 661 [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
96 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 81–2 [88] (Kirby J).
97 *Baker v Campbell* (1983) 153 CLR 52, 85 (Murphy J).
98 [2019] FCA 1551 ('*Tommy*').
99 Ibid [37].
100 Ibid [8]–[11].
101 Ibid [17]–[20].

acting as agent for the common law holders)',[102] as a statutory 'concept' or 'vehicle'.[103] As a result, the Yamatji Marlpa Aboriginal Corporation was unable to make any claim for privilege in the subpoenaed documents.

To reach this conclusion, her Honour began by affirming comments of Reeves J in *QGC Pty Ltd v Bygrave*,[104] which emphasised the unique role and importance of identifying the 'solicitor on the record' in native title matters, noting that availability of costs sanctions as a means of controlling solicitors had been 'significantly reduced' by s 85A of the *NTA*.[105] For Mortimer J, these comments 'emphasise that, in examining how a solicitor "on the record" in a proceeding for a party must behave, the focus is on the precise relationship which arises between that solicitor and her or his "client"'.[106] From that starting point, her Honour then observed that the *NTA* creates a method through which a representative 'entity' — the 'named applicant' — comes into existence and serves an 'applicant' for the purposes of the various types of applications possible under the *NTA*.[107] Noting that those persons hold 'ongoing, collective responsibility' for the prosecution of an application under the Act,[108] and that it is those persons from whom 'the legal representatives will take their instructions',[109] her Honour held that — absent contrary evidence and for the limited purpose of determining where legal professional privilege lies[110] — 'it is the applicant, as an entity (and therefore those individuals who constitute the applicant, jointly) which is the "party" and the "client", and holds any privilege'.[111] Instructions about the maintenance of privilege can thus be given 'jointly and in accordance with their authorisation by the claim group (but also taking into account the terms of s 62A about the extent of their authority) … in the same way they give any other instructions to their legal representatives about the conduct of a proceeding under s 61'.[112]

Where a RNTBC is created under ss 56–7 of the *NTA* following a determination of native title, to hold that title on trust for a claim group, her Honour held that the 'same reasoning' applied even more strongly, 'since such a body is a legal person and the intention of the Act is that the native title recognised in the common law holders will be held by a legal person, either on trust or as agent for the common law holders'.[113] As her Honour explained, the privilege

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102 Ibid [39], [81].
103 As to the latter, see *CITIC Pacific Mining Management Pty Ltd v Yaburara and Coastal Mardudhunera Aboriginal Corporation* [2020] WASC 332, [53] (Master Sanderson).
104 (2010) 186 FCR 376 (Federal Court of Australia).
105 *Tommy* (n 99) [39]–[48].
106 Ibid [48].
107 Ibid [50]–[57].
108 Ibid [55]–[56], citing *Lennon v South Australia* (2010) 217 FCR 438, 447–8 [34] (Mansfield J).
109 *Tommy* (n 99) [58].
110 Cf ibid [84].
111 Ibid [56].
112 Ibid [81].
113 Ibid [60].

'pass[es] from the relevant applicant to the relevant prescribed body corporate, subject to any arguments about loss or waiver'.[114] Decisions about claiming or waiving privilege then become 'subject to the usual decision-making processes of that prescribed body corporate, in accordance with its constitution and rule book'.[115] Some practical difficulties may be experienced in this situation, because the instructions and documents held by a solicitor prior to a determination, 'do not automatically transfer to the resulting PBC post-determination, as the PBC is a new legal entity, different to the claim group and the applicant that represents it'.[116]

Mortimer J's decision in *Tommy* is notable because it fundamentally rejected a submission that 'a representative body, rather than any individual solicitor as the legal representative for a native title applicant or a prescribed body corporate, had some unilateral role, and some unilateral control, over expert reports which it had commissioned and funded'.[117] The importance of this decision, and the fact that it marked only the start of litigation as to the interaction between the rules of civil procedure and the principles of the *NTA* was not lost on her Honour, who made the following additional comments of note:

> What is important is not to assume that in the unique and various circumstances arising in the making of claims under s 61 of the Native Title Act, there is some ongoing, automatic attachment of any particular privilege to documents such as anthropological reports. This case is a good illustration of the dangers of making too many assumptions about that matter, and a good illustration of the law's focus on the circumstances in which a particular report was created, and on the particular circumstances in which such a report might have, or might not have, formed part of a confidential communication for the purposes of parties to a proceeding resolving their dispute. It is also a good illustration of the need for those who assert a privilege to be able to prove it. On that count, there are no special rules for native title proceedings.[118]

Consequently, for an anthropological report to be the subject of legal professional privilege, the party resisting production must establish on the balance of probabilities that the report represents a confidential communication between solicitor and client (or agents thereof) for the purpose of legal advice or litigation.[119] All the same elements are applicable in the native title context as in other forms of litigation.

It is this tension between recognising the 'unique nature' of native title litigation, balanced against the ordinary principles of civil procedure, and taking shape in the light of the unique set of facts presented in any given case, that is

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114 Ibid [83].
115 Ibid.
116 Angus Frith, 'Later Use and Control of Evidence Given in Native Title Hearings' in Pamela Faye McGrath, Ludger Dinkler and Alexandra Andriolo, *Managing Information in Native Title (MINT): Survey and Workshop Report* (Report, 1 November 2015) 51, 52.
117 *Tommy* (n 99) [215].
118 Ibid [68].
119 Ibid [28]–[29].

likely to continue producing litigation for some time to come. In this regard, it is noteworthy that *Tommy* has been referred to with approval by the Court,[120] and was applied by Griffiths J in the context of alleged misuse of confidential information against the background of discontinued and revived claims in *Mumbin v Northern Territory [No 1]*.[121] However, as the Court has repeatedly emphasised, *Tommy* does not present any blanket rule of automatic application. Rather, claims must be worked out on a 'case by case basis'.[122] Indeed, Griffiths J's decision in *Pappin v Attorney-General (NSW)* ('*Pappin*') [123] was identified by Mortimer J as a case where the specific contractual provisions in issue produced an alternative result, finding that the terms of an expert's retainer meant that NTSCorp Ltd was itself the holder of legal professional privilege in an anthropological report in respect of which production was sought.[124]

## B *Loss of Privilege*

The second key question which has been the subject of recent analysis is the question of loss of privilege. Given the definition of legal professional privilege offered above, it is relatively straightforward to observe that legal professional privilege:

1. will not arise where the communication is not made for the dominant purpose of the giving or receiving of advice, or for use in existing or anticipated litigation (regardless of whether it ultimately came to be used that way);[125] and/or
2. will not arise, or will be 'waived' (or 'destroyed'), if and when the communication is no longer 'confidential' (save for some small exceptions).[126]

In this respect, legal professional privilege may be waived by the client (to whom the benefit of legal professional privilege accrues) either expressly or impliedly by conduct inconsistent with the maintenance of the confidentiality that grounds the privilege.[127] As Gleeson CJ, Gaudron, Gummow, and Callinan JJ held in *Mann v Carnell*, 'considerations of fairness may be relevant to a determination of whether

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120 *Alvoen v Queensland [No 3]* [2021] FCA 785, [72]–[74] (Collier J).
121 [2020] FCA 475, [41], [69].
122 Ibid, [41]; *Tommy* (n 99) [67] (Mortimer J).
123 [2017] FCA 817.
124 See *Tommy* (n 99) [80].
125 *Commissioner of Taxation (Cth) v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499, 521–2 (Gibbs ACJ).
126 See, eg, *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 1232, [45]–[46] (Wigney J)
127 See *Mann v Carnell* (1999) 201 CLR 1, 13 [28]–[29], 15 [34] (Gleeson CJ, Gaudron, Gummow and Callinan JJ) ('*Mann*'). See also *Evidence Act 1995* (Cth) s 122.

there is such inconsistency'.[128] Extensive attention has been given to the operation of legal professional privilege with respect to experts and expert reports,[129] and much of this discussion applies equally in the native title context.

Two further, and closely related, types of privilege also require discussion at this juncture: settlement privilege and 'without prejudice' privilege. At common law, 'without prejudice' privilege protects from disclosure those documents evidencing admissions made in an effort to settle a dispute.[130] Under this rule, correspondence containing admissions, and passing between the parties during discussions conducted with a view to reaching an agreed resolution of their dispute, are generally inadmissible in evidence, and are privileged from disclosure by compulsive process.[131] 'Without prejudice' privilege will not arise where the court cannot be satisfied the correspondence passing between the parties was conducted on an understanding that the correspondence be 'confidential' or 'without prejudice' to their legal rights.[132] The Uniform Evidence Law gives statutory form to this privilege, in the form of settlement privilege, providing in s 131(1) that — subject to an extensive list of exemptions — evidence of communications between disputing parties 'in connection with an attempt to negotiate a settlement of the dispute' or documents 'prepared in connection with an attempt to negotiate a settlement of a dispute' are not admissible.[133] However, as the Uniform Evidence Law applies only to the adduction of evidence, the common law privilege continues to govern pre-trial processes, such as the 'discovery, production and inspection of documents'.[134]

These seemingly simple tests have masked some significant difficulties in native title litigation — most commonly in the context of anthropologist reports that have passed between the parties in the process of negotiating a consent determination. The message emerging clearly from *Tommy* and from the earlier decision of Mansfield J in the *Lake Torrens Overlap Proceedings*,[135] which it followed, is that many anthropological reports which are intended or used for — or commissioned with an eye to — submission to either the State or the Court for the purposes of satisfying the State's consent determination guidelines are unlikely to attract either legal professional privilege or 'without prejudice' privilege or will lose any such privilege when provided to any other party, notwithstanding that such production is, in effect, mandatory under the various

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128 *Mann* (n 129) 15 [34].

129 See generally *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438 (Lindgren J) (Federal Court of Australia).

130 *Field* (n 93) 291–2 (Dixon CJ, Webb, Kitto and Taylor JJ).

131 Ibid; *Trade Practices Commission v Arnotts Ltd* (1989) 88 ALR 69 (Beaumont J) (Federal Court of Australia); *Bailey v Beagle Management Pty Ltd* [2001] FCA 185, [18] (Goldberg J).

132 See, eg, *Kong v Kang* [2014] VSC 28, [61] (Derham AsJ).

133 *Evidence Act 1995* (Cth) s 131.

134 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 100–1 [149] (Callinan J). See also *Mann* (n 129), 9–12 [17]–[27] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

135 *Re Lake Torrens Overlap Proceedings* [2015] FCA 519.

State and Territory consent determination guidelines. While it may be arguable that submission pursuant to such guidelines constitutes disclosure under compulsion of law (and therefore the disclosing party is 'not taken to have acted in a manner inconsistent with' the maintenance of legal professional privilege),[136] any such argument is yet to be clearly tested by the court.

There are indications that such an argument is unlikely to succeed. In the *Lake Torrens Overlap Proceedings*, Mansfield J was called on to resolve various claims for both legal professional and settlement privilege and other objections to disclosure of 'pre-existing historical, anthropological and other expert reports' by competing claim groups and South Australian Native Title Services.[137] His Honour rejected the submission that a general obligation of confidentiality attached to the documents, holding that 'whatever the circumstances in which they came to be created, they were provided to the opposing parties to the litigation'.[138]

Similarly, his Honour found that any legal professional privilege in the reports had been waived upon provision of the reports to the State and Commonwealth in an effort to negotiate a 'joint claim' to resolve the overlap.[139] Finally, his Honour rejected any claim of settlement privilege in the reports, critically finding that the reports were 'not shown to have come into existence, nor to have been provided under any express or tacit arrangement that — at the conclusion of negotiations — they should not be available for use to the benefit (or detriment) of one or other parties if the matter were not resolved by negotiation'.[140] As his Honour observed, it would be difficult for material provided to the State to meet its consent determination policy to be protected by settlement privilege, as '[i]f the matter proceeded to a consent determination … that material would be part of the evidentiary material relied on by the State to adopt [its] position' on the consent determination itself.[141]

Mortimer J in *Tommy* expressly approved this analysis,[142] and indicated that her Honour would have reached the same conclusions independently in any case.[143] Her Honour concluded that any legal professional privilege that may have subsisted in the anthropological reports either never arose because there was no evidence that the report was prepared for the dominant purpose of providing legal advice to any client,[144] was lost upon submission of the report to the State for the purposes of negotiating a consent determination, or both. Her Honour also noted that the Western Australian Determination Guidelines expressly contemplated

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136 See *Evidence Act 1995* (Cth) s 122(5)(a)(iii).
137 See *Tommy* (n 99) [130] (Mortimer J), discussing *Re Lake Torrens Overlap Proceedings* (n 137).
138 *Re Lake Torrens Overlap Proceedings* (n 137) [46].
139 Ibid [47].
140 Ibid [59].
141 Ibid [65].
142 *Tommy* (n 99) [130]–[140].
143 Ibid [145].
144 Ibid [203]–[205].

the submission of documents to the court if a consent determination was agreed.[145] The anthropological reports were 'not created so that it could be kept from the State, and used in an adversarial way in a contested claim for native title'.[146] Once that foundational proposition is accepted, even if there is *some* possibility that the material may later be used in a contested hearing, any legal professional privilege that might have otherwise vested in the document never arose, or was defeated when it was voluntarily provided to the State.

Similarly, no settlement privilege arose as the material provided to the State 'did not contain anything in the nature of an admission or offer of compromise, … [and] could well have been put to adversarial use',[147] and was not subject to any restrictions as to the possible uses to which it could be put[148] (or, in respect of one particular report, had been impliedly waived).[149] Great weight was placed, in both *Tommy* and the *Lake Torrens Overlap Proceedings*, on the fact that there was *no* evidence that the information or documents could not be available for use to the benefit (or detriment) of one or other parties if the matter were not resolved by negotiation. Indeed, in both cases, the relevant expert retainers and State consent determination guidelines contemplated such future uses. The fact that such use was within the 'reasonable contemplation'[150] of the parties was considered inconsistent with the existence of settlement privilege in the documents.

## VI Some Lessons

Multiple lessons may be drawn from the previous sections of the article for those involved in native title litigation.

First, and most saliently, it must be recalled that there are no 'free passes' in native title litigation. Whether it is the requirement to establish 'special circumstances' to be released from the *Hearne v Street* obligation, applications for leave to access restricted documents, or objections to production on the grounds of privilege, the court will apply the same tests as in traditional civil litigation. As Mortimer J stated in *Tommy* at [68] (cited in Part IV.A above), 'there are no special rules for native title proceedings'. While the application of these usual principles may be shaped in the light of the unique nature of native title litigation, and the court has been willing to do so where necessary, it should be assumed that the court's expectation and default position will be to apply the same legal tests as it would in any other litigation. Indeed, such a message — emphasising that the general obligations on lawyers and parties litigating in the court are equally

145 Ibid [148]–[149], [166]–[167], [244]–[249].
146 Ibid [125].
147 Ibid [157], [218].
148 Ibid [158]–[163], [218].
149 Ibid [219]–[221].
150 Ibid [95], [160], [162].

applicable to native title matters — has been a notable feature of the court's recent jurisprudence.[151]

Secondly, no special rules apply to the management of documents in native title litigation. As a starting point, principles of open justice — which weigh heavily in the balance of any subsequent discretion — mean that parties should 'be mindful that, upon a request, any document that they have filed in the Court may potentially be made available to any member of the public'.[152] The difficulty facing both parties and the court is to integrate the operation of these open justice principles with the need to respect First Nations people, and principles of Indigenous data sovereignty. In respect of First Nations people, the comments of Mortimer J in *Booth* and *Hughes* (see Parts III and IVB above, respectively) demonstrate the seriousness of the principles in issue. The cases discussed in this article have demonstrated that legal advisors, anthropologists and assistants must be alert to the possibility of disclosure or use beyond the instant litigation, and must advise First Nations people as to those risks and possibilities (noting, however, that this may adversely impact upon the quality of the evidence ultimately received, or the willingness of First Nations people to participate in the litigation process).

Thirdly, the tenor of the cases discussed above demonstrates that disputes as to document production and access must be addressed on a specific, case-by-case basis, with careful attention to the existing legal frameworks that apply to their disclosure. This is especially the case when dealing with anthropological reports, where an (unsustainable) presumption of secrecy appears to have taken place. Such an approach must be tempered in light of the decisions discussed herein, and careful attention must be given to the use and disclosure of anthropological reports. As Mortimer J stated in *Booth*:

> The full and frank participation of experts is often encouraged by the knowledge that what they say is to be used only for the purposes of the proceeding and may, at least initially, be undertaken in a confidential setting, so that they may truly speak their minds. Ultimately, some of their reports, or their discussions, may by the choice or conduct of the parties, or a ruling of the Court, become more freely available. But those decisions are very much made in the specific context of a specific proceeding.[153]

Fourthly, and relatedly, parties must not assume that all material or correspondence gathered by an anthropologist from First Nations people is automatically privileged from production. Specific attention must be given to the

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151 See, eg, *Sandy v Queensland* (2017) 254 FCR 107, 122 [47] (Reeves, Barker and White JJ); *Western Bundjalung People v A-G (NSW)* [2017] FCA 992, [3]–[24], [66] (Jagot J); *Barkandji Traditional Owners #8 v A-G (NSW)* [2015] FCA 604, [12] (Jagot J); *Phyball v A-G (NSW)* [2014] FCA 851, [1], [9] (Jagot J); *Yaegl People #1 v A-G (NSW)* [2015] FCA 647, [9]–[10] (Jagot J); *Yaegl People #2 v A-G (NSW)* [2017] FCA 993, [12]–[16] (Jagot J); *Malone v Queensland* [2020] FCA 1188, [67] (O'Bryan J); *Agius v South Australia [No 6]* [2018] FCA 358, [66] (Mortimer J); *Akiba v Queensland* [2017] FCA 1336, [135]–[137] (Mortimer J); *Tommy* (n 99) [68] (Mortimer J).

152 *Nicholls* (n 71) [11] (Robertson J).

153 *Booth* (n 29) [39].

nature and purpose for which documents are produced, and subsequently used, for privilege claims to be maintainable. As Reeves J stated in *Wyman v Queensland*,[154] neither privilege nor confidentiality can 'throw a protective cover over every communication that has occurred between members of the Bidjara People and [an expert] during his professional life as an anthropologist'.[155]

In this respect, those commissioning expert reports ought to give specific attention to, and be very clear of, the purpose for which the report is commissioned, and the potential uses to which the report might be put. Ideally, these matters ought to be explicitly recorded in the retainer agreement (alongside appropriate obligations of confidentiality), and document control mechanisms established to maintain confidentiality. Furthermore, those involved in native title litigation ought to create and invest in protocols for document management and controls upon access, use and distribution of material. It is important that any decisions to share or disclose documents are made with full appreciation of the potential consequences of doing so on any existing legal rights.

Fifthly, where parties are concerned about the risk of documents being used for adverse or collateral purposes, it will be prudent for express agreements to be made to govern the terms on which any disclosure occurs. Such arrangements should be established prior to that disclosure occurring. In both *Tommy* and the *Lake Torrens Overlap Proceeding*, the absence of contractual restrictions on disclosure weighed heavily against the existence or maintenance of any privilege. If suitable terms cannot be agreed, alternative arrangements — such as separate export reports — may need to be commissioned. While the cost of implementing such measures may be high, such costs are almost certainly going to be lower than the costs of litigation relating to document access later.

Sixthly, representative bodies ought to review their terms of engagement with experts in light of the decisions in *Tommy* and *Pappin*. Those decisions make clear that the 'default' position — that the relevant client to whom privilege accrues, and from whom instructions may be sought is the named applicant(s) for the native title determination — may be varied by clear contractual terms to the contrary. If representative bodies wish to maintain control over documents, rather than merely acting as a custodian thereof, clear terms of engagement listing the representative body as the commissioning party and client will be required.

Seventhly, where evidence which may be especially sensitive is filed in proceedings, parties ought to promptly seek confidentiality or non-publication orders under Part VAA of the *Federal Court of Australia Act 1976* (Cth), as they would in any other Federal Court proceeding in which such an issue arises. Although the threshold for obtaining orders of this sort is high, they are the most effective mechanism for preserving and protecting the interests of persons and parties

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154 *Wyman v Queensland* (n 95).
155 Ibid [28].

whose interests may otherwise be jeopardised by publication or disclosure of documents.

Finally, parties and legal advisors ought to be conscious of, and promote, principles of Indigenous data sovereignty wherever they are able. Increasing litigation surrounding access to documents in native title litigation is generally a poor, alien solution to issues that intimately affect the rights, interests, and status of First Nations peoples. Those First Nations peoples should be centred in all efforts to resolve documentary disputes, as the burgeoning jurisprudence has recognised. While some judicial decisions have demonstrated a willingness to promote principles of Indigenous data sovereignty, the jurisprudence has not yet reached a stage whereby those principles have any direct operative effect. Accordingly, and in some tension with the first conclusion expressed above, principles of self-determination must be expected to be construed in light of — and subject to — the ordinary rules of practice and procedure applying to all civil litigation in the court.

## VII Conclusion

A recent trend in native title litigation has emerged of disputes surrounding access to documents taking up an increasing amount of judicial time and attention. As this article has discussed, recent cases have required the court to translate, adapt, and apply 'ordinary' principles of civil procedure to the unique context of native title litigation. While having due regard to the special features of native title litigation, and recalling the principles of Indigenous data sovereignty, the cases demonstrate that the court has generally applied the same tests, with the same level of stringency, as it would do in ordinary *inter partes* litigation.

However, this has required the court to confront several unique issues arising from the 'mapping' of these principles onto the native title context. Whether documents are sought by consent, from the court, or via compulsive means, recent cases have demonstrated the difficulty of the potential issues surrounding access. For consensual resolution, persons possessing documents must be mindful of the *Hearne v Street* obligation, and conscious that release from that obligation requires the court to be persuaded that some 'special circumstances' exist. Where documents are sought from the court, particular attention must be given to principles of 'open justice' and how they apply to the specific document sought. In the context of subpoenas and notices to produce, questions of legal professional privilege and 'without prejudice' (or settlement) privilege are likely to loom large.

While each of these issues are not unique to native title matters, the court has consistently demonstrated that resolution of these issues will occur on a case-by-case basis, applying well-established general principles to the unique factual context of a given matter while being cognisant of the demands of the native title

context. Judicial decisions have generally favoured the disclosure of documents, emphasising that there are no special rules protecting documents in native title litigation. In doing so, the need for careful attention to, and management of, documents, has become particularly acute. For those engaged in native title litigation, such issues ought to be given careful attention, lest the interests of First Nations peoples be adversely impacted by careless or unexpected disclosure of sensitive material.

# A Review of the New Legislative Definition of Consent in Queensland: An Opportunity for Western Australia?

James Duffy* and Kelley Burton†

*This article examines recent amendments to the definition of consent in the Queensland Criminal Code, with a view to recommending amendments to the Western Australia Criminal Code. Shortcomings in the definition of consent in the Western Australian Code are highlighted and suggestions are provided as to how these might be remedied. Given the different origins and form of criminal law across Australian states and territories, the definition of consent has naturally varied. In some instances, these variations are semantic, and the content of the law is uniform. In other cases, interpretive 'grey areas' exist, with the very real consequence that the concept and content of 'consent' may operate differentially across state borders. Given the shared genesis (and current similarity) of the Queensland Criminal Code and the Western Australia Criminal Code, there are few reasons for their definitions of consent to vary in form and substance.*

## I Introduction

The 2021 Australian of the Year, Grace Tame, has worked tirelessly to highlight the invidious problem of sexual violence in Australia. In particular, Tame acknowledges that there are nine different definitions of consent across the country and argues that understanding consent is critical to preventing sexual violence.[1] The debate about the scope of consent is topical. New South Wales and Victoria are currently taking steps to strengthen their definition of consent by

* Queensland University of Technology Law School, SFHEA, BCom (UQ), LLB (Hons) (UQ), LLM (QUT), GradDipPsyc (Distinction) (QUT), james.duffy@qut.edu.au.

† School of Law and Society, University of the Sunshine Coast, SFHEA, BBus (Dist)/LLB (Hons) (QUT), GradDipLegal Practice (QUT), LLM (QUT), PhD (USQ), kburton3@usc.edu.au.

1 Kate Ainsworth, 'Grace Tame Urges Action on Matters of Consent, Condemns Reputational Damage Control in Wake of Tasmania Sexual Harassment Investigation', *ABC News* (online, 25 August 2021) <https://www.abc.net.au/news/2021-08-25/grace-tame-urges-action-on-matters-of-consent/100407774>.

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legislating an affirmative consent model.[2] Queensland and Western Australia have not adopted an affirmative consent model, although the Queensland Law Reform Commission recently completed a review of consent laws as they relate to sexual offending ('*QLRC Final Report*').[3] This led to a new definition of consent being inserted into the *Criminal Code Act 1899* (Qld) Sch 1 ('*Queensland Criminal Code*' or '*QCC*') in April 2021.[4] This article focuses on the definition of consent in Queensland and Western Australia because the criminal codes operative in these jurisdictions are colloquially described as 'Griffith Codes' and share the same genesis.[5] The Law Reform Commission of Western Australia announced in December 2021 that it would be reviewing ch 31 of the *Criminal Code Compilation*

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[2] The *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW) received royal assent on 8 December 2021 and will commence on a date to be proclaimed. See also New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020). Victoria is planning to adopt an affirmative consent model, which was recommended by the Victorian Law Reform Commission: Margaret Paul, 'Affirmative Consent Laws to be Introduced in Victoria for Sexual Assault Cases', *ABC News* (online, 12 November 2021) <https://www.abc.net.au/news/2021-11-12/victorian-affirmative-consent-sexual-offences-justice-reform/100615234>; Victorian Law Reform Commission, Improving the Justice System Response to Sexual Offences (Report, September 2021).

[3] Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Report No 78, June 2020) ('*QLRC Final Report*').

[4] *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) Pt 3; *Criminal Code Act 1899* (Qld) sch 1 ('*QCC*') ss 347, 348, 348A. In 2019, the Queensland Government referred the issue of consent for the purposes of sexual offences to the Queensland Law Reform Commission: Queensland Government, *Prevent. Support. Believe. Queensland's Framework to Address Sexual Violence* (Report, 2019) 4, 21. At the time of writing, the Queensland Supreme and District Court Criminal Directions Benchbook did not accurately reflect the significant legislative changes to the definition of consent that came into effect in the *Criminal Code* (Qld) in April 2021 as a result of the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld). The Queensland Supreme and District Court Criminal Directions Benchbook on the topic of 'Rape s 349 (Offences Occurring after 27 October 2000)' was out of date by more than six months. Ideally, the Benchbook should be reviewed and updated accordingly after each amendment to the criminal law. See Queensland Courts, 'Supreme and District Courts Criminal Directions Benchbook', *Rape s 349 (Offences Occurring after 27 October 2000)* (Web Page, November 2020) 168 <https://www.courts.qld.gov.au/___data/assets/pdf_file/0004/86179/sd-bb-168-rape-s349-offences-occurring-after-27-october-2000.pdf>. There is no equivalent (publicly available) Directions Benchbook in Western Australia.

[5] The English criminal law was codified in Queensland and Western Australia more than 100 years ago by Sir Samuel Griffith: Michael Kirby, 'Foreword' in Thomas Crofts and Kelley Burton, *The Criminal Codes: Commentary and Materials* (Lawbook Co, 6th ed, 2009). Today, authors continue to explore the fundamental principles of the Griffith Codes in Queensland and Western Australia together in textbooks, even though the criminal law in the two jurisdictions has been dynamic over time and, at times, evolved differently in response to changing social attitudes. See Eric Colvin, John McKechnie and Elizabeth Greene, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 9th ed, 2021); Kelley Burton, Thomas Crofts and Stella Tarrant, *Principles of Criminal Law in Queensland and Western Australia* (Lawbook Co, 3rd ed, 2020); Thomas Crofts et al, *The Criminal Codes: Commentary and Materials* (Lawbook, 7th ed, 2018); John Devereux and Meredith Blake, *Kenny Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths, 9th ed, 2016); Kelley Burton, *Criminal Law in Queensland and Western Australia: LexisNexis Questions and Answers* (LexisNexis Butterworths, 2nd ed, 2015); Andrew Hemming, *Criminal Law Guidebook: Queensland and Western Australia* (Oxford University Press, 2015); Thomas Crofts, *Criminal Law in Queensland and Western Australia: Study Guide* (LexisNexis Butterworths, 2nd ed, 2014). Even though Tasmania and the Northern Territory are also referred to as Code jurisdictions, they differ in significant ways from the Queensland and Western Australian Codes.

*Act 1913* (WA) ('*Western Australia Criminal Code*' or '*WACC*'), with a focus on the meaning of consent as it relates to sexual activity.[6] The overarching goal of this article is to analyse the definition of consent in Queensland with a view to identifying law reform opportunity in Western Australia.[7] Advocating for change so that the criminal law reflects contemporary social values and promotes sexual autonomy is preferable to a Griffith Code jurisdiction in Australia being left behind and again being labelled as an 'anachronism'.[8]

Preventing sexual violence is an overdue priority in Queensland and Western Australia. In the 2020 calendar year, 7,144 sexual offences were recorded in Queensland and 7,724 were recorded in Western Australia.[9] There has been a general uptrend in the incidence of sexual offending in both states since 2010.[10] While there is no doubt that sexual violence has received increased media coverage in Australia over the previous years, the recent data trends in Queensland and Western Australia do not provide an accurate picture of sexual violence in these jurisdictions. The prevalence of sexual violence is likely far worse than shown in the statistics, as this data only reflects the victims of sexual offending who actually report an offence to police.

Both the *QLRC Final Report* and the earlier Queensland Government Report, '*Prevent. Support. Believe. Queensland's Framework to Address Sexual Violence*' ('*Queensland's Framework to Address Sexual Violence*'), acknowledge that sexual offences are significantly under-reported.[11] There are myriad barriers to reporting sexual offences. These include victims fearing discrimination, the offender, or both; victims fearing being stigmatised; victims feeling shame or blame; victims feeling like they will not be believed if they report what has happened; victims not trusting authorities; victims not considering the sexual violence as a serious crime; and the challenges in reporting sexual violence due to language competency and cultural concerns.[12] In a milieu where some victims struggle to report and others choose not to report sexual violence, there is a clear and urgent need for appropriate support services and a coordinated, holistic,

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6 Law Reform Commission of Western Australia, 'Project 113 — Sexual Offences', *Western Australia Government* (Web Page, 8 December 2021) <https://www.wa.gov.au/government/publications/project-113-sexual-offences>.

7 A discussion of the excuse of mistake of fact in relation to consent for sexual offences is beyond the scope of this article (but see *QCC* (n 4) s 348A). Instead, the focus of this article is on the legislative definition of consent as it relates to the elements of sexual offences in Queensland and Western Australia.

8 Andrew Hemming, 'Why the Queensland, Western Australian and Tasmanian Criminal Codes are Anachronisms' (2012) 31(2) *University of Tasmanian Law Review* 1, 1.

9 Queensland Police, 'Sexual Offences Numbers for All Queensland since 2001', *Queensland Crime Statistics* (Web Page, 2022) <https://mypolice.qld.gov.au/queensland-crime-statistics/>. See also Queensland Government Statistician's Office, *Crime Report, Queensland, 2019–2020* (Report, 26 May 2022) 7; Western Australia Police Force, 'Crime in Western Australia', *Crime Statistics* (Web Page, 28 April 2022) 3 <https://www.police.wa.gov.au/crime/crimestatistics#/>.

10 Queensland Government, *Prevent. Support. Believe. Queensland's Framework to Address Sexual Violence* (Report, 2019) 5 ('*Queensland's Framework to Address Sexual Violence*').

11 *QLRC Final Report* (n 3) 48; *Queensland's Framework to Address Sexual Violence* (n 10) 9.

12 *QLRC Final Report* (n 3) 48, 50.

inter-disciplinary national response to prevent sexual violence. The criminal law in each state and territory in Australia forms an important part of this national response.

Despite the fact that the criminal codes in Queensland and Western Australia share the same genesis, sexual offences in these two jurisdictions are labelled differently and comprise different elements. The appropriate labelling of offences serves to communicate to the community what an offender has done wrong without needing to be a lawyer.[13] In Queensland, the key sexual offences include rape, sexual assaults, attempt to commit rape and assault with intent to commit rape.[14] Rape expressly contains the element of consent and, correspondingly, this is imported into the offence of attempt to commit rape.[15] In addition, some types of sexual assault contain the element of consent.[16] Other types of sexual assault do not mention the element of consent, but it is still relevant due to the definition of assault in the *QCC*, which in turn refers to consent.[17] The equivalent sexual offences in Western Australia include sexual penetration without consent, aggravated sexual penetration without consent, indecent assault and aggravated indecent assault.[18] For these Western Australian offences, sexual penetration without consent and aggravated sexual penetration explicitly contain the element of consent.[19] While consent is not an explicit element of indecent assault and aggravated indecent assault, it is still relevant as an element of 'assault'.[20] The definition of consent is therefore critical to several sexual offences in Queensland and Western Australia, and requires clear and articulate treatment in the both jurisdictions.

This article consists of five parts, each of which analyses aspects of Queensland law-reform relating to sexual offending, and the potential applicability of these changes to the *WACC*. Part II of this article discusses the desirability of having a singular definition of consent for sexual offences in both the *QCC* and the *WACC*. The *QCC* was recently amended to ensure that the same definition of consent applied to a range of sexual offences, where previously this had not been the case. The wording of the *WACC* is examined to see if similar amendments are required in that State. Part III considers recent legislative amendments in Queensland that explicitly reflect common law principles

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13 James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217.

14 See *QCC* (n 4) ss 349, 352, 350, 351.

15 *QCC* (n 4) ss 349–50.

16 *QCC* (n 4) s 353(1)(b)(i)–(ii).

17 *QCC* (n 4) s 353(1)(a), (2)–(3). See *QCC* (n 4) s 245 regarding the definition of assault.

18 See *Criminal Code Act 1913* (WA) ('*WACC*') ss 325, 326, 323, 324. In Western Australia, circumstances of aggravation include pretending to be armed or armed with a dangerous or offensive weapon or instrument, being in the company of another person, the accused does bodily harm to another person, the accused does an act that is likely to seriously and substantially degrade or humiliate the victim, the accused threatens to kill the victim, and the victim is 13 years of age or over but under 16 years of age: *WACC* s 319.

19 *WACC* (n 18) ss 325–6.

20 Ibid ss 323–4. See ibid s 222 regarding the definition of assault.

regarding consent for the purpose of sexual offences. The focus is on the absence of consent when a complainant does not say or do anything to communicate a lack of consent. It is argued that Queensland could have taken stronger steps in the drafting of its new s 348(3) and that the *WACC* would benefit from adopting a more strongly worded provision.

Part IV of this article acknowledges the longstanding common law principle that a person may withdraw from sexual activities at any point through words or conduct. Where a person continues to engage in sexual activity after another person has withdrawn their consent to sexual activity, then there is no ongoing consent. This longstanding principle is now reflected in the *QCC* as a result of the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) amendments to the definition of consent. Finally, further opportunities for refining the Western Australian legislative definition of consent are explored in Part V. Particular focus is placed on circumstances where fraud vitiates consent and the difficulties encountered by the Western Australian Court of Appeal when dealing with the issue of fraud and consent.

## II Giving a Consistent Meaning to Consent for All Sexual Offences

An important and sensible amendment made by the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) relates to the applicability of the definition of consent in s 348 to different sexual offences contained in ch 32 of the *QCC*. Historically, there was an assumption that the definition of consent in s 348 applied to all offences in ch 32 of the *QCC*.[21]

In the Queensland Court of Appeal decision of *R v BAS* ('*BAS*'),[22] Fryberg J concluded as a matter of statutory interpretation that the definition of consent only applied to offences in ch 32 of the *QCC* where the word 'consent' was expressly mentioned.[23] The case of *BAS* involved the appellant touching or making contact with the breasts and vaginas of seven young women over a period of approximately six months. He was found guilty after trial on nine counts of indecent dealing, 12 counts of sexual assault and three counts of rape. The appellant had engaged in indecent touching and digital penetration of some of the women, under the pretence that he was performing a form of alternative therapy to help with sports injuries and issues of posture. The Crown case was argued on the basis that consent to the acts was not freely and voluntarily given, as that consent was obtained by false and fraudulent representations about the nature or purpose of the acts.[24] The fact that the offences of both rape and sexual assault

21 *R v BAS* [2005] QCA 97 ('*BAS*').
22 Ibid.
23 Ibid [51]–[52].
24 Ibid [84].

were present in the case allowed Fryberg J to consider whether the meaning of consent was identical for both offences. As a matter of statutory construction, his Honour held that the definition of consent in s 348 applied to the offence of rape, but not to the offence of sexual assault in s 352(1)(a).[25]

The precedential effect of this decision was that the definition of consent in s 348 was applicable to the offences of rape,[26] attempt to commit rape[27] and one form of sexual assault,[28] but not to the offences of assault with intent to commit rape[29] and an alternative form of sexual assault.[30] The approach of Fryberg J gave primacy to a literal interpretation of the text of s 348 and ch 32 more broadly. Section 348 begins with the words '[i]n this chapter, consent means …'. According to Fryberg J, as the word 'consent' does not directly appear in some offences within the ch 32, the s 348 definition cannot be applied to those offences.

Consent is, of course, relevant to s 351 and s 352(1)(a) of the *QCC*, because assault is an element of these offences. Both forms of assault in s 245 of the *QCC*[31] must occur without the consent of the victim. As 'consent' is mentioned in s 245, which is part of ch 26 of the *QCC*, Fryberg J concluded that the definition of consent provided for the purpose of ch 32 cannot be used.

While there is some logic to the interpretive approach of Fryberg J in *BAS*, the case created a precedent that lacked coherence. Why was it the case that some sexual offences used one definition of consent, whereas other sexual offences relied on a different definition of consent? Duffy has previously argued that:

> From a practical (and law reform) viewpoint, there is no reason in principle for the meaning of consent to differ, depending on the precise nature and severity of sexual offending. This is currently the situation in Queensland, regarding consent to rape on the one hand, and consent to sexual assault on the other. The definition of consent in s 348 is more complete and helpful than the definition of consent currently relevant under s 352(1)(a) (ie, the meaning of consent as an element of assault under s 245 of the Queensland Criminal Code). This fact is acknowledged in the current trial directions relating to sexual assault in the Supreme and District Courts Criminal Directions Benchbook, which continue to reference the language of consent as found in s 348.[32]

The Queensland Law Reform Commission was alive to this potential anomaly and, in the *QLRC Final Report*, recommended legislative change to ensure that the s 348 definition of consent applied to every offence in ch 32 of the *QCC*.[33] Interestingly,

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25 Ibid [51]–[52].
26 *QCC* (n 4) s 349.
27 Ibid s 350.
28 Ibid s 352(1)(b).
29 Ibid s 351.
30 Ibid s 352(1)(a).
31 In s 245 of the *QCC*, type 1 assault involves a direct application of force and type 2 assault involves an attempted or threatened application of force.
32 James Duffy, 'Sexual Offending and the Meaning of Consent in the Queensland Criminal Code' (2021) 45(2) *Criminal Law Journal* 93, 112.
33 *QLRC Final Report* (n 3).

one month after the *QLRC Final Report* was published, but before the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) became law, the case of *R v Sunderland* ('*Sunderland*')[34] was decided in the Queensland Court of Appeal.

*Sunderland* was another case where an accused was tried on counts of sexual assault and rape. The case is significant, because it directly overruled the decision in *BAS* that the definition of consent in s 348 did not apply to the offence of sexual assault under s 352(1)(a). According to Sofronoff P:

> Chapter 32 cannot sensibly be read so that the definition of consent in s 348 applies only when the word 'consent' appears expressly as part of the definition of an offence in Ch 32, as it does in s 349. If it were read that way it would mean that although lack of consent is an element of every one of the offences referred to in Chapter 32, namely s 349 (rape), s 350 (attempted rape), s 351 (assault with intent to commit rape) and s 352 (sexual assault), the definition in s 348 only applies to s 349 and s 350 and to the element of rape in s 351, but not to s 352 or to the element of assault in s 351 (but it will apply to the other element in that section, rape).[35]

Sofronoff P held that, under s 578 of the *QCC*, sexual assault is an alternative verdict to rape on an indictment. According to his Honour, it would be 'absurd' for a jury to consider one definition of consent for the offence of rape, and a different definition of consent for sexual assault, when they are potentially alternative verdicts.[36] Even though Sofronoff P did not specifically refer to seminal statutory interpretation passages from cases such as *Project Blue Sky v Australian Broadcasting Authority*,[37] his interpretive approach better accords with the modern approach to statutory interpretation.[38] The context of words in a statute and the consequences of a literal or grammatical construction have meant that words in a section are sometimes required to be read in a way that does not strictly correspond with their literal or grammatical meaning.[39] Sofronoff P

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34 (2020) 5 QR 261 ('*Sunderland*').

35 Ibid 271–2 [40].

36 Ibid 272 [41].

37 (1998) 194 CLR 355, 384 ('*Project Blue Sky*'): 'the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'

38 The first Australian case to refer to the 'modern approach' to statutory interpretation was *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309, 315, when Mason J stated: 'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasize the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.' More recent cases that have highlighted this approach include *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Project Blue Sky* (n 37); *Alcan (NT) Alumina v Commissioner of Territory Revenue* (2009) 239 CLR 27; *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362.

39 *Project Blue Sky* (n 37).

acknowledged the literal interpretation of the applicability of the consent definition, but concluded that the consequences of such an interpretation were undesirable and impractical. A competing interpretation was open on the language of the provision, and that interpretation should be preferred in order to achieve harmony between related sections (sexual assault as an alternative verdict to rape) and within an individual section (section 351 assault with intent to commit rape).

On 7 April 2021, the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld) became law. This amendment Act confirmed the applicability of the s 348 definition of consent to all offences in ch 32 of the *QCC*. This was achieved by inserting a definition of assault in s 1 of the Code, and inserting a definition of assault in s 347 of the Code:

> **1 Definitions**
>
> ***assault* —**
>
> (a) generally — see section 245; or
>
> (b) for chapter 32 — see section 347.
>
> ...
>
> **347 Definitions for ch 32**
>
> In this chapter —
>
> ***assault*** has the meaning given by s 245 as if a reference in section 245 to consent were a reference to consent within the meaning given by section 348.

While this drafting was not the most elegant way to achieve consistency in meaning for the word 'consent' in ch 32 of the Code, its meaning is reasonably clear. Despite the decision reached in *Sunderland*, there was value in legislating for this outcome. Without legislative amendments, the Queensland Court of Appeal (or the High Court of Australia) may have overruled *Sunderland* and reaffirmed the approach to consent taken by Fryberg J in *BAS*.[40]

The *WACC* is susceptible to the same inconsistency of interpretation regarding the meaning of consent across different sexual offences. Section 319(2) of the *WACC* states that '[f]or the purposes of this Chapter ... consent means ...'. Sexual offences are contained in ch 31 of the *WACC*. The word consent is specifically used in the offence of sexual penetration without consent (s 325) but is not used in defining the offence of indecent assault in s 323. In the case of *Higgins v Western Australia*,[41] the Supreme Court of Western Australia Court of

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[40] The ability of State courts of appeal to overrule their own earlier decisions was discussed in the High Court case of *Nguyen v Nguyen* (1990) 169 CLR 245. According to the High Court, as State courts of appeal are often courts of last resort (absent the grant of a special leave to appeal to the High Court), 'it would seem inappropriate that the appeal courts of the Supreme Courts and of the Federal Court should regard themselves as strictly bound by their own previous decisions. In cases where an appeal is not available or is not taken to [the High] Court, rigid adherence to precedent is likely on occasions to perpetuate error without, as experience has shown, significantly increasing the corresponding advantage of certainty': 269–70.

[41] (2016) 263 A Crim R 474.

Appeal considered whether the s 319(2)(a) definition of consent applied to sexual offences involving assault in ch 31 of the Code. The Court held that this definition of consent applied to the offence of indecent assault, even though the word consent is not specifically used in the offence of indecent assault in s 323. This outcome was justified with reference to the text, context and purpose of the *WACC*,[42] with context understood broadly to encompass extrinsic materials such as a second reading speech and explanatory memorandum.

The legislative drafting of s 319(2)(a) is slightly different to s 348 of the *QCC*. While s 348 uses the language '[i]n this Chapter …' when defining consent, s 319(2)(a) uses the language '[f]or the purposes of this Chapter …' when defining consent. This difference in the wording of ch 32 of the definition of consent in the *WACC* ('[i]n this Chapter' versus 'for the purposes of this Chapter') gave the Court of Appeal more confidence in concluding that the definition of consent in s 319(2)(a) applied to the offence of indecent assault.[43] That said, a differently composed Court of Appeal may take a different view as to the meaning of consent for the purpose of s 323 of the *WACC*, similar to that expressed by Fryberg J in *BAS*. To exclude this possibility, the *WACC* should, in our view, be amended in a similar way to the *QCC*.

## III Explaining the Approach to Consent when there is an Absence of Word or Action to Communicate Consent

The *QLRC Final Report* recommended the insertion of a new subsection in s 348 of the *QCC*.[44] Section 348(3) now reads:

> (3) A person is not to be taken to give consent to an act only because the person does not, before or at the time the act is done, say or do anything to communicate that the person does not consent to the act.

This amendment was very modest, and the wording of the subsection itself is highly caveated. The drafting is also awkward (and if the word 'not' had been used one more time, the drafters could be accused of tying the reader in (k)nots). Section 348(3) does not create new law in Queensland. It reflects the common law position already established in the cases of *R v Shaw* ('*Shaw*')[45] and *R v Makary* ('*Makary*').[46] In *Shaw*, the Queensland Court of Appeal stated that a 'complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it.'[47] In *Makary*, Sofronoff P confirmed that:

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42 Ibid. See in particular McLure P at 476 [5]–[11] and Mazza JA at 495–7 [125]–[137].
43 Ibid 497 [135].
44 *QLRC Final Report* (n 3) 94, 105.
45 [1996] 1 Qd R 641 ('*Shaw*').
46 [2019] 2 Qd R 528 ('*Makary*').
47 *Shaw* (n 45) 646.

> An absence of objection is not the same as giving consent. There is no *a priori* consensus to having sexual intercourse by reason of a person's submission to unwelcome, but mild, sexual overtures and these do not, by the lapse of time, metamorphose into the giving of consent to sexual intercourse.[48]

One suggestion for Western Australian reform is to introduce a more strongly worded provision that deals with the circumstance where an accused does not say or do anything to signal consent (or lack of consent). The Queensland provision is concentrated on a failure to communicate a *lack* of consent. The focus should be on a failure to communicate consent. Case law and legislation aside, as a matter of logic, a failure to communicate dissent does not equal consent. That is all that the newly inserted s 348(3) is saying.

Instead, we argue that Western Australian should consider adopting the same drafting utilised in Victoria and Tasmania.[49] With respect to the meaning of consent, both states confirm in legislation that a person does not consent to an act if they do not say or do anything to communicate/indicate consent. This law requires a positive communication of consent for consent to be present. Just like in Queensland, the *WACC* defines consent to mean consent freely and voluntarily *given*.[50] If Western Australian courts adopt the same approach to this definition as the Queensland Court of Appeal in *Makary*, they acknowledge that consent is both a state of mind and something that must be *given* through the making of a representation about that state of mind. On one view, a law that requires a positive communication of consent for consent to be present is a law that sits quite comfortably with a requirement that consent be *given*.

There was, however, reticence on the part of the QLRC to recommend a law that 'a person who does not say or do anything to communicate consent' does not consent.[51] For that reason, such a provision was not inserted into the *QCC*. The Western Australian Parliament now has the luxury of examining these reasons for not including such a provision and deciding for itself whether those reasons are persuasive. Chief amongst the reasons why the QLRC did not recommend such a provision was the assertion that the law should not criminalise consensual sexual activity.[52] As a principle of law, this statement is true and trite. The concern of the QLRC appears to be the situation where a person may be mentally/internally consenting to sexual activity but does not do or say anything to communicate that consent. One answer to this concern is that consent is defined in the *QCC* as a state of mind that must be freely and voluntarily given. If that consent is not given through the making of some type of representation, then it does not meet the legal

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48 *Makary* (n 46) 546–7 [70].

49 *Crimes Act 1958* (Vic) s 36(2)(l); *Criminal Code Act 1924* (Tas) sch 1 s 2A(2)(a). See also *Crimes Act 1900* (NSW) s 61HK(2): 'a belief that the other person consents to sexual activity is not reasonable if the accused person did not, within a reasonable time before or at the time of the sexual activity, say or do anything to find out whether the other person consents to the sexual activity'.

50 *WACC* (n 18) s 319(2).

51 *QLRC Final Report* (n 3) 93–4.

52 Ibid 94.

definition of consent as provided for in s 348. In such a circumstance, consent (as legally understood) would be absent, so there would be no criminalisation of a 'consensual' sexual activity. A second practical answer to this concern is that if a person is, in reality, mentally consenting to sexual activity, but does not say or do anything to communicate this consent, then who would bring any subsequent sexual activity to the attention of the police? Surely not the person who was mentally consenting.

A further stated concern of the QLRC is that such a provision may create unintended consequences.[53] It is difficult to test this assertion because the *QLRC Final Report* does not detail what these unintended consequences might be. There is some suggestion that '[r]elevant circumstances like the nature and duration of the relationship between the parties involved in the sexual activity and how that relationship might impact on the ways in which those parties might communicate may be given less weight by the trier of fact.'[54]

This suggestion is speculative at best. The nature and duration of a relationship, and how that may impact upon communication styles surrounding sexual activity, will always be a key focus in sexual offence proceedings. These factors provide a broader context that is essential to better understanding the meaning of words or actions used by people during sexual activity.[55] A section that states 'a person who does not say or do anything to communicate consent does not consent', means what it says. It does not capture the parties in a pre-existing relationship who give consent in subtle and nuanced ways, based on a pattern of previous behaviour.[56] The giving of consent can of course be subtle and nuanced. But it must be given somehow. The person who does not say or do anything to indicate consent, does not *give* consent in any material form. For these reasons, it is hard to understand why the QLRC thought that the inclusion of such a section in the *QCC* might be problematic.

One final concern is how a provision of this type might alter the law as expressed in *Makary*. The following statement from Sofronoff P (discussing the definition of consent in s 348) is provided in full to give context:

> First, there must in fact be 'consent' as a state of mind. This is also because the opening words of the definition define 'consent' tautologically to mean, in the first instance, 'consent'. The complainant's state of mind remains elemental. Second, consent must also be 'given' in the terms required by the section.
>
> The giving of consent is the making of a representation by some means about one's actual mental state when that mental state consists of a willingness to engage in an act. Although a representation is usually made by words or actions, in some circumstances, a representation might also be made by remaining silent and doing

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53 Ibid.
54 Ibid.
55 *Sunderland* (n 34) 272–3 [44].
56 *Makary* (n 46) 543 [50].

> nothing. Particularly in the context of sexual relationships, consent might be given in the most subtle ways, or by nuance, evaluated against a pattern of past behaviour.[57]

In particular, his Honour appears to be stating that, in some circumstances, saying nothing and doing nothing can be understood as a positive representation of consent to sexual activity. It may well be that the authors of this article lack imagination, but we cannot envisage a situation where consensual sexual activity occurs, involving one party who does not say or do anything to signal consent. For the sake of clarity, it is our opinion that consent *can* be given in subtle or nuanced ways, and that the broader context of the sexual activity will often further an understanding as to the meaning of words or actions. As Duffy has previously stated:

> The existence or non-existence of consent as a matter of fact, is a by-product of verbal and non-verbal communication, governed by context. It is this unique interplay of communication and context, that will determine whether the words or actions of an individual in a particular case, are sufficient to meet the legal meaning of consent as described in the *Queensland Criminal Code* and further explicated through case law.[58]

The most sensible conclusion to draw is that a provision which states, 'a person who does not say or do anything to communicate consent, does not consent', cannot be reconciled with a small part of President Sofronoff's judgment in *Makary*, where his Honour held that a representation might also be made by remaining silent and doing nothing.[59]

The strongest articulation of why a provision of this nature should not be added into legislation comes from Dyer, who has been prolific in his writing on sexual offending in Australian law over the last five years.[60] According to Dyer, sections like s 2A(2)(a) of the *Tasmanian Criminal Code* and s 36(2)(l) of the *Crimes Act 1958* (Vic) may not have much effect, because in the vast majority of contested sexual offending cases, a complainant has said or done something that may communicate consent.[61] Instead, these provisions may unduly focus attention on whether particular words or actions were used *for the purpose* of communicating

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57 Ibid 543 [49]–[50].

58 Duffy (n 32) 103.

59 *Makary* (n 46) 543 [50].

60 Andrew Dyer, 'Sexual Assault Law Reform in New South Wales: Why the Lazarus Litigation Demonstrates No Need For s 61HE of the Crimes Act to Be Changed (Except in One Minor Respect)' (2019) 43(2) Criminal Law Journal 78; Andrew Dyer, 'Yes! To Communication about Consent; No! To Affirmative Consent: A Reply to Anna Kerr' (2019) 7(1) Griffith Journal of Law & Human Dignity 17; Andrew Dyer, 'Mistakes That Negate Apparent Consent' (2019) 43(3) Criminal Law Journal 159; Andrew Dyer, 'The Mens Rea for Sexual Assault, Sexual Touching and Sexual Offences in New South Wales: Leave It Alone (Although You Might Consider Imposing an Evidential Burden on the Accused)' (2019) 48(1) Australian Bar Review 63; Andrew Dyer, 'Progressive Punitiveness in Queensland' (2020) 48(3) Australian Bar Review 326; Andrew Dyer, 'Affirmative Consent in New South Wales: Progressive Reform or Dangerous Populism?' (2021) 45(3) *Criminal Law Journal* 185.

61 Dyer, 'Sexual Assault Law Reform in New South Wales' (n 60) 79 fn 8.

consent.[62] We accept both of these arguments, but believe on balance that inserting such a provision still has value, for the following reasons:

1. It makes clear that a failure to communicate about consent (whether that be the absence of dissent or the absence of positively communicated consent) means that consent is not present.
2. A person who is initiating sexual contact is encouraged to take positive communicative steps to ascertain whether another person is consenting, if that has not already been made clear.[63]
3. The individual who does not say or do anything to communicate consent is protected, if this absence of communication is due to a freeze response (tonic immobility),[64] or a decision that shutting down and doing nothing is the best way to survive/endure an unwanted sexual encounter.
4. Explicit legislative acknowledgment that a person does not consent if they do not say or do anything to communicate consent limits the ability of a defendant to rely on the mistake of fact excuse when a complainant says or does nothing to indicate consent.[65]

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62 Ibid 87. We would, however, make the point that a focus on the complainant's words and conduct before and during sexual activity in a contested sexual offence case is an important line of inquiry for defence counsel. Dyer's concern is that a sexual encounter may be broken down into many parts of communication, and it may be undesirable to focus so minutely on the complainant's conduct which is said to communicate consent. We accept that this may involve a difficult line of questioning between a defence counsel and a complainant. That said, one of the roles of defence counsel in hearings of this type is to point to a list of words or actions given by a complainant that suggest consent was given. This list of words or actions may alternatively form the basis of an honest and reasonable, yet mistaken belief in the existence of communicated consent. This focus on the complainant's conduct must also be counterbalanced with a focus on the conduct of the accused, and the prosecution has an important role to play in examining the steps an accused took to ascertain/confirm that consent to the sexual activity was present.

63 *QLRC Final Report* (n 3) 85.

64 Susan Suarez and Gordon Gallup, 'Tonic Immobility as a Response to Rape in Humans: A Theoretical Note' (1979) 29(3) *The Psychological Record* 315; Grace Galliano et al, 'Victim Reactions During Rape/Sexual Assault: A Preliminary Study of Immobility Response and its Correlates' (1993) 8(1) *Journal of Interpersonal Violence* 109; Jennifer Heidt, Brian Marx and John Forsyth, 'Tonic Immobility and Childhood Sexual Abuse: A Preliminary Report Evaluating the Sequela of Rape-Induced Paralysis' (2005) 43(9) *Behaviour Research and Therapy* 1157; Bianca Fileborn, *Sexual Assault Laws in Australia* (Resource Sheet, February 2011); Avigail Moor et al, 'Rape: A Trauma of Paralyzing Dehumanization' (2013) 22(10) *Journal of Aggression, Maltreatment & Trauma* 1051; Anna Möller, Hans Peter Söndergaard and Lotti Helström, 'Tonic Immobility During Sexual Assault: A Common Reaction Predicting Post-Traumatic Stress Disorder and Severe Depression' (2017) 96(8) *Acta Obstetricia et Gynecologica Scandinavica* 932.

65 It is suggested that such a provision would limit the ability of an accused to rely on the mistake of fact excuse, but not completely remove the possibility. Where the law requires a positive communication of consent, there still remains the possibility that an accused has an honest and reasonable but mistaken belief that consent has been communicated.

## IV Acknowledging the Withdrawal of Consent by Words or Conduct

Queensland case law has been clear for many years that a person who continues to sexually penetrate a complainant after consent has been withdrawn commits the crime of rape. The more recent Queensland Court of Appeal decisions of *R v Johnson*,[66] *R v OU*[67] and *R v Kellett*[68] affirm this principle, and are consistent with the earlier decision of the Queensland Court of Criminal Appeal in the case of *R v Mayberry*.[69] While so much is clear from the case law, however, this legal position was not previously clear on the face of the *QCC*. The *QCC* has never explicitly defined the offences of rape or sexual assault as continuing offences.[70] This differs from other Australian jurisdictions where an offence involving sexual intercourse or sexual penetration is defined to include the *continuation* of sexual intercourse or penetration. In Western Australia, for example, the offence of sexual penetration without consent reads:

> **325. Sexual penetration without consent**
>
> (1) A person who sexually penetrates another person without the consent of that person is guilty of a crime and is liable to imprisonment for 14 years.[71]

Pursuant to s 319 of the *WACC*, to sexually penetrate means, inter alia, 'to continue sexual penetration'.[72] Read together, these sections would capture an accused who *continues* to sexually penetrate another person without the consent of that person.

The *QLRC Final Report* suggested that a new subsection be inserted into s 348 of the *QCC*, to expressly provide that, if a sexual act is done or continues to be done after consent is withdrawn, it occurs without consent.[73] This recommendation was accepted by the Queensland Parliament, and is now reflected in s 348(4) of the *QCC*.[74] The purpose of this change was not to effect any change to the law of Queensland, but to make that law more visible and more readily understood by members of the public.[75]

One benefit that Western Australia may obtain by including a similar provision in s 319(2) (definition of consent for the purpose of ch 31), is that it would be made clear that withdrawal of consent is relevant to all offences in ch 31,

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66 [2015] QCA 270.
67 [2017] QCA 266.
68 [2020] QCA 199, [139].
69 [1973] Qd R 211.
70 Andreas Schloenhardt, *Queensland Criminal Law* (Oxford University Press, 5th ed, 2018) 313.
71 *WACC* (n 18) s 325.
72 *WACC* (n 18) s 319(1)(e) (definition of 'sexually penetrate').
73 *QLRC Final Report* (n 3) 103–6.
74 This subsection now reads: 'If an act is done or continues after consent to the act is withdrawn by words or conduct, then the act is done or continues without consent.'
75 *QLRC Final Report* (n 3) 103–4.

where consent is an issue. At present, it is clear in the *WACC* that continued sexual penetration after consent has been withdrawn is an offence under s 325.[76] Unlike the definition of 'sexually penetrate', which includes 'to continue sexual penetration', there is no provision that states that indecent assault includes a continued indecent assault after consent has been withdrawn.[77]

Assume a male is intimately touching a female on the breasts during foreplay (and consent has been given). After a while, the female says 'do you mind stopping that, my breasts are starting to hurt?'. If the male continues to touch the woman's breasts, then it is assumed, based on the wording of *WACC* s 323, that an indecent assault has occurred. Adding a declaratory provision to s 319(2) to the same effect of s 348(4) of the *QCC*, would address any concerns about the applicability of withdrawn consent to sexual offences in ch 31 of the *WACC*.

## V Identifying Other Opportunities for Western Australia to Refine its Legislative Definition of Consent

Parts II, III and IV have focused on the recent legislative changes to the definition of consent in the *QCC* and how the *WACC* may benefit from these changes. This part will consider additional drafting challenges that are unique to the Western Australian definition of consent. Table 1 maps the scope of the Western Australian legislative definition of consent against the equivalent definition in Queensland.[78] Given their shared origin, there is much overlap between the two definitions. Both jurisdictions state that consent must be freely and voluntarily given by a person with the cognitive capacity to give the consent, and that consent is not freely and voluntarily given if it is obtained by force, threat or intimidation.[79]

In Table 1, the shaded cells indicate where the Western Australian definition of consent is different to the Queensland definition. These shaded cells signify where the Western Australian definition of consent could be amended to better align with the current legislative definition of consent in Queensland. The following discussion focuses on the factors that negative consent, with particular attention paid to consent obtained through deceit or any fraudulent means.

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76 See also *Ibbs v The Queen* (1987) 163 CLR 447.

77 This can be compared with *Crimes Act 1900* (NSW) s 61HB(1A): 'The continuation of sexual touching as defined in subsection (1) is also "sexual touching" for the purposes of this Division.'

78 *QCC* (n 4) ss 347–8; *WACC* (n 18) s 319(2).

79 *QCC* (n 4) ss 348(1), 348(2)(a)–(b); *WACC* (n 18) s 319(2)(a).

***Table 1: The Scope of Western Australian Legislative Definition of Consent Mapped against the Queensland Legislative Definition of Consent.***

| Queensland Legislative Definition of Consent | Queensland Legislative Provision | Western Australian Legislative Definition of Consent | Western Australian Legislative Provision |
|---|---|---|---|
| Assault defined for the purpose of sexual offences | *QCC* s 347 Assault definition | There is an opportunity in Western Australia to improve the legislative definition of consent here. | |
| Consent means freely and voluntarily given by a person with the cognitive capacity to give the consent | *QCC* s 348(1) | ***Consent*** means a consent freely and voluntarily given | *WACC* s 319(2)(a) |
| Without limiting those words [in the cell immediately above], a person's consent to an act is not freely and voluntarily given if it is obtained by: | *QCC* s 348(2) | Without in any way affecting the meaning attributable to those words [in the cell immediately above], a consent is not freely and voluntarily given if it is obtained by: | *WACC* s 319(2)(a) |
| • Force | *QCC* s 348(2)(a) | • Force | *WACC* s 319(2)(a) |
| • Threat or intimidation | *QCC* s 348(2)(b) | • Threat, intimidation | *WACC* s 319(2)(a). |
| • Fear of bodily harm | *QCC* s 348(2)(c) | There is an opportunity in Western Australia to improve the legislative definition of consent here as 'fear of bodily harm' is not explicitly referred to in the Western Australian definition of consent. Depending on what causes the fear of bodily harm, the consent may be vitiated by 'force', 'threat' or 'intimidation'. This may also be covered by the introductory words to the Western Australian definition of consent, that is, 'consent freely and voluntarily given'. | |
| • Exercise of authority | *QCC* s 348(2)(d) | There is an opportunity in Western Australia to improve the legislative definition of consent by being more explicit as 'exercise of authority' is not expressly provided in the Western Australian legislative definition of consent. This may be covered by the | |

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| | | introductory words to the Western Australian definition of consent, that is, 'consent freely and voluntarily given'; or another example negating consent such as 'threat', 'intimidation', 'deceit, or any fraudulent means'. |
| • False and fraudulent representations about the nature or purpose of the act | *QCC* s 348(2)(e) | There is an opportunity in Western Australia to improve the legislative definition of consent by being more explicit as 'false and fraudulent representations about the nature or purpose of the act' is not expressly provided in the Western Australian legislative definition of consent. This is currently covered by 'deceit, or any fraudulent means': *Criminal Code 1913* (WA) s 319(2)(a); *Michael v State of Western Australia* (2008) 183 A Crim R 348. |
| • Mistaken belief induced by the accused person that the accused person was the person's sexual partner | *QCC* s 348(2)(f) | There is an opportunity in Western Australia to improve the legislative definition of consent and be more explicit here. In *Michael v State of Western Australia* (2008) 183 A Crim R 348, 'deceit, or any fraudulent means' in *Criminal Code 1913* (WA) s 319(2)(a) was interpreted broadly and covers a mistaken belief induced by the accused person that the accused person was the person's sexual partner. |

The Queensland and Western Australian legislative definitions of consent take diverse approaches to excluding false and fraudulent representations about the nature or purpose of the act, as a factor that negates consent. In Queensland, the legislative definition of consent explicitly provides that a person's consent to sexual activity is not free and voluntary if the offender made false and fraudulent representations about the nature or purpose of the act.[80] The reference to the word 'purpose' was intended to capture, for example, a radiographer who advises a patient that he is using an ultrasound transducer to conduct an internal

[80] *QCC* (n 4) s 348(2)(e).

examination of a vagina for a diagnostic medical purpose, when the real purpose is his own sexual gratification.[81]

In contrast, the Western Australian legislative definition of consent does not refer to false and fraudulent representations about the *nature or purpose* of the act. Instead, the Western Australian provision states that consent is not freely and voluntarily given if it is obtained by 'deceit, or any fraudulent means'.[82] Consequently, if a sexual offender in Western Australia did make false and fraudulent representations to the victim about the nature and purpose of the sexual act, then the victim did not give free and voluntary consent. The outcome in the radiographer example described above would be the same in Queensland and Western Australia, but the interpretive process in arriving at that outcome would be different. In Western Australia, greater judicial interpretation of the legislative definition of consent is required. The phrase 'any fraudulent means' in the Western Australian definition of consent is potentially much broader in scope than the equivalent Queensland provision and thereby has the capacity to capture a wider range of circumstances that fall within the realm of deceit or fraud. From a law reform perspective, the question becomes whether the 'fraudulent means' exception to consent in the Western Australian provision is too broad and should be limited in a similar way to the Queensland provision.

More than a decade ago, the breadth of the phrase 'deceit, or any fraudulent means' was discussed in the Western Australian Court of Appeal decision of *Michael v Western Australia* ('*Michael*').[83] President Steytler reflected on the historical origin of the phrase, noting that its broad wording was designed to capture a wider set of circumstances in which fraud could vitiate consent, compared to the common law.[84] His Honour reinforced this view by stating:

> The court is, of course, bound by the legislation enacted by the Parliament. Resort to the common law, when interpreting a statute, is appropriate only when its language is ambiguous or in other special circumstances (which are not presently applicable).[85]

Accordingly, Steytler P did not interpret the phrase 'deceit, or any fraudulent means' narrowly, as did the High Court did in *Papadimitropoulos v The Queen*,[86] where it was held that

> it is the consent to [penetration] which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the

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81 *R v Mobilio* [1991] 1 VR 339 ('*Mobilio*'). See also Queensland Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (Report, February 2000) 240. For a Queensland example, see *BAS* (n 21), where a male practitioner of natural medicine digitally raped female patients and touched their breasts for his own sexual gratification rather than therapeutic purposes.

82 *WACC* (n 18) s 319(2)(a).

83 (2008) 183 A Crim R 348 ('*Michael*').

84 Ibid; Michael Murray, *The Criminal Code: A General Review* (Report, June 1983).

85 *Michael* (n 83) 370–1 [88].

86 *Papadimitropoulos v The Queen* (1957) 98 CLR 249 ('*Papadimitropoulos*').

> character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.[87]

In *Michael*, Steytler P did not need to provide an opinion on the scope of the phrase 'deceit, or any fraudulent means'.[88] However, his Honour expressed concern that the phrase is 'susceptible to an interpretation that is dramatic in its reach' and 'the most appropriate solution is that the legislation should be amended'.[89] At this point in 2008, the Western Australian legislature should have been on notice that the wording of the provision was uncertain in scope, and had the potential to create interpretive difficulties for judges. Since *Michael*, there have been no legislative changes to the Western Australian definition of consent to clarify the scope of the phrase 'deceit, or any fraudulent means'.

In contrast and in dissent, EM Heenan AJA stated:

> [I]t would be quixotic in the extreme for any person in the current age to ignore the inevitable, that there will always be, however unsatisfactory it may be from any moral viewpoint, many instances in which men or women engage in sexual intercourse with each other when that activity is preceded, and to an extent induced, by some form of deception such as 'I am not married'; 'I am not seeing anyone else'; or with false and exaggerated protestations of wealth, importance or status. Examples could be multiplied of promises being made which were never intended to be kept, and of facts or conditions concealed which, if revealed, would almost certainly lead to rejection. Conduct of this kind which I think can safely be said, has probably been common since the earliest times of recorded human history, however deplorable, has not previously been regarded as criminal, or at least so criminal as to justify a conviction for the most serious form of sexual offence prevailing from time to time. That is a powerful indication that such misconduct or deceit has not generally been regarded as criminal and it would be surprising indeed if, by such an indirect means, as the amendment to s 319(2) of the *Criminal Code*, Parliament had intended to effect such a far-reaching change to the law which is likely to affect and criminalise types of conduct which had not previously been treated as the most serious of the indictable sexual offences.[90]

This judicial interpretation suggests that construction of the phrase 'deceit, or any fraudulent means' should be subject to some limitation. His Honour suggested the following scope of the provision:

> I consider that the scope of deceit or any fraudulent means in s 319(2) should be treated as referring to those frauds or misrepresentations which deprived the person concerned of a full comprehension of the nature and purpose of the proposed activity

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87 Ibid 261.
88 *Michael* (n 83) 371 [89].
89 Ibid.
90 Ibid 432 [373].

> or his or her legal status of the person as a spouse, or his or her identity as an acceptable sexual partner.[91]

Heenan AJA's interpretation of 'deceit, or any fraudulent means' is therefore broader than the common law position in *Papadimitropoulos*, which only recognised fraud as to the identity of the person or the nature of what they were doing, as factors that override consent.[92] His Honour read down an otherwise broad provision, limiting it to circumstances of fraud mentioned in *Papadimitropoulos*, with an updated recognition of fraudulent representations as to the purpose of an act, such as those made in *R v Mobilio*.[93] The net result of the *Michael* decision involved one judge calling for legislative reform of the provision, and another judge reading the provision down, in order to render it practicably workable and to avoid any antecedent fraudulent representation (no matter how benign) from overriding an otherwise freely given consent. The inaction of the Western Australian Parliament with respect to the confusion this provision has caused is difficult to understand. Given that Heenan AJA's interpretation of the phrase 'deceit, or any fraudulent means' accords almost perfectly with the current drafting of the *QCC*, it is suggested that the *WACC* adopt the more precise language of the *QCC* and delete the reference to 'deceit, or any fraudulent means'. In its place, the following factors should be held to negative consent:

1. false and fraudulent representations about the nature or purpose of the act;
2. a mistaken belief induced by the accused person that the accused person was the person's sexual partner.[94]

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91 Ibid 432–3 [376]. In *R v Winchester* (2011) 222 A Crim R 1, Muir JA stated that '[a] person's consent may be influenced, for example, by a belief engendered by words and/or conduct on the part of the other person that the other person is promising or offering: an enduring relationship; an engagement or marriage; jewellery; emotional support; a house for children of a previous marriage; financial assistance; a paid vacation; or a combination of those things … it cannot be supposed that, at least as a general proposition, there can be no free and voluntary consent where the consent is influenced by such a promise or offer which is part of normal social interaction' (at 29 [82]). In this case, the offender fraudulently promised to give a horse to the victim in return for sexual intercourse, but that was insufficient to vitiate the victim's consent.

92 *Papadimitropoulos* (n 86).

93 *Mobilio* (n 81). See also *R v Williams* [1923] 1 KB 340.

94 This is the exact wording found in the *QCC* (n 4) s 348(2)(e) and (f). It should be noted that if the broad words 'deceit, or any fraudulent means' are removed from the Western Australian legislative definition of consent, each type of fraud that vitiates consent would need to be specifically covered in the definition. The Western Australian definition of consent could be more explicit by stating consent is not freely and voluntarily given if it is obtained by the fear of bodily harm or the exercise of authority: *QCC* (n 4) s 348(2)(c)–(d). However, the other heads that negate consent or the overarching introductory words that consent is 'freely and voluntarily given' are adequate to capture such behaviour.

## VI Conclusion

Understanding consent is a critical step towards preventing sexual violence.[95] This article has analysed the Queensland legislative definition of consent with a view to recommending changes to the *WACC* definition of consent. This issue is timely given that the Queensland legislative definition of consent changed in April 2021 as a result of the *Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021* (Qld). Based on these amendments, several key areas for legislative improvement have been identified regarding the Western Australian definition of consent:

1. The legislative definition of consent should be applied consistently for all sexual offences throughout the WACC.
2. A provision should be introduced that states: 'A person does not consent to an act, if they do not say or do anything to communicate/indicate consent.'
3. A provision should be inserted that provides that if a sexual act is done or continues to be done after consent is withdrawn, it occurs without consent.
4. The phrase 'deceit, or any fraudulent means' as a circumstance that negatives consent should be deleted and replaced with:
    a. False and fraudulent representations about the nature or purpose of the act;
    b. A mistaken belief induced by the accused person that the accused person was the person's sexual partner.

When Grace Tame commented on the nine different definitions of consent across the states and territories in Australia, there was a temptation to push back against this criticism from a criminal law perspective. The definitions of consent in each state and territory are a by-product of their form (Criminal Code States v non-Code States), and the text, context and purpose of the legal document in which they reside. That said, when the criminal law of Queensland and Western Australia is considered, there are few good reasons why the definition of consent as it relates to sexual offending should be different between the two States. Western Australia now has the opportunity to review its laws relating to consent. If this opportunity is taken, it will lead to an updated and harmonised definition of consent in the *WACC*.

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95 Ainsworth (n 1).

# Pairing International Taxation and Conflict of Laws: Common Challenges and Reciprocal Lessons

Sagi Peari* and Nolan Sharkey†

*This article explores the relationship between two legal fields that represent the legal backbone of contemporary cross-border and internet commercial activity: conflict of laws and international taxation. Despite the growing significance of the two fields of law, legal scholarship has yet to explore their intriguing relationship. Which state can levy tax on a multi-billion-dollar Delaware (US) corporation with headquarters in London (UK) that sells $500,000,000 worth of products to Australian consumers each year? Which law should adjudicate an online contract between a NSW corporation and a German corporation, signed online and addressing the delayed delivery of goods in Brazil due to the coronavirus outbreak? Despite the paramount significance of both disciplines, their traditional underpinnings appear to be fundamentally challenged and pressed by the realities of COVID-19, dynamic commerce, and the digital environment. Our cross-disciplinary partnership aims to design a unifying conceptual framework that captures the essentials of both disciplines. Through reciprocal lessons, this framework will help address the uncertainty in both disciplines.*

## I Introduction

Will the government collect tax? How much tax will the government collect? Which law will govern a given commercial activity? These are pertinent questions for businesses, the general public, government and Australian society as a whole when engaged in daily trade and commerce. These questions are particularly important during the current unprecedented economic challenges of COVID-19, and they will become even more important during the post-COVID-19 economic recovery.

Our cross-disciplinary partnership — from the fields of international taxation and conflict of laws — offers an analysis of the contemporary challenges of international taxation from the perspective of conflict of laws.

* Senior Lecturer in Private and Commercial Law, University of Western Australia Law School.
† Barrister of the High Court of Australia, Chaterted Accountant, Winthrop Professor of Law, University of Western Australia, Professorial Fellow in Taxation, University of New South Wales.

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Correspondingly, the article examines the key uncertainties of international taxation from the intellectual perspective of conflict of laws.[1]

This is an ambitious goal. We do not deny that. The article aims to shed a different light on both fields and tackle their most acute puzzles and ambiguities. To the best of our knowledge, in the lengthy histories of international taxation and conflict of laws, no attempt has been made in the academic literature (whether in English or otherwise) to comprehensively consider the interplay between the two disciplines and suggest their intellectual combination as one conceptual whole.

The central thesis of this article is that conflict of laws and international taxation can provide each other with invaluable lessons and insights to cope with the challenges of the contemporary commercial reality. We develop our argument through the following two-stage process. *First*, we show the conceptual interconnectedness between the two fields. In contrast to comments in the literature[2] and case law[3] that draw a sharp line between international taxation and conflict of laws, we argue that the two are intimately interconnected through a set of underlying ideas and rationales. Despite addressing different aspects within the legal universe and targeting different objects, the two disciplines relate at a fundamental level. This stage of our analysis explains why drawing a conceptual parallel between the question of applicable law and international taxation is possible and, in fact, necessary.

*Second*, we provide detailed suggestions on how each discipline can benefit the other. We argue that both disciplines have been facing, more or less, a similar set of practical and conceptual problems, especially the challenges of digitalisation enhanced by the realities of COVID-19 and increasing cross-border commercial activity led by corporations. This all gives rise to our central point about the significance of the reciprocal lessons. Carefully conceptualised, qualified and analysed, conflict of laws and international taxation can teach each other a lot. We argue that the Australian public, business community and taxation

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1 We would like to make two clarifications as to the scope and breadth of the article. First, a terminological point. 'Conflict of laws' here refers to the question of the applicable law to govern a given dispute that contains a foreign element. 'International taxation' here refers to the operation of states' income tax law in relation to a context with a foreign element as well as treaties altering this operation (see also below Part IV D). This means that the article does not engage with the potential interplay between the two disciplines on the point of recognition of foreign judgments and the question of jurisdictional authority. These important questions would require independent treatment. Second, the article has a global outlook and targets readers beyond the borders of Australia. The argument is generally a conceptual one, which explains the frequent reference to international literature and case law.

2 See, eg, Paul Torremans and James Fawcett (eds), *Cheshire, North & Fawcett: Private International Law* (Oxford University Press, 15th ed, 2017) 119 ('*Cheshire & North*'); Hans W Baade, 'Operation of Foreign Public Law' in Konrad Zweigert and Ulrich Drobnig (eds), *International Encyclopedia of Comparative Law* (Brill, 1970) 52.

3 See, eg, *Holman v Johnson* (1775) 98 ER 1120, 1121 (Lord Mansfield); *Amner v Clark* (1835) 150 ER 202; *The Antelope* (1825) 23 US 66, 123 (Marshall CJ).

policy-makers, as well as the global community, will benefit from these reciprocal lessons.

This article is structured as follows. Part II outlines both disciplines: conflict of laws and international taxation. It elaborates on their nature and significance, and it discusses the confusion that presently surrounds major areas in both fields. Part III elaborates on our conceptual argument that pairs international taxation with conflict of laws. Part IV considers how the reciprocal lessons can greatly benefit each discipline and shed light on their most acute problems. This is sustainable and beneficial for the future of clear conflict of laws rules and the fair sharing of the tax burden. Part V offers some concluding remarks.

## II Conflict of Laws and International Taxation: Nature, Significance and Confusion

### A *Nature and Significance*

The field of conflict of laws deals with cases involving a foreign element in their factual matrix.[4] Consider a contractual dispute between a UK and a NSW corporation in relation to a failure to deliver goods in Japan due to the coronavirus outbreak. Or consider a mistaken payment made by a New York bank to a Victorian resident's Swiss bank account. Given the persisting divergences in private and commercial law provisions among the jurisdictions,[5] which law should courts apply to adjudicate the above-mentioned cases?

The contemporary corporate context demonstrates the centrality of conflict of laws analysis. As business-oriented entities, corporations frequently operate on a cross-border basis. They target potential customers in different jurisdictions and rarely limit their activity exclusively to a single jurisdiction. The growing phenomenon of cross-border commerce and goods transportation further increases the likelihood of a foreign element in cases involving a corporation.[6] We see firms incorporating in one place, while locating their headquarters, conducting business, or both, in other places.[7]

Furthermore, in federal systems, such as Australia, the US and Canada, conflict of laws issues arise on a daily basis. Adjudicative tribunals around the world generally do not delineate between federal and international instances of

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4 For further discussion on the traditional classification of the field according to presence of foreign element in the factual matrix of the case, see below nn 115–23 and accompanying text.

5 See, eg, *Cheshire & North* (n 2) 8–15.

6 See, eg, Sagi Peari, 'Challenging the Place of Incorporation Rule' (2019) 71(6) *Governance Directions* 305 ('Challenging the Place').

7 See, eg, Sagi Peari, 'Which Law Governs Dispute Involving Corporations?' (2019) 34(2) *Australian Journal of Corporate Law* 252 ('Which Law Governs Dispute?').

cross-border interactions.[8] Thus, the same conflict of laws analysis applies to a contract signed in the UK between a Victorian resident and a German resident with respect to a delayed delivery of goods in Brazil, as it does to a contract signed between a NSW and a Victorian resident with respect to a delayed delivery of goods in Western Australia. In this way, the conflict of laws doctrine equalises between cross-federal and international levels of interaction. The frequent divergence between private law provisions at the federal level suggests the relevance of conflict of laws analysis even within the domestic federal context.[9]

Internet activity is another major factor that contributes to the significance of conflict of laws. The phenomenon of online contracts and online reviews has dramatically intensified the potential presence of a single foreign factor in private law litigation. COVID-19 has led to an unprecedented boom in online commerce and online contracts.[10] What law should govern an online contract between a NSW resident and an online seller, such as Amazon or Alibaba? Or which law would govern an Indonesian plaintiff's claim in relation to an online review posted by a NSW resident, when the plaintiff suffered significant damage to its reputation primarily in China, and also in Indonesia, Australia, the UK and Japan? The inherently transnational nature of the internet[11] suggests that an inherent foreign element is built into *every* online activity. It could be argued, for example, that even an online contract signed between two Victorian residents with respect to

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8 The conflict of laws doctrine generally does not delineate between cross-federal and international interactions. See, eg, Christopher A Whytock, 'Myth of Mess? International Choice of Law in Action' (2009) 84(3) *New York University Law Review* 719, 729, n 53; Mathias Reimann, 'Domestic and International Conflicts Law in the United States and Western Europe' in Patrick J Borchers and Joachim Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honor of Friedrich K Juenger* (Transnational Publishers, 2001) 109; Gerhard Kegel, 'The Crisis of Conflict of Laws' (1964) 112 *Collected Courses of the Hague Academy of International Law* 5; Ralf Michaels and Christopher A Whytock, 'Internationalizing the New Conflict of Laws Restatement' (2017) 27(3) *Duke Journal of Comparative and International Law* 349.

9 Consider, for example, the doctrine of contract frustration. While the Australian state and territories follow the common law vision of the doctrine (see *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337), the consequences and effect of frustration are different. Thus, the states of Victoria and SA have adopted a flexible model of the effect of frustration (see, eg, *Frustrated Contracts Act 1978* (NSW); *Frustrated Contracts Act 1988* (SA); *Australian Consumer Law and Fair Trading Act 2012* (Vic)). See also Clive Turner, John Trone and Roger Gamble, *Concise Australian Commercial Law* (Thomson Reuters, 5th ed, 2019) 195, which signifies the significance of the conflict of laws analysis even within inter-Australian level.

10 See, eg, 'Have You Deliberately Purchased Any of These Products or Services Online Instead of Offline because of the COVD-19/Coronavirus Pandemic?', *Statista* (Web Page, 31 May 2020) <https://www.statista.com/statistics/1107859/shifting-to-online-purchases-because-of-the-covid-19-pandemic-by-category>. See also Dan Jerker B Svantesson, *Private International Law and the Internet* (Kluwer Law International, 4th ed, 2021) 1.

11 On the a-geographical nature of the internet see, eg, Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge University Press, 2010) 3, 87; Tobias Lutzi, *Private International Law Online* (Oxford University Press, 2020) 14–38; Svantesson (n 10) ch 2.

delivery of goods in Victoria could trigger a conflict of laws analysis due to the fact that the contract was signed online.[12]

The field of taxation bears even greater significance for contemporary society. Tax plays a key role in the sustainability of the modern state. For millennia, various forms of taxation have supported the operation of domestic orders, including (but not limited to) financing such essential state activities as building schools, roads, supporting the judicial system and providing the much-needed safety net for disadvantaged members of society.[13] As Roberts J put it in *Bull v United States*, 'taxes are the life-blood of government'.[14] Holmes J characterised the tax system as 'what we pay for civilized society'.[15] Benjamin Franklin once sarcastically commented, '[i]n this world nothing can be said to be certain, except death and taxes'.[16] Through its evolution, fusion and sophistication, taxation has remained one of the cornerstones of the modern state. COVID-19 has led to revenue decreases and the need for economic stimulus.[17] This makes certain tax cuts and economic spending necessary. This situation means there is a greater need to collect revenue from available sources.[18]

Taxation faces very similar challenges to that of conflict of laws. The rapidly growing phenomena of cross-border commercialisation, multinational corporations, international direct investment, cross-border capital flow, digitalisation and, of course, the new COVID-19 reality, have all raised serious questions about the extraterritorial-taxation power of states.[19] To what extent

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12 For a discussion of this point, see Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press, 2018) 79–90, 273–95 ('*The Foundation of Choice of Law*'). Indeed, the growing significance of the conflict of laws has not gone under the radar of Australian legal educators. For the debate on whether conflict of laws should be incorporated as a compulsory subject within the Australian law school curricula see, eg, Michael Douglas, 'Integrating Private International Law into the Australian Law Curriculum' (2020) 44(1) *Melbourne University Law Review* 98.

13 See, eg, Reuven S Avi-Yonah, 'Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State' (2000) 113(7) *Harvard Law Review* 1573, 1632 (mentioning that the starting point of the contemporary social safety net financed through taxation started, perhaps, at the end of the 19th century. This was Bismarck's social insurance scheme, which was financed almost exclusively through a comprehensive income tax).

14 *Bull v United States* (1935) 295 US 247, 259.

15 *Compania General de Tabacos de Filipinas v Collector of Internal Revenue* (1927) 275 US 87, 100.

16 Benjamin Franklin in a letter to Jean-Baptiste Leroy, 1789, which was re-printed in *The Works of Benjamin Franklin* (GP Putnam's Sons, 1904). While nowadays we cannot imagine a state of not being sustained through taxes, some views in academic literature challenge the inherent necessity of taxation as one of the cornerstones of the modern state. See, eg, Arslan Aliev, 'State without Taxes' (Research Paper, October 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2677060>.

17 Markus Mannheim, 'Australia's Coronavirus Spending to Protect Economy Dwarfs the GFC Stimulus Package', *ABC News* (online, 5 April 2020) <https://www.abc.net.au/news/2020-04-05/coronavirus-data-stimulus-spending-dwarfs-gfc-chart/12115518>.

18 See, eg, Richard Krever, 'Tax Responses to a Pandemic: An Australian Case Study' (2020) 1(1) *Belt and Road Initiative Tax Journal* 52.

19 See Michael J Graetz, *Follow the Money: Essays on International Taxation* (Columbia Law and Economics Working Paper No 538, 2016) vii <https://scholarship.law.columbia.edu/faculty_scholarship/2543>, (demonstrating the increasing significance of cross-border financial activity and the subsequent dramatic increasing significance of the discipline of international taxation).

and in which scenarios can states impose their tax laws? The extraterritorial scope of tax laws is indeed the principal object of inquiry of the field of international taxation.

While international taxation tends to be based on a common, foundational set of organising ideas developed in the 19th and early 20th centuries, as articulated in fora such as the League of Nations in 1923,[20] detailed rules vary from place to place. The identification of domestic international tax laws is therefore necessary. Different tax laws could potentially govern any given factual scenario. Different rules of international taxation could potentially apply to determine the identity of the applicable tax law.[21]

Take, for example, the case of a Delaware corporation with headquarters in London (UK), which sells most of its products to Australian consumers. This corporation made a significant net profit during 2021 of, say, USD 70,000,000. Which country should levy tax on the income of this corporation: the United States? The UK? Australia? Or maybe even another country, such as the country where most of the intellectual property of the corporation originated and was developed? Might the answer change if an Australian resident owned a 35% share of that corporation? Which country or countries should tax a dividend distributed by the corporation? Similar to the field of conflict of laws, international taxation appears to be one of the foremost aspects of the contemporary commercial reality, business activity and state sustainability.

### B *The Confusion in Both Fields*

Despite the paramount significance of both disciplines, their doctrinal aspects are far from clear. This situation impacts the basic ability of Australians and Australian businesses to predict the legal outcomes of their potential activity. Such a situation is detrimental to equity and is counter-productive to business initiative and basic planning. Worse, in the area of international taxation, unpredictability leads to tax revenue loss as well as compliance costs. This reduces net revenue, which is essential for maintaining Australia's present position as one of the leading wealthy liberal democracies with a well-developed social system, particularly given the unprecedented financial challenges of COVID-19.

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[20] See generally W H Coates, 'League of Nations Report on Double Taxation Submitted to the Financial Committee by Professor Bruins, Einaudi, Seligman, and Sir Josiah Stamp' (1924) 87(1) *Journal of the Royal Statistical Society* 99. See also Sunita Jogarajan, 'Prelude to the International Tax Treaty Network: 1815–1914 Early Tax Treaties and the Conditions for Action' (2011) 31(4) *Oxford Journal of Legal Studies* 679, 682–3.

[21] For an overview of technical differences see Roy Saunders, *International Tax Systems and Planning Techniques* (Thomson Reuters, 2nd ed, 2011).

Consider the present confusion in the field of conflict of laws. Representing at least 250 years of rich history,[22] conflict of laws doctrine represents a case of sophistication, continuously facing the challenges of technological innovation, the cross-border flow of goods and commercialisation. From its early days,[23] conflict of laws doctrine has focused on the so-called 'territorial' connecting factors, such as the place where the parties sign a contract, the place where the contract is to be performed, or the place where the tortious activity took place.[24] To illustrate, a territorial connecting factor of the place of tort would direct to the application of Indonesian law in the case of a tort committed by one Victorian resident against another in Indonesia.[25]

Later, many jurisdictions became supportive of the so-called 'closest connection' principle, which applies the law of that jurisdiction with the 'closest connection' to the parties and the event.[26] This process does not focus exclusively on the territorial connecting factors; it also takes into consideration the so-called personal connecting factors. The places of the parties' residence and business are examples of personal connecting factors.[27] For instance, under the closest connection principle, a contract between two NSW residents signed in Indonesia in relation to the transportation of goods to NSW should be governed by NSW law, as representing the closest connection to the parties and the event. As advocated by the founding father of the discipline, Friedrich Carl von Savigny,[28] this principle insists that every case of cross-border interaction should be carefully assessed as a whole, taking into account both connecting factors: territorial (such as the place of contractual performance and the place of tort) and personal (such as the place of the parties' business and their residence).

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22 *Robinson v Bland* (1760) 97 ER 717, 718–19 (where Lord Mansfield addressed the question of applicable law in a case where a bill of exchange was given in France by one English resident to another in relation to a gambling debt). Some would argue that the historical roots of conflict of laws go much deeper than that: see, eg, Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, 4th ed, 2019) 7–13.

23 See, eg, Friedrich K Juenger, *Choice of Law and Multistate Justice* (Martinus Nijhoff Publishers, 1993) 47–69.

24 On the predominance of the territorial connecting factors within conflict of laws doctrine: see, eg, Lea Brilmayer, *Conflict of Laws: Cases and Materials* (Little Brown, 2nd ed, 1995) 19–20; Lea Brilmayer and Raechel Anglin, 'Choice of Law Theory and the Metaphysics of the Stand-Alone Trigger' (2010) 95(4) *Iowa Law Review* 1125, 1138; Symeon C Symeonides, 'Territoriality and Personality in Tort Conflicts', in Talia Einhorn and Kurt Siehr (eds), *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E Nygh* (TMC Asser Press, 2004) 401.

25 *Tolofson v Jensen* [1994] 3 SCR 1022; *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

26 American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) §§ 145 ('most significant relationship'), 188 ('*Second Restatement*'); Mortensen, Garnett and Keyes (n 22) 448–51. In the context of tort law, Australia could be presented as an exception as its courts adopted a strict place of tort rule, with no exceptions. This position seems to be problematic, and thus integration of a flexible exception, based on the closest connection principle, is desirable. For a discussion of this point see Peari, *The Foundation of Choice of Law* (n 12) 105–6.

27 See, eg, Adrian Briggs, *Private International Law in English Courts* (Oxford University Press, 2014) 123–4.

28 Friedrich Carl von Savigny, *A Treatise on the Conflict of Laws: And the Limits of Their Operation in Respect of Place and Time* (T&T Clark, 1880) 135, 196. See also Peari, *The Foundation of Choice of Law* (n 12) 31–69.

Alongside the closest connection principle, the so-called party autonomy principle has also been adopted by conflict of laws doctrine over the years. According to this principle, the parties have the ability to determine the identity of the applicable framework to adjudicate their rights and duties. Thus, NSW and Singapore residents can agree that their contractual rights and duties would be governed by English law in a contract between them.[29] While the party autonomy principle is primarily applied in the context of contract law,[30] various international instruments have recognised the validity of this principle beyond contract law.[31]

Despite its sophistication, conflict of laws doctrine is not free of difficulties.[32] Consider the traditional place of the tort rule, which favours the application of the law of the place where the tort took place.[33] It would appear that adjudicative tribunals have been struggling to accommodate some flexibility into the legal analysis in a quest to 'escape' the rigidity of this rule.[34] The quest for the place of the 'tort' seems to present a serious challenge in the online context, specifically in the context of online defamation. Where does the tort take place in the case of online defamation? Is it the place where the defamatory material was downloaded? Or, is it the place where the defendant suffered most damage to her or his reputation? Or is it some other place, such as the place of the defendant's residence at the time of the defamatory event?[35]

The conflict of laws rules in the area of contract law is another example of the present confusion. While contract law doctrine warmly adopted the party

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29 Cf *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418. See also *Mendelson-Zeller Co Inc v T & C Providores Pty Ltd* [1981] 1 NSWLR 366; *State Bank of New South Wales v Sullivan* [1999] NSWSC 596; Brooke Marshall, 'Australia' in Daniel Girsberger, Thomas Kadner Graziano and Jan L Neels (eds), *Choice of Law in International Commercial Contracts* (Oxford University Press, 2021) 715.

30 See, eg, Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018) ch 8 (mentioning the *Hague Convention on the Law Applicable to Trusts and on their Recognition*, opened for signature 1 July 1985, The Hague No 30 (entered into force 1 January 1992), as the only exception to the contract law domain application of the party autonomy principle in Australia). See also Mortensen, Garnett and Keyes (n 22) 497–500.

31 *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40, art 14; Mo Zhang, 'Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law' (2009) 39(3) *Seton Hall Law Review* 861, 864; «中華人民共和國**涉外民事關系法律適用法**» [Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships] (People's Republic of China) National People's Congress, Order No 36, 28 October 2010, arts 47–8.

32 The classical statement on confusion within conflict of laws was made by Prosser, who characterised the field as 'a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon': William L Prosser, 'Interstate Publication' (1953) 51(7) *Michigan Law Review* 959, 971.

33 See above n 25.

34 *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331; Peari, *The Foundation of Choice of Law* (n 12) 105; Mortensen, Garnett and Keyes (n 22) 441–2. See also above n 26.

35 Peari, *The Foundation of Choice of Law* (n 12) ch 6. Indeed, the Australian jurisprudence seems to depart from the rigid place of tort law in the case of cross-border defamation. See, eg, *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, 515–20, 530–9; Mortensen, Garnett and Keyes (n 22) 479. See also Svantesson (n10) ch 4 [III.B], ch 9 [I.K.3].

autonomy principle during the 20th century,[36] there has been remarkable antagonism towards this principle in the 21st century.[37] Apparently, under this principle, the stronger party of the bargain frequently imposes the application of whichever law favours her or his interests. The parties' consent expressed under this principle is not a 'real' or a 'genuine' consent.[38] This criticism seems to be intensified in the online context, in which remote parties frequently have little or no knowledge of each other. Not surprisingly, there has been a strong call in the literature to move away from the party autonomy principle[39] and its broad scope of application.[40] In a similar vein, based on s 67 of the *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*'),[41] the Australian Federal Court has recently invalidated a conflict of laws provision in the context of consumer contracts.[42]

The confusion is striking in the light of the paradigmatic centrality of online contracts and online defamation in contemporary society. Hundreds of millions of people worldwide shop online.[43] Online shopping seems to be convenient and cost-effective, and it is growing rapidly in popularity under COVID-19 restrictions. Online defamation is commonplace as well. People post reviews about their experiences with products and services on specially designed websites. These reviews frequently play a determinative role in other people's decisions to purchase a certain service or product.[44] Positive reviews can elevate and inflate a business. Negative reviews can destroy it overnight. It seems that the world belongs to the digital age, internet commerce and internet reviews. The era of COVID-19 has only escalated this reality and intensified the immanent need to clarify the conflict of laws rules.

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36 On a remarkable adoption of party autonomy, see, eg, Mills (n 30) 313–16; John F Coyle, 'A Short History of the Choice-of-Law Clause' (2020) 91(4) *University of Colorado Law Review* 1147, 1166–72. See also the cases cited in above n 29.

37 See, eg, Pedro De Miguel Asensio, *Conflict of Laws and the Internet* (Edward Elgar Publishing, 2020) ch 3.

38 For further discussion on the point of genuineness of consent, see Symeon C Symeonides, 'The Scope and Limits of Party Autonomy in International Contracts: A Comparative Analysis' in Franco Ferrari and Diego P Fernández Arroyo (eds), *Private International Law: Contemporary Challenges and Continuing Relevance* (Edward Elgar Publishing, 2019) 101 ('The Scope and Limits of Party Autonomy in International Contracts').

39 Margaret Radin, *Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2014) vi.

40 See, eg, Symeonides, 'The Scope and Limits of Party Autonomy in International Contracts' (n 38).

41 *Competition and Consumer Act 2010* (Cth) sch 2 s 67 ('*Australian Consumer Law*').

42 *Australian Competition and Consumer Commission v Valve Corporation (No 3)* (2016) 337 ALR 647 ('*Valve Corp*'). The judgment in *Valve Corp* was delivered in the Federal Court of Australia in 2016. It was fully reaffirmed by the Full Court in *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, and more recently, by denying leave to appeal, tacitly reaffirmed by the High Court in *Valve Corporation v Australian Competition and Consumer Commission* [2018] HCASL 99. It should be noted that the invalidation of the conflict of laws provision has been delivered in the context of the specific language of s 67 of the *Australian Consumer Law* (n 41), rather than a result of a reference to a general conflict of laws doctrine.

43 Sophia Tang, *Electronic Consumer Contracts in the Conflict of Laws* (Hart Publishing, 2009) 62.

44 *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575, 600 [25].

A similar difficulty arises in the field of international taxation. Similar to conflict of laws, international taxation struggles to accommodate the challenges of transnational corporations, international trade, the frequent mobility of financial resources, high daily volumes of cross-border transactions, digitalisation and, more recently, the challenges of COVID-19. At the heart of international tax practice is the allocation of income to various states. This is done through complex state laws and Double Tax Agreements ('DTAs'). DTAs are bilateral treaties in which the parties agree on taxing rights and restrictions as well as other tax related matters. Practical determination of the tax rights is therefore a complex exercise.[45]

In addition, the variety of possible allocations creates the possibility of a great variety of tax outcomes and creates the opportunity for professionals to seek the lowest tax possibilities through allocation choices. The question of the extent to which such strategic allocations are legitimate and legal is very difficult to ascertain.[46] The combination of this difficulty and the amount of money to be saved through advantageous, legitimate and legal allocations creates an incentive for significant investment in professional expert services. It similarly creates an incentive for states to invest in policing these practices.

The DTAs do not resolve the confusion within the field of international taxation. In fact, they may at times intensify it. Since one of the roles of the DTAs is to set meaningful dispute resolution mechanics,[47] they themselves require allocation of the tax authority. As is often the case, the devil is in the details. Even though DTAs use terms such as 'permanent establishment' and 'arms-length transfer pricing' as their guiding concepts, there is disagreement about their definition.[48] In fact, the disputes over these concepts are common and represent major pillars of international taxation dynamics.[49] Furthermore, Australia has only 48 DTAs out of 195 countries of the contemporary international order. [50]

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45 See, eg, Kevin J Holmes, *International Tax Policy and Double Tax Treaties: An Introduction to Principles and Application* (IBFD, 2nd ed, 2014); Robert Deutsch, Róisín M Arkwright and Daniela Chiew, *Principles and Practice of Double Taxation Agreements: A Question and Answer Approach* (BNA International, 2008).

46 On the legitimacy and legality of strategic allocations see, eg, Nolan Sharkey, 'The Interests of Developing Countries in the Context of the OECD/G20 Led International Income Tax Initiatives' (2019) 3(2) *Bratislava Law Review* 47 ('The Interests of Developing Countries').

47 See, eg, *Articles of the Model Convention with Respect to Taxes on Income and on Capital* (2017) art 25.

48 For example, wage income is sourced where the work is done in many situations but also may be where the place of employment is. This place of employment is important in Hong Kong while the place the work is done is important in China. The actual definition of Permanent Establishment will vary in detail from one DTA to the next. For example, in the DTA between Singapore and Australia, the use of 'substantial equipment' can constitute a permanent establishment under article 4(3)(b). This inclusion is not found in the China-Singapore DTA or in most other DTAs internationally.

49 Australia's right to tax capital gains related to business under certain DTAs was disputed by taxpayers and the government of the United States. See Robert Deutsch and Nolan Sharkey, 'Australia's Capital Gains Tax and Double Taxation Agreements' (2002) 56(6) *Bulletin for International Fiscal Documentation* 228.

50 For the current list, see 'Australian Tax Treaties', *Australian Government: The Treasury* (Web Page) <https://treasury.gov.au/tax-treaties>.

Notably, in such a central sector as the resource sector in Africa, Australia has only one DTA.[51] Hence, while it is true that the international tax treaty network provides a widespread, consistent and familiar framework for international business, it is far from complete and harmonious.

## III The Conceptual Interconnectedness Between the Fields

At first glance, conflict of laws and international taxation look to be quite distinctive disciplines. Conflict of laws involves a dispute between two (or more) litigating parties with some 'foreign element' in the factual basis of the case.[52] It inquires into the identity of the applicable framework to adjudicate a dispute between the litigants. In contrast, international taxation focuses on a single person or business entity in relation to activities within a certain state or territory. It considers questions such as who should tax the person or business entity and how. Given this divergence between the two fields, a longstanding 'separation thesis' has challenged the very possibility of interaction between the disciplines.[53]

However, we challenge the separation thesis. Both disciplines involve a careful assessment by the adjudicative tribunal of the party's or parties' relevant actions and choices. Both disciplines are grounded in the fundamental premises of the contemporary international order, which are epitomised in the key doctrines, principles and concepts of the fields. Specifically, we argue that a common conceptual link between the normative foundations of conflict of laws and international taxation could be established through the following four interconnected pillars:

1. the nature of the disciplines is grounded in the notion of the 'most meaningful connection' to a certain authority;
2. the legal analysis under both disciplines must strive towards this connection;
3. the legal analysis under both disciplines is preoccupied with the questions of legitimacy and genuineness of choice; and

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51 *Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, signed 1 July 1999, [1999] ATS 34 (entered into force 12 December 1999) ('*DTA South Africa*').

52 See below Part IV D.

53 See, eg, *Planche v Fletcher* (1779) 99 ER 164, 165; Matthias Lehmann, 'Regulation, Global Governance and Private International Law: Squaring the Triangle' (2020) 16(1) *Journal of Private International Law* 1, 5–7. See also above nn 2–3 and accompanying text.

4. both disciplines accommodate the basic insights of the Westphalian order within their normative foundations.[54] The ensuing sections discuss each one of these pillars in turn.

## A *Most Meaningful Connection to a Certain Authority*

We argue that both disciplines involve the key question of *a most meaningful connection to a certain authority* at their fundamental level. International taxation allocates authority over a particular income based on the degree of connectedness between the income, the state and the taxpayer. This sort of nexus follows from the basic premise of taxation's role in the modern liberal democracy.[55] It represents a reciprocal relationship between the state and the taxpayer, under which a given act of levying tax must be justified in terms of the connectedness to a certain territorial authority and the activities that have taken place within that territory.[56] This fundamental reciprocity and the inherent fairness within the taxpayer–government relationship explains, for example, the principal objection of the international community to double taxation, which does not allow for the possibility of a taxpayer paying tax more than once for the same income.[57] The predominant connecting factors of the place of a taxpayer's residence (which is a personal connecting factor) and the source of income (which is a territorial connecting factor),[58] alongside the comprehensive body of literature and case law, precisely represents a sophisticated attempt to establish the most meaningful nexus between the authority and the taxpayer.

A similar point applies to conflict of laws. Similar to international taxation, this discipline is preoccupied with the process that assesses the interaction between the litigating parties.[59] This process ultimately looks for a territory that has the most meaningful connection with the parties and assesses the nature of their interaction. It can be argued that the above-mentioned closest connection principle[60] has not just played a key role in the writings of the founders of the

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54 See, eg, Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21(3) *International History Review* 569; Claire A Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27(2) *Review of International Studies* 133.

55 Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) ch 7; Jacob Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge University Press, 2016) chs 2, 4.

56 Ibid.

57 Reuven S Avi-Yonah, 'Tax Competition, Tax Arbitrage, and the International Tax Regime' (Working Paper No 73, University of Michigan Law School, January 2007) 1, 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=955921> ('Tax Competition'); Daniel Shaviro, 'The Two Faces of the Single Tax Principle' (2016) 41(3) *Brooklyn Journal of International Law* 1293, 1293.

58 For further discussion of this point, see below nn 91–103 and accompanying text.

59 Peari, *The Foundation of Choice of Law* (n 12) 79–125.

60 See above nn 26–8 and accompanying text.

discipline,[61] but has also been fairly central to the foundations of the party autonomy principle,[62] and, apparently, to contemporary conflict of laws jurisprudence.[63]

## B *The Approximation Move*

The deep interconnectedness between the conceptual underpinnings of international taxation and conflict of laws goes even further. Within the normative structures of the disciplines, the quest for a most meaningful connection to a certain authority *must take place as a matter of principle*. For centuries, conflict of laws analysis has been engaged in assessing a wide range of potential connecting factors related to the parties and a particular event: the place of the parties' residence, the place of the parties' business, the place of the contractual performance, the place of contract formation and the place of tort.[64] While, traditionally, more focus has been attributed to territorial connecting factors, the research has shown that, even within the classical conflict of laws jurisprudence literature, personal connecting factors have played a central role.[65] This constant quest for a meaningful nexus between the parties, their interaction and the applicable law crystallizes such notions as the basic fairness between the litigating parties, approximates towards their reasonable expectations,[66] and above all is required by the essentials of modern liberal theory.[67] Locating this most meaningful nexus and an approximation towards it reflects one of the fundamental features of the conflict of laws analysis.

The normative structure of international taxation presents a similar pattern and follows related conceptual steps. Taxation plays an essential role in the

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61 Savigny (n 28) 196, 198, 202.

62 Peari, *The Foundation of Choice of Law* (n 12) 106–25. See also G C Cheshire, *Private International Law* (Clarendon Press, 6th ed, 1961) 215.

63 See, eg, Symeon Symeonides, *Choice of Law* (Oxford University Press, 2016) 33, 104–5; *Second Restatement* (n 24) §§ 145(1), 146–9, 152. See also Jonathan Hill and Máire Ní Shúilleabháin, *Clarkson & Hill's Conflict of Laws* (Oxford University Press, 5th ed, 2016) 12: '[t]he examples demonstrate the prevailing approach adopted by English law to the issue of choice of law: in the absence of party choice, the parties can be deemed reasonably to expect their relationships and transactions to be governed by the law with which those relationships and transactions are most closely connected.'

64 See, eg, Benjamin Geva and Sagi Peari, *International Negotiable Instruments* (Oxford University Press, 2020) 73–80.

65 Ibid; Sagi Peari, 'Savigny's Theory of Choice-of-Law as a Principle of "Voluntary Submission"' (2014) 64(1) *University of Toronto Law Journal* 106.

66 For an argument regarding the primary centrality of the concept of 'parties' reasonable expectations' in choice-of-law thought, see Hill and Ní Shúilleabháin (n 63) 9–19; Peter E Nygh, 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort' (1995) 251 *Rec Des Cours* 273, 294–6; Benjamin Hayward, *Conflict of Laws and Arbitral Discretion: The Closest Connection Test* (Oxford University Press, 2017) 42, 44–6.

67 For a discussion of this point, see Peari, *The Foundation of Choice of Law* (n 12) ch 2; Sagi Peari, 'The Choice-Based Perspective of Choice-of-Law' (2013) 23(3) *Duke Journal of Comparative and International Law* 477.

sustainability of the modern state and requires that a most meaningful connection to a certain authority must be found. This is as a matter of principle. Similar to conflict of laws, international taxation must approximate its quest for a most meaningful connection to a certain territorial authority. While the field of conflict of laws justifies this compulsory approximation on the grounds of liberal theory, international taxation requires it due to the special role that taxation plays in states' structure and sustainability. Without taxes, the state cannot support its basic structure and its essential services. The international taxation regime must approximate the tax allocation towards a certain territory. Certain states will receive the tax on the income. Indeed, this explains one of the central principles of international taxation, which alongside the principle of avoiding double taxation, requires that *tax jurisdiction must be allocated to at least one state.*[68] This means that, as a matter of principle, the international community should be able to levy tax on a given income at least once, but no more than once.

### C *The Legitimacy and Genuineness of Choice*

The foundational basis of both disciplines embraces an inherent inquiry into matters of choice. As we have seen,[69] during the 20th century the conflict of laws doctrine adopted party autonomy as a central principle in the area of contract law. Yet, this doctrine does not take this principle for granted and it is heavily preoccupied with the questions of the genuineness and legitimacy of a given choice. Some significant limits on the nature and scope of the parties' choice has been established.[70] Thus, as we have seen,[71] based on the language of the *Australian Consumer Law*, the Federal Court of Australia has determined that it is not legitimate to exercise party autonomy in cases of consumer contracts.[72] In a similar vein, most systems hold the view that it is not legitimate for the parties to choose a law that does not represent an official law of one of the states.[73] Further, some systems do not consider it to be legitimate when the parties' choice involves a law that does not have a connection to one of the parties or their transaction.[74]

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68 Avi-Yonah, 'Tax Competition' (n 57) 6 mentions the fundamental principle of international taxation according to which 'income from cross-border transactions should be subject to tax once (that is, not more but also not less than once)'. See also Shaviro (n 57) 1293.

69 See above nn 29–31 and accompanying text.

70 See, eg, Daniel Girsberger, Thomas Kadner Graziano, and Jan L Neels, 'General Comparative Report' in Daniel Girsberger, Thomas Kadner Graziano and Jan L Neels (eds), *Choice of Law in International Commercial Contacts* (Oxford University Press, 2021) 1, 22–3.

71 See above nn 38–42 and accompanying text.

72 Ibid.

73 See, eg, Katharina Boele-Woelki, 'Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws' (2010) 340 *Rec Des Cours* 275, 401–19; Symeon C Symeonides, 'Party Autonomy in Rome I and II from a Comparative Perspective' in Katharina Boele-Woelki et al (eds), *Convergence and Divergence in Private International Law* (Eleven International Publishing, 2010) 513, 539–40.

74 *Second Restatement* (n 26) § 187(2); Mo Zhang, 'Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome' (2015) 44(3) *Stetson Law Review* 831.

In this way, the inquiry into the legitimacy and genuineness of the choice seems inherent to the conflict of laws doctrine.

By its very nature, international taxation does not involve an interaction between two persons but rather an interaction between a taxpayer and the entire pool of regimes that could potentially claim a meaningful nexus between the taxpayer and their territories. Further, international taxation has a unique character in the sense that it serves as a primary vehicle for sustainability of the modern state. Under these circumstances, a 'direct' party autonomy (ie a situation where the party or parties can simply expressly specify the applicable law) is not possible.

This does not mean, however, that the notion of choice does not play a role within the foundations and the operational mechanics of international taxation. The opposite is true. A person may decide to move her or his residence to another territory. A company may decide to establish a subsidiary business entity when it operates in foreign territory. Such decisions would frequently lead to legal implications for international taxation (and, of course, conflict of laws)[75]. While parties cannot choose the governing law, the choices that they make when choosing their residence, transaction and operation shape the connecting factors that are then used to identify the governing tax law. In other words, those choices create a connection to a certain territory, which becomes relevant for grasping the applicable law under the most meaningful connection principle and its analysis of the various connecting factors.

For sure, it is legitimate for individuals and businesses to conduct their commercial activities and investments in the most efficient way to maximise their after-tax profits, subject to anti-tax avoidance rules. The taxpayer can make a perfectly legitimate choice as to the location of a certain business, the place of product development and manufacturing, and the place of residence. The taxpayer can exercise her or his choice. Yet, the parameters of legitimate and genuine tax planning must be known.[76]

Notably, the international taxation doctrine has developed mechanisms that, in certain circumstances, cast doubt on the legitimacy and genuineness of certain transactions and activities. In some cases, the law takes given activity, or a transaction as not taking place at all, as serving as a façade or masquerade for tax avoidance.[77] The rules of international taxation look at the situation as a whole

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75 For a similar point on the relevancy of the parties' choices within the traditional conflict of laws doctrine of connecting factors, beyond the explicit choice under the party autonomy principle, see Mills (n 30) 14–17.

76 See, eg, Nolan Sharkey, 'The Economic Benefits of the Use of Guanxi and Business Networks in a Jurisdiction with Strong Formal Institutions: Minimisation of Taxation' (2008) 6(1) *eJournal of Tax Research* 45.

77 Reuven S Avi-Yonah and Gianluca Mazzoni, 'Taxation and Human Rights: A Delicate Balance' in Philip G Alston and Nikki R Reisch (eds), *Tax, Inequality, and Human Rights* (Oxford University Press, 2019) 259.

and apply an objective standard of assessment.[78] They sometimes ignore the independence of the legal entities and contractual labels, which seems to reflect the underlying premise of these rules that challenge the legitimacy and genuineness of the taxpayer's choice.

Consider two central examples within the contemporary international tax doctrine: Controlled Foreign Companies ('CFC') Rules and Transfer Pricing.[79] CFC rules originated in the US and were adopted by other countries during the 1970s and 1980s.[80] In Australia, they were introduced on the basis that they enforce capital export neutrality and prevent tax avoidance.[81] Thus, it may be asserted that these rules can challenge the genuineness and legitimacy of choices made by taxpayers.[82] Transfer Pricing demonstrates another angle of this position. To illustrate, consider an Australian company that extracts iron in Australia and sells it to a Chinese company in China. The Australian company decides to establish a subsidiary company in Singapore, which now acts as a hub of the iron selling and marketing to China. Should the law respect this choice? The mechanism of Transfer Pricing would carefully assess the situation as a whole and would determine the legitimacy and genuineness of the transaction made between parts of a multinational group.[83]

From this perspective, both disciplines are heavily preoccupied with the questions of the 'genuineness' and 'legitimacy' of a given choice, which suggests the approximation move under the most meaningful connection principle should take place based on an assessment of those actions of the party (or parties) that the law considers to be *genuine and legitimate*.

### D *The Basic Premise of Westphalian Order*

Finally, conflict of laws and international taxation are deeply interconnected on another level. The normative foundations of both disciplines accommodate the basic premises of the contemporary paradigm of Westphalian order.[84] This means that both disciplines accept the fundamental premise that the most meaningful

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78 See, eg, *Income Tax Assessment Act 1936* (Cth) pt IV.

79 See, eg, OECD, 'OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017' (Web Page, 20 January 2022) < https://www.oecd.org/tax/transfer-pricing/oecd-transfer-pricing-guidelines-for-multinational-enterprises-and-tax-administrations-20769717.htm ('OECD Transfer Pricing Guidelines').

80 Reuven S Avi-Yonah, 'International Tax as International Law' (2004) 57(4) *Tax Law Review* 483, 488–90.

81 Lee Burns, *Controlled Foreign Companies: Taxation of Foreign Source Income* (Longman Professional, 1992) 5-10.

82 Ibid.

83 See, eg, OECD, *Transfer Pricing Guidance on Financial Transactions: Inclusive Framework on BEPS:* Actions 4, 8–10 (Report, 11 February 2020) <https://www.oecd.org/tax/beps/transfer-pricing-guidance-on-financial-transactions-inclusive-framework-on-beps-actions-4-8-10.htm>; OECD, 'OECD Transfer Pricing Guidelines' (n 79).

84 See above n 54.

allocation of authority should take place in a way that would be consistent with international order as comprising a multiplicity of states. The states may deeply diverge in their private law and commercial law provisions. While some systems are supportive of punitive damages in the tort law, others reject it.[85] While some systems approach the question of contractual interpretation based on the subjective intentions of the parties, others designate a significant role to objective aspects of the parties' interaction and business efficacy.[86] Similarly, various systems have a different degree of taxation. In some systems the corporate tax is high. In others it is low.[87] Australia and China have a wide tax base including amounts such as capital gains while others, such as New Zealand, Singapore and Hong Kong exclude most capital gains.[88]

The fundamental insight of the Westphalian order is that the states and their public legal institutions are situated in equal relation to each other.[89] This means, for example, that the conflict of laws process should not, as a matter of principle, accommodate a substantive assessment of the quality of the involved laws. An Australian judge, for example, should not take the question of the merit of the applied foreign law into account. The same point applies to the field of international taxation. As a matter of principle, the question of the most meaningful connection to a certain authority should not take into consideration the tax rates of the involved states. For Westphalian order, each state has its own prerogative on how to tax and how to allocate its resources.[90] This suggests that the process of allocating authority must be done in a way that would respect the equality of the international order. In other words, both disciplines are engaged in the exercise of the most meaningful connection to a certain territory *in the way that would respect and honour the equal structure of international order*.

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85 See, eg, Gerhard Wagner, 'Comparative Tort Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2nd ed, 2019) 995.

86 See, eg, Solene Rowan, 'Problems of Contractual Interpretation: English and French Law Compared' [2020] *Lloyd's Maritime and Commercial Law Quarterly* 273.

87 Singapore's current company tax rate is 17% on a narrow base. Australia, on the other hand, uses 30%.

88 Nolan Sharkey, 'Renovating the Tax Base: The Development of Selected International Aspects of The Income Tax Regime in Mainland China and Singapore with Reference to Hong Kong' (2016) 70(6) *Bulletin for International Taxation* 355, 361.

89 See, eg, Ulrich K Preuss, 'Equality of States: Its Meaning in a Constitutionalized Global Order' (2008) 9(1) *Chicago Journal of International Law* 17; Thomas H Lee, 'International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today' (2004) 67(4) *Law and Contemporary Problems* 147; Steven R Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press, 2015) 221–64.

90 This indifference to the substance of the involved laws is the rule of thumb. However, it could be argued that a careful review of international taxation and conflict of laws reveals that some exceptions apply to this formal structure of international order and the avoidance of the quality judgment of the involved provisions. Certain limitations in the areas of international taxation (such as instances of severe under taxation and the OECD discussion about harmful tax competition) and conflict of laws (such as public policy and international human rights exceptions applicable in national courts and arbitrative tribunals) apparently represent exceptions to this rule of thumb. This point deserves independent treatment and goes beyond the scope of this article, which focuses on the basic structure of the fields, and not on the exception to it.

Armed with these insights as to the deep interrelation between the two disciplines, we are now in a position to move on to the second stage of our argument: the discussion, analysis and suggestions with respect to the reciprocal lessons. As we will see, these reveal how extensively the disciplines can assist each other in tackling their most pertinent challenges.

## IV Reciprocal Lessons: Tackling the Most Pertinent Challenges of the Disciplines

### A *The Operational Mechanics of the Most Meaningful Connection Principle: Presumptions, Connecting Factors and Flexibility*

We argue that conflict of laws and international taxation are both fundamentally grounded on the most meaningful connection principle and the continuous exercise of the approximation towards it. Representing the very essence of both fields, the quest for finding the most appropriate 'nexus' is inherent to the operational mechanics of their core legal doctrines, concepts and principles. Through providing this foundational basis for both disciplines, the suggested framework offers guidance to their deepest complexities and confusions. Which connecting factors are relevant within the quest of situating the 'most meaningful connection'? Are some connecting factors more important than others? Is there a possibility of establishing some built-in presumptions for the operation of the legal doctrines?

Take, for example, the traditional bases of international taxation: 'residence' and 'source'.[91] It could be argued that these can be explained through the lens of the suggested framework. Both traditional bases of international taxation represent a complex syllogism of presumptions and indicative connecting factors, which are both territorial and personal. Stated in different terms, 'residence' and 'source' should not be viewed as independent bases of taxation but rather represent two related aspects within the unifying concept of 'most meaningful connection'.

This understanding, we suggest, will lead to more careful and coherent understanding and implementation of the international taxation rules. It would not focus on the formal definitions but on the careful assessment and relative weighting of the activities of persons and businesses. Setting pre-determined points of departure for judicial analysis is an important part of the adjudicative process, providing it with certainty, transparency and meaningfulness.[92] Conflict

[91] See generally Holmes (n 45) ch 2; Deutsch, Arkwright and Chiew (n 45).
[92] See Peari, *The Foundation of Choice of Law* (n 12) chs 3, 6.

of laws' doctrine[93] could have learned from international taxation on the point of adoption of a set of pre-determined points of departure, or presumptions, for locating the territory with the most meaningful connection.

Conflict of laws, for its part, could teach international taxation that the formal strict territorial rule of the place of contract formation cannot play a central role in the determination of the most meaningful connection. When this rule played a central role in conflict of laws rules in the past,[94] it was heavily criticized as being arbitrary and overly formal.[95] Subsequently, the conflict of laws jurisprudence rejected this rule in favour of a much more comprehensive analysis of the factual scenarios in the cases.[96] While the relevance of the contract formation rule has been coined as a 'theoretical exercise',[97] unfortunately this is not the case for international taxation. In the latter, the place of contract formation still plays a fairly central role within the operational mechanics of the field, specifically as a guiding rule for 'source' basis determination.[98]

The connecting factor of 'residence' is another area of reciprocal learning. One of the puzzles of the contemporary conflict of laws doctrine is that it continues to adhere to fairly outdated concepts of 'residence' with unclear reference to a related concept of a 'domicile'.[99] It is really unfortunate that this uncertainty revolves around one of the key concepts of the subject. The situation is different in the area of international taxation. Many international taxation regimes have adopted a sophisticated range of tests for personal residence that operate together to create more certainty in taxing jurisdiction. This system includes tests that require a careful and substantive assessment of such factors as the 'principal abode' of the taxpayer and her or his family ties as well as mechanical aspects such as the number of days in the country.[100] With respect to private individuals, DTAs look at such concepts as 'permanent home' and

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93 For the lack of pre-set presumptions within the Australian jurisprudence of the closest connection principle see eg, Martin Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2020) 480–84.

94 On the traditional centrality of contract formation see, eg, Stephen G A Pitel and Nicholas S Rafferty, *Conflict of Laws: Essentials of Canadian Law* (Irwin Law, 2nd ed, 2016) 285: '[t]he early English and American choice of law rule for contract was the *lex loci contractus* — the law of the place of contracting'; *Bondholders Securities Corp v Manville et al* [1933] 4 DLR 699, [38] (applying the proper law of that time — the place of contract formation — to the case of promissory notes).

95 See, eg, Geva and Peari (n 64) 73–80, 173–5, 247–50.

96 See, eg, Peari, *The Foundation of Choice of Law* (n 12) 235–72.

97 Matthias Lehmann, 'Financial Instruments, Bonds & Loans, Cheques, Bills of Exchange and Guarantees in Private International Law' (Paper, 2016) 22 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2849363>.

98 See, eg, Robin Woellner et al, *Australian Taxation Law* (Oxford University Press, 30th ed, 2022) 24:100–24:160. Interestingly, in the field of international taxation, the adjudicative practice tends to refer to private law principles rather than principles of conflict of laws: *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404. In this article, we challenge this practice.

99 For the classical debate in the conflict of laws literature on this point see, eg, Walter W Cook, *The Logical and Legal Bases of the Conflict of Laws* (Harvard University Press, 1942) 194–211; Willis L M Reese, 'Does Domicil Bear a Single Meaning?' (1955) 55(5) *Columbia Law Review* 589, 594.

100 Avi-Yonah, 'International Tax as International Law' (n 80) 485.

'closest personal and economic relations'.[101] There is no reason why the conflict of laws jurisprudence could not learn from the experience of international taxation in designing a meaningful test of residence.

The above-mentioned points about the decline of the place of contract formation rule and the rise of such factors as residence suggest a more general point about the possible declining significance of the traditional territorial factors, such as the place of contract formation and the place of manufacturing. While these factors could continue to play a role in both conflict of laws and international taxation analyses, one may pinpoint the growing significance of personal connecting factors, such as the place of business activity and residence.[102] The growing volume of cross-border commerce alongside the changes in the structure and form of the business under which these have frequently received highly complicated forms[103] would, perhaps, require reshaping the identity and structure of the possible presumptions or points of departure for the legal analysis. Within this reality, the territorial connecting factors become less attractive and the significance of personal factors increases. The important progress made in the area of international taxation with respect to such connecting factors as the place of residence could greatly benefit this exercise of reshaping.

This interconnected vision of the fields perceives the most meaningful connection principle as a unifying normative basis of grasping the nature and interrelation of the various connecting factors: 'source', 'residence', 'domicile', 'permanent home', 'place of contract formation', 'principal abode', 'place of business' and so on. Despite the multiplicity of names and titles, this common basis of connecting factors provides an invaluable opportunity to shed light on their operational mechanics, interconnection and future development in both disciplines.

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101 Generally found in art 4 of the DTAs and used to allocate residence in the case of dual residents. See, eg, *DTA South Africa* (n 51) art 4(2).

102 See, eg, Geva and Peari (n 64) 73–80. For international taxation, this would be the range of factors allowing taxation of business profits under the common law source rule and permanent establishment definition in DTAs.

103 See, eg, Diane Ring, 'International Tax Relations: Theory and Implications' (2007) 60(2) *Tax Law Review* 83, 86.

## B *The Challenges of Digital Economy*

Dramatically enhanced by the realities of COVID-19,[104] the digital economy has become a central mode of commerce.[105] The digital economy challenges the geographical borders of the traditional state. Having no territorial borders or barriers between physical locations,[106] the internet presents a paramount challenge for the traditional doctrines of conflict of laws and international taxation, which have been based on the of territoriality of the Westphalian order.

Consider the field of international taxation. There is a strong call within this field to reconsider the traditional bases of taxation. Specific proposals have been made that aim to support the position that businesses within the digital economy do not sufficiently pay their 'fair share'.[107] It has been argued against the traditional bases of taxation of residence and source, contending that those are outdated and no longer reflect the contemporary digital reality.[108]

These concerns have been echoed by the OECD's Base Erosion and Profit Shifting (OECD BEPS) project in its work on taxation and the Digital economy, which recently resulted in the OECD's Pillar 1 and 2.[109] These pillars propose radical alterations to traditional source taxing rights in particular circumstances.[110] The core concern is that non-resident entities can make business profits through the internet without having sufficient presence to trigger a taxing right in a jurisdiction.[111] This means that the jurisdiction where the customers are will not be able to tax the non-resident entity as source or a

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104 On the dramatic increase in internet users during COVID-19 see, eg, 'How Covid-19 Will Drive a Rapid e-Commerce Revolution', *Inside Retail* (online, 14 April 2020) <https://insideretail.com.au/news/how-covid-19-will-drive-a-rapid-e-commerce-revolution-202004>; Andrew Birmingham, 'Huge Spike in Ecommerce once COVID-19', *Ecommerce* (Web Page, 22 June 2020) <https://which-50.com/huge-spike-in-ecommerce-once-covid-19-hit>. See also Herbert Smith Freehills, 'EP61 Catalyst: Exploring Opportunities: Digital Transformation', *Catalyst* (Web Page, 28 October 2020) <https://www.herbertsmithfreehills.com/latest-thinking/catalyst-podcast-series>.

105 See, eg, Jinyan Li, 'Protecting the Tax Base in a Digital Economy' (Research Paper No 78, Osgoode Hall Law School, York University, 18 April 2018) 479, 481–2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3164995, which mentions the dramatic increase of internet users.

106 The point about the 'borderless' feature of the internet as challenging the traditional structure of private international law's territorial rules has been well noted in the literature. See above n 10. See also Roy Goode's related sarcastic comments on the adherence of the contemporary legal doctrine to the traditional quest that locates the physical location of the debt in 'The Assignment of Pure Intangibles in the Conflict of Laws' in Louise Gullifer and Stefan Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Hart Publishing, 2014) 353, 355–6.

107 There have been significant discussions in various initiatives of the OECD and G20.

108 See, eg, Organisation for Economic Co-Operation and Development, Project on Base Erosion and Profit Shifting: BEPS Action Plan, 2013, Action 1: Tax Challenges Arising from Digitalisation; Organisation for Economic Co-Operation and Development, BEPS Action Plan 2, and Pillar 1 and 2.

109 See the reports by the OECD here: OECD, 'Action 1: Tax Challenges Arising from Digitalisation', *BEPS* (Web Page) <https://www.oecd.org/tax/beps/beps-actions/action1/>; 2015 OECD, *Addressing the Tax Challenges of the Digital Economy*. Action 1:2015 Final Report, OECD/G20 BEPS Project (Paris). https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf.

110 Ibid.

111 Ibid.

permanent establishment are required before taxation is allowed. A clear and simple example of this is where goods are sold through an international website. This situation is thought to be a fundamental challenge to the concepts underlying traditional income tax jurisdiction. Consider the following objection made recently by Li:

> Existing international tax rules are based on fundamental assumptions that include the following: tax laws are creatures of sovereign States and national tax laws interact via bilateral agreements; transactions are physical, involving goods and services; physical locations are necessary for carrying on business activities; and international income is allocated for tax purposes between the residence country and source country. These assumptions are disrupted by the digital economy, which is inherently borderless, intangible, characterized by an unparalleled reliance on intangible assets, massive usage of data (notably personal data) and widespread adoption of multisided business models capturing value from externalities generated by free products.[112]

Stated in these terms, the objection challenges the ability of the traditional international tax rules to properly address the challenges of digitalisation. According to this objection, the digital world is too complex, too different to be accommodated within the rationales of the existing tax rules.[113]

Interestingly, the above-stated objection applies directly to conflict of laws. The above passage could easily appear in the conflict of laws literature. Indeed, a related argument has been made about the need to reconsider and revolutionise the existing conflict of laws rules.[114] Similar to international taxation, it has been argued that new conflict of laws rules are needed to capture the unique nature of technological innovation.[115] According to this position, the digital economy presents an immensurable challenge for the traditional territorial structure of the field. Accordingly (and similar to the field of international taxation), proposals have been made for completely new conflict of laws rules that would capture the distinctive character of the internet.[116]

With all due respect, we disagree with the proposal to annihilate the traditional rules, either in the field of international taxation or in the field of conflict of laws. This is not the first time the law has faced serious technological challenges.[117] Recall that the Westphalian paradigm is still in place. Despite the clear advances in the phenomenon of globalisation (and perhaps some regression in it, such as Brexit 2020), the contemporary international order is still comprised of a multiplicity of states governed by different private, commercial and tax laws.

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112 Li (n 105) 480.

113 Ibid.

114 See, eg, Philip A Davis, 'The Defamation of Choice-of-Law in Cyberspace: Countering the View that the Restatement (Second) of Conflict of Laws is Inadequate to Navigate the Borderless Reaches of the Intangible Frontier' (2002) 54(2) *Federal Communications Law Journal* 339, 349–56. See also above nn 68–78 and accompanying text.

115 Ibid. See also Svantesson (n 10) chs 11–12.

116 Ibid.

117 Peari, *The Foundation of Choice of Law* (n 12) 273–95.

The inherently flexible, a-geographical phenomenon of the internet still operates in this reality, which requires the adjustment of the existing legal rules to capture the formal structure of the Westphalian territorial paradigm.

Our position is that a re-statement of the underlying rationale of the existing conflict of laws and international taxation rules is required. As noted above, the normative imperative of tracking and approximating towards the most meaningful connection to a certain territory seems to stand at the heart of this rationale. The nature of digital transactions, interrelations and activities can very likely challenge the traditional operative mechanics of this rationale, such as the presumptions of the place of residence and source in the area of international taxation. The digital version of commerce would perhaps mean a broader and more substantive look at the nature of the parties' interaction (in the case of conflict of laws) or party activity (in the case of international taxation). Such connecting factors as the place of the internet server,[118] and the place of the website,[119] should perhaps be considered as less relevant for determining the most meaningful connection. A further decline of the traditional territorial connecting factors could be expected.

However, the underlying structure of the existing rules is still based on the premise of the state's territoriality as a reflection of Westphalian order.[120] The invention and advances of the internet do not mean that this structure is not in place. As long as the Westphalian order is in place, the underlying rationales of the fields must remain the same. No revolution is required.[121]

### C *The Case of Corporations*

Corporations and corporate activity are important for both conflict of laws and international taxation. They are at the heart of international business. The number of conflict of laws cases involved with corporations is only growing.[122] The same point applies to the field of international taxation as corporate taxation remains a key revenue source in most countries worldwide and is subject to significant dispute.

The traditional and contemporary conflict of laws doctrine could learn much from international taxation on the point of corporations. In Australia (as well as

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118 *Valve Corp* (n 42) [163].

119 Brian Fitzgerald et al, *Internet and E-Commerce Law: Business and Policy* (Thomson Reuters, 2011) 869–72.

120 Li (n 105) 500.

121 For comments along those lines, see Organisation for Economic Co-Operation and Development, *Are the Current Treaty Rules for Taxing Business Profits Appropriate for E-Commerce?* (Final Report, 2004) (in the field on international taxation); Peari, *The Foundation of Choice of Law* (n 12) 273–95 (in the field of conflict of laws).

122 Peari, 'Which Law Governs Dispute?' (n 7). See also Sagi Peari, 'An Assessment of the US Rules which Determine the Relevant Law Applicable to Corporations: A Suggestion for Reform' (2021) 45(3) *Delaware Journal of Corporate Law* 469, 479–86 ('An Assessment of the US Rules').

in the UK[123] and the US),[124] conflict of laws jurisprudence continues to attribute paramount significance to the connecting factor of the place of incorporation.[125] The centrality of this connecting factor is clear at both levels of corporate activity: within corporate internal affairs (ie in relation to disputes between corporate actors and between those actors and the corporation itself), and within corporate external affairs (ie in relation to disputes between a corporation and other individuals or business entities).[126] To illustrate, if the company wished its internal affairs to be governed by Canadian law, the company must incorporate in Canada. There is no other choice.

The problem is that, in the contemporary reality, the connecting factor of the place of incorporation seems be quite arbitrary due to the remarkable ease with which a corporation may be set up anywhere. It has been argued that the traditional and almost exclusive focus on the place of incorporation reflects an outdated connecting factor that ignores such key values as basic fairness and reasonable expectations.[127] Another difficulty is that, in the US, for example, it has been demonstrated that this traditional rule is inefficient. It bears a significant cost to the company and affects its operative structure.[128] Recently, the US jurisprudence seems to have reconsidered this stringent rule.[129]

Here, we argue, the international tax doctrine can offer important insights to conflict of laws. In the corporate case, the field of international taxation appears to have coped much better with the task of approximation towards a certain authority. The systems of international taxation tend to take a more inclusive approach that carefully takes into account the connecting factor of the place of incorporation alongside other connecting factors.[130] Many DTAs use the concept of 'place of effective management'[131] to determine the residence of corporations. The CFC Rules have been designed to override the easiness and

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123 See, eg, Robert R Drury, 'The Regulation and Recognition of Foreign Corporations: Responses to the "Delaware Syndrome"' (1998) 57(1) *Cambridge Law Journal* 165, 170.

124 See, eg, Deborah A DeMott, 'Perspectives on Choice of Law for Corporate Internal Affairs' (1985) 48(3) *Law and Contemporary Problems* 161, 162–3.

125 Peari, 'Challenging the Place' (n 6).

126 See, eg, Peari, 'An Assessment of the US Rules' (n 122) 494–7.

127 Ibid.

128 Jens Dammann, 'A New Approach to Corporate Choice of Law' (2005) 38(1) *Vanderbilt Journal of Transnational Law* 51; Jens Dammann, 'State Competition for Corporate Headquarters and Corporate Law: An Empirical Analysis' (2021) 80(1) *Maryland Law Review* 214; Peari, 'An Assessment of the US Rules' (n 122).

129 See, eg, Change Capital Partners Fund I, LLC v Volt Electical Systems LLC *(Del Super, CA No N17C-05-290 RRC, 3 April 2018)* where a Delaware choice of law clause was upheld between a Delaware Corporation headquartered in New York and a Texas Corporation headquartered in Texas; *ABRY Partners V, L.P. v F&W Acquisition LLC*, 891 A.2d 1032, 1049 (Del. Ch. 2006).

130 Nolan Cormac Sharkey, 'China's New Enterprise Income Tax Law: Continuity and Change' (2007) 30(3) *University of New South Wales Law Journal* 833.

131 See, eg, *DTA South Africa* (n 51) arts 4(1)(b), (3); Woellner et al (n 98) 1306.

arbitrariness imbedded in the establishment of a corporation.[132] Since the connecting factor of the place of incorporation is easy to manipulate, other connecting factors such as the place of management and control,[133] and the place of business,[134] are considered under the regime of international taxation. Along these lines, the case law has developed a fairly broad and comprehensive test that focuses on such issues as the 'effective' control of the company, rather than the place where the directors' meetings formally took place.[135]

In this way, it would appear that international taxation (in contrast to conflict of laws) has developed an effective assessment of the factual situation of any given corporate activity that goes beyond the formalistic view of connecting factors and looks at the most meaningful connection. At the end of the day, we argue, both disciplines should focus on the careful assessment of the company's operational activities and business. Both are grounded on the most significant connection principle. Hence, the time for reconsideration of the rigid connecting factor of the place of incorporation in conflict of laws is long overdue. The unifying basis of the disciplines and the position taken by international taxation provides a justification for such a reconsideration.

## D *The Nature of the 'Foreign Element' within the Very Definition of the Disciplines: How do we Define 'International Taxation' and 'Conflict of Laws' in the First Place?*

It seems to be clear that the discipline of conflict of laws is grounded on the insight that a so-called foreign element must be present in the factual basis of the case.[136]

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132 The Australian Controlled Foreign Company regime is found in Part X of the *Income Tax Assessment Act 1936* (Cth). It seeks to attribute particular types of income to Australian shareholders when they control a non-resident company. See also Avi-Yonah, 'International Tax as International Law' (n 80) 488.

133 Avi-Yonah, 'Tax Competition' (n 68) 22.

134 Woellner et al (n 98) [24:064].

135 There has been a line of cases dealing with how best to locate true management and control in different circumstances. Key authorities are: *Malayan Shipping Co Ltd v Federal Commissioner of Taxation* (1946) 71 CLR 156; *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1973)129 CLR 177. Most recently, *Bywater Investments Ltd v Commissioner of Taxation* (2016) 260 CLR 169 reviewed the issues in locating central management and control.

136 For the classical classification of the field according to foreign element, see, eg, Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2012) 3 (referring to a foreign element as 'simply a contact with some system of law other than English law'); Eugene F Scoles, Peter Hay and Patrick J Borchers, *Conflict of Laws* (West Publishing, 4th ed, 2005) 1 (referring to private international law cases as 'connected with more than one country'); Hill and Ní Shúilleabháin (n 63) 1 ('[i]n short, any case involving a foreign element raises potential conflict of laws issues'); *Cheshire & North* (n 2) 1 ('[p]rivate International law is that part of English law which comes into operation whenever the court is faced with a claim that contains a foreign element. It is only when this element is present that private international law has a function to perform'); Symeonides, *Choice of Law* (n 63) 2 ('[t]he adjective *international* describes an important attribute of the disputes that fall within the scope of this subject — they are international (or interstate) in the sense that they have contacts with more than one country or state' (emphasis in original)).

Without this, a case cannot be considered a conflict of laws case. This is an important distinction between conflict of laws cases and others cases. Practically, this distinction is important as it triggers the operation of some of the conflict of laws doctrines.[137]

The same is true in the case of international taxation. International tax lawyers have intuitively recognised that the field fundamentally involves the question of tax authority allocation in 'cross-border transactions'[138] in relation to transactions 'involving, or potentially involving, two jurisdictions'.[139] They appreciate that international tax law has something to do with transactions which cross 'national borders'[140] and 'involves a question of intersections with other countries' systems'.[141] And yet, scholars have acknowledged that 'there is no formal or specific definition' of international taxation.[142] This definition seems to be important, as it tackles the very nature of the field and raises its most preliminary question: when does the regime of international taxation first enter the picture?

Obviously, the question of the 'foreign element' is key for both disciplines. This is a conceptual question that defines the boundaries of both disciplines: how do we distinguish (if at all) cases of domestic taxation from international taxation? When should the conflict of laws analysis first arise? However, some of the contemporary conflict of laws literature has challenged the traditional adherence to the presence of a foreign element.[143] Furthermore, it has been argued that the contemporary practical reality of cross-border commerce and digitalisation represents a situation where some degree of 'foreignness' can be found in a large portion of the factual scenarios of the cases.[144] Perhaps we should rethink our vision of international taxation as many instances of human activity may raise issues pertinent to it. The same point applies to conflict of laws: perhaps commercial activity involves a much broader range of conflict of laws cases than we thought. The definition of both disciplines may not need to hinge on the presence of a foreign element. The serious doubts expressed in conflict of laws literature about the necessity of a 'foreign element' could be extended to international taxation.

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137 The operation of party autonomy principle is a representative example of this point. Some conflict of laws provisions require a given case to be first classified as a 'conflict of laws' case to enable a choice of applicable law which differs from their own law. See, eg, *Hague Principles on Choice of Law in International Commercial Contracts* (approved on 19 March 2015), art 1(2) ('*Hague Principles*').

138 Avi-Yonah, 'Tax Competition' (n 68) 16.

139 Woellner et al (n 98) 1289.

140 Ring (n 103) 83.

141 Ibid, 84.

142 Ibid 83 n 2.

143 See, eg, Peari, *The Foundation of Choice of Law* (n 12) 85–90.

144 See, eg, Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws (2008) 41(2) *Vanderbilt Journal of Transnational Law* 381, 422: '[a]lmost all cases in the world have links to more than one state'. See also Peari, *The Foundation of Choice of Law* (n 12) 87.

### E *The Classification Step*

One of the essential aspects of the operational mechanics of classical conflict of laws doctrine has been the 'classification' step[145] and the inherent complexities that it involves. Consider the traditional tort law rule according to which a tort law dispute should be governed by the law of the place where the tort has taken place.[146] Which system's law should determine that a given factual scenario is a 'tort law' dispute in the first place? This classification step has been recognised as a complex conceptual problem for conflict of laws thinking.[147] It follows the 'chicken or the egg problem': apparently one needs to first determine the identity of the applicable law before the classification step. Yet, the classification step needs to be performed according to certain law.[148]

Notably, the field of international taxation suffers from the same 'classification' problem. Presently, under the contemporary structure of international tax rules, the classification step is required to classify such key concepts and categories of the field as 'residence'[149] and 'company'[150] under the rules of the domestic system. This practice is puzzling, as it is at odds with the very nature of international taxation, which fundamentally acknowledges the plurality of tax orders and potential classification schemes.[151] This problem within the contemporary regime of international taxation needs to be addressed, as it presents a clear challenge to the very nature of the field.

On this point, the conflict of laws doctrine can offer much to international taxation doctrine. While acknowledging the complexity of the classification step, conflict of laws doctrine offers a set of solutions to the conceptual and practical puzzles that this step entails.[152] Notably, conflict of laws offers an important awareness of the 'chicken or the egg problem' of the classification step. This awareness of the problem and its complexity has provided the courts with an important point of departure for a more coherent, fair and predictable resolution of cross-border disputes.[153] This means, for instance, that the adjudicative tribunal should not automatically apply its own classification rules, but rather take into account the classification rules of the foreign system or systems as well.

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145 See, eg, Sagi Peari and Marcus Teo, 'Justifying Concurrent Claims in Private International Law' (2022) 81(2) *Cambridge Law Journal* (forthcoming).

146 See above nn 30–1 and accompanying text.

147 See, eg, Peari and Teo (n 145).

148 See, eg, Ernest G Lorenzen, 'The Qualification, Classification, or Characterization Problem in the Conflict of Laws' (1941) 50(5) *Yale Law Journal* 743.

149 For an example of the issues, see, eg, Nolan Sharkey, 'Tax Treaties and Temporary Residence for Individuals: Tax Abuse? (2014) 69(2) *Bulletin for International Taxation* 67.

150 Sharkey, 'The Interests of Developing Countries' (n 46).

151 Ibid.

152 See, eg, Karen Knop, Ralf Michaels and Annelise Riles, 'From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style' (2012) 64(3) *Stanford Law Review* 589, 634–6; Peari, *The Foundation of Choice of Law* (n 12) 201–4.

153 See, eg, Peari and Teo (n 145); Peari, *The Foundation of Choice of Law* (n 12) 201–4.

There is no reason why international taxation could not learn from those lessons of experience and circumspection of conflict of laws.

## F *Foreign Law in Domestic Courts*

A related point applies with respect to another fairly central feature of the conflict of laws mechanics — the very possibility of applying a foreign law in a domestic court. Consider a tort committed by an Australian resident against an Indonesian resident in Indonesia. When the Indonesian resident submits the claim in an Australian court, under the conflict of laws rules the Australian court should apply Indonesian tort law.[154] Similar to the classification step, the conflict of laws doctrine has developed a sophisticated toolkit for such matters as the scope and proof of the foreign law in the domestic courts.[155] Above all, the conflict of laws doctrine has recognised that the application of foreign law cannot be 'perfect' — it is hard to apply 'truly' foreign laws in a domestic system.[156] The domestic courts do not really have the ability to apply 'authentic' foreign law. Despite the use of experts, the domestic courts frequently do not have the required expertise.[157] Yet, while acknowledging the inherent difficulty in such an exercise, the conflict of laws doctrine offers some important insights on this matter: for the sake of considerations of fairness and legal certainty, a reasonable approximation towards the 'foreign law' must be made.[158]

Contemporary international tax doctrine also faces the challenge of applying foreign law. Even though most tax disputes involve a tax office and a taxpayer dealing with domestic law, it is also possible that a foreign tax will need to be considered to settle the dispute. For example, the DTAs become part of the domestic law, yet they refer to whether a person is 'resident' under the foreign law. If that is being disputed, the domestic court will have to consider the application of the foreign law.[159] While the practice of applying foreign law is inherent to the operational mechanics of the field, this practice is relatively new and does not have the wealth of centuries of experience and self-balance guided by considerations of fairness, predictability and reasonableness. Conflict of laws

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154 See above nn 34–5 and accompanying text.

155 See, eg, *Cheshire & North* (n 2) 105–14.

156 Ibid.

157 Ibid. Relatedly, the emerging phenomenon of international commercial courts has relaxed the traditional requirements involved in proving the foreign law. For instance, under the rules of the Singapore International Commercial Court, the parties could prove the content of the foreign law through their submissions, without resorting to the opinions of experts. See, eg, Singapore International Commercial Court, 'SICC Proceedings in General' (Web Page) <https://www.sicc.gov.sg/guide-to-the-sicc/sicc-proceedings-in-general>.

158 Knop, Michaels and Riles (n 152) 629–32.

159 Nolan Sharkey, 'The Correctness of the Chinese Position of Enterprise Residence in Chinese Law: The Institutional and Treaty Implications' (2014) 68(11) *Bulletin for International Taxation* 617 ('The Correctness of the Chinese Position').

doctrine could supply the doctrine of international taxation with the benefit of its experience and internal balance and the process of learning from mistakes.

Hence, during the exercise of proving the content of foreign tax law, international taxation could focus on the values of legal certainty and fairness rather than engaging with frequently endless exercises of applying foreign law in the same way the foreign tribunal would have applied it. When it comes to the application of foreign law in domestic tribunals, 'perfection' could rarely (and should not) be reached. The emerging issue of international taxation could easily learn from conflict of laws on an acute point of rules' operation.

### G *The Harmonization Process*

Finally, there is room for reciprocal lessons on the point of the harmonisation process. While we reject the argument made in the literature about the existence of a customary international taxation law,[160] no one can ignore the sustainable global effort to harmonise the international tax rules across jurisdictions. Today, there are more than 2,000 bilateral treaties signed between states, which aim to create 'conflict of laws' rules and 'tie-breaker' rules between two states. The aim of these treaties is to avoid situations of double taxation through the means of tax exemptions and credits for foreign taxes.[161] Clearly, the treaties resemble, in language and in structure (and are mostly modelled on), the OECD and UN models.[162] Yet, as we have mentioned above,[163] it would be a fallacy to argue that international taxation has reached a point of harmonisation on the point of taxation 'conflict of laws' rules. While the double tax treaties may be identical in 75 per cent of wording,[164] the treaties still diverge on significant aspects. Further, they frequently refer to the domestic definition of such concepts as 'residence',[165] which underscores the deficiency in the contemporary harmonisation process. The devil is in the detail. And yet, clearly, the international community makes a significant effort to harmonise international tax rules.

Unfortunately, conflict of laws jurisprudence has not made the same effort to unify the rules. Despite some significant efforts made in the international community, and the hopes expressed by the foundational thinkers of the

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160 Avi-Yonah, 'International Tax as International Law' (n 80).

161 Ibid 493–4; Avi-Yonah, 'Tax Competition' (n 68) 16.

162 Avi-Yonah, 'Tax Competition' (n 68) 5–6. See also Li (n 89) 500 (commenting on the operation of OECD, OECD Model Convention and its Commentaries as *de facto* world tax organization); Shay Moyal, 'Back to Basics: Rethinking Normative Principles in International Tax' (2019) 73(1) *Tax Lawyer* 165, 173 (mentioning the hope of the American forefather of international taxation — Adams — and how his desire for international cooperation, administrative competence, and decreased tax avoidance were fulfilled as the vast majority of the countries adopted similar provisions to ensure tax payment and prevent tax overpayment).

163 See above nn 48–52 and accompanying text.

164 Reuven S Avi-Yonah, 'Double Tax Treaties: An Introduction' (Paper, 3 December 2007) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1048441> 1.

165 Sharkey, 'The Correctness of the Chinese Position' (n 159).

disciplines,[166] the harmonisation processes in conflict of laws move very slowly. To illustrate, the *Convention on the Law Applicable to Contracts for the International Sale of Goods*,[167] which addresses applicable law in international sales contracts, has a limited scope and has never entered into force. The *Hague Principles on Choice of Law in International Commercial Contracts* ('*Hague Principles*')[168] did enter into force. However, the limited scope of this instrument is striking: it is only limited to cases that the *Hague Principles* define as 'international commercial contracts'; it does not extend to situations where the parties do not specify the applicable law; it does not address cases that involve consumer transactions; and, most importantly, it can be easily contracted out.[169]

In contrast to conflict of laws, the rules of international taxation represent a genuine effort on the part of the international community to harmonise the law. Conflict of laws can only learn from international taxation on the point of the immediate necessity of the harmonisation of its rules.[170]

## V Summary

The central thesis of our argument is that conflict of laws and international taxation can provide each other with invaluable lessons and insights to cope with the contemporary challenges of COVID-19, cross-border commerce and digitalisation. Our argument developed through the following two-stage process. *First*, we showed the conceptual interconnectedness between the two fields. In contrast to the comments in the literature and case law that draw a sharp line between the issues of international taxation and conflict of laws, we argued that the two are intimately interconnected through a set of underlying ideas and rationales. By addressing different aspects within the legal universe and targeting different objects, the two disciplines relate at a fundamental level. This stage explained why the conceptual analysis between the question of applicable law and international taxation is possible, and in fact necessary. It included tackling the very origins of each discipline and making the necessary qualifications as to the

166 Savigny (n 28) 136–7.

167 *Convention on the Law Applicable to Contracts for the International Sale of Goods* (concluded 22 December 1986) <https://assets.hcch.net/docs/b4698bc5-9d42-4352-934f-5232a8dcb12c.pdf>.

168 *Hague Principles* (n 137).

169 For a limited scope of the *Hague Principles* (n 137), see, eg, Symeon Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61(4) *American Journal of Comparative Law* 873; Giesela Rühl, 'Regulatory Competition and the Hague Principles of Choice of Law in International Commercial Contracts' in Thomas John, Rishi Gulati and Ben Koehler (eds), *The Elgar Companion tothe Hague Conference on Private International Law* (Edward Elgar Publishing, 2020) 125.

170 Indeed, the forefather of conflict of laws viewed harmonisation as one of the fundamental goals of the discipline. See Savigny (n 28) 136–7; Th M de Boer, 'Living Apart Together: The Relationship between Public and Private International Law' (2010) 57(2) *Netherlands International Law Review* 183, 196.

parameters of the relevancy of the arguments and debates in each one of the disciplines.

*Second*, we provided a detailed analysis of how each discipline can benefit the other. As we have shown, both disciplines have been facing a more or less similar set of practical and conceptual problems: the challenges of digitalisation and increasing cross-border commercial activity of corporations. This all supports our central point about the significance of reciprocal lessons: carefully conceptualised, qualified and analysed, conflict of laws and international taxation can teach each other a lot. Such reciprocal learning-exercises may involve adopting new interpretations of existing legal texts, the development of common law, the passing of new statutory law, the development of new aspects of international treaties or, perhaps, a combination of these things. We argue that the Australian public and the global community will potentially benefit greatly from those lessons.

THE UNIVERSITY OF QUEENSLAND
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## For further details, please contact:


**T:** +61 7 3365 2206

**E:** law@uq.edu.au

**W:** law.uq.edu.au

**A:** Level 3, Forgan Smith Building (1)
The University of Queensland
St Lucia QLD 4072, Australia