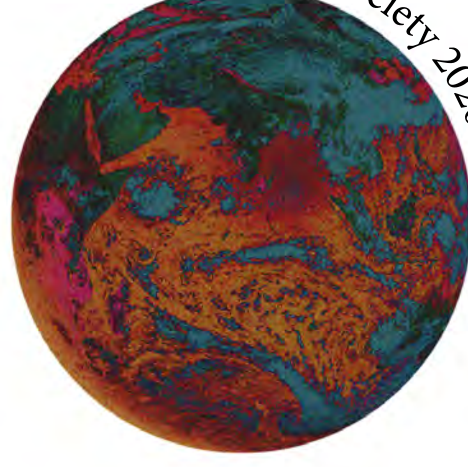
CRISIS



obal pandemic, the ... impacts of climate ... unprecedented times ... Western
ocracies, 2020 has ... unprecedented ... and it is only Septemb
ch, this year's theme, 'Crisis', seemed the only sensical topic ... The editorial boa
ctively believed that Sydney University law students should focus on such circumstances and understand h
erative the law is to respond to these times of immense difficulty. It is during times of crisis that complexities a
lations arise, and the crucial function of the law in the maintenance and survival of civil society and social or
mes pertinent. In continuing the tradition of canvassing a diverse selection of contemporary legal issu
ey University Law Society ('SULS') is proud to present the sixth edition of Law in Society. This journal is
nguished piece in the SULS publication portfolio that deals exclusively with legal issues and topics. In line w
ious editions, this year's issue showcases diverse critical and original perspectives from law students. We had
whelming amount of interest in Law in Society this year, with an incredible number of abstracts submitted th

ACKNOWLEDGMENTS

Many thanks to everyone who made the production and publication of the 2020 Sydney University Law Society Law in Society Journal possible. In particular, we would like to thank the Sydney Law School and the University of Sydney Union for their continued support of SULS and its publications.

We acknowledge the traditional Aboriginal owners of the land that the University of Sydney is built upon, the Gadigal People of the Eora Nation. We acknowledge that this was and always will be Aboriginal Land and are proud to be on the lands of one of the oldest surviving cultures in existence. We respect the knowledge that traditional elders and Aboriginal people hold and pass on from generation to generation, and acknowledge the continuous fight for constitutional reform and treaty recognition to this day. We regret that white supremacy has been used to justify Indigenous dispossession, colonial rule and violence in the past, in particular, a legal and political system that still to this date doesn't provide Aboriginal people with justice.

EDITORS

Editorial Team:	Zachary O'Meara (Editor-in-Chief), Alexander Bird, Annie Chen, Alexander MacIntyre, Vanessa Li
Publications Director:	Alison Chen
Design Director:	Daniel Lee Aniceto
Design Team:	Justine Hu, Arasa Hardie, Gemma Wu, Michelle Chen and Shaily Shrestha

SULS Office
Monday to Thursday 10am-2pm
Tuesday extended hours 10am-6pm

Room 103
New Law Building Annex F10
University of Sydney
Camperdown NSW 2006

Phone (02) 9352 0204
Website www.suls.org.au
Facebook @SydneyUniversityLawSociety
Instagram @suls_sydney

All contents © Sydney University Law Society Incorporated 2020
All references to 'Sydney University Law Society' or 'SULS' refers to Sydney University Law Society Inc., an incorporated charitable association registered in the state of New South Wales.

This publication is copyrighted. Except where permitted under the Copyright Act 1968 (Cth), no part of this publication may be reproduced or stored by any process, electronic or otherwise, without the specific written permission of the Sydney University Law Society.

This journal is published by the students of the University of Sydney. Law in Society is published under the auspices of the Sydney University Law Society. The views expressed in the articles are those of the authors, not the editors.The views and opinions expressed in this publication do not necessarily represent those of the Sydney University Law Society or Sydney Law School.

Contents

Editor-in-Chief's Foreword

A global pandemic, the devastating impacts of climate change, and the erosion of the rule of law in Western democracies, 2020 has already brought unprecedented times of uncertainty and difficulty, and it is only September. As such, this year's theme, Crisis, seemed the only sensical topic to reflect, engage, and critique. The editorial board collectively believed that Sydney University law students should focus on such circumstances and understand how imperative the law is to respond to these times of immense difficulty. It is during times of crisis that complexities and tribulations arise, and the crucial function of the law in the maintenance and survival of civil society and social order becomes pertinent.

In continuing the tradition of canvassing a diverse selection of contemporary legal issues, Sydney University Law Society ('SULS') is proud to present the sixth edition of Law in Society. This journal is a distinguished piece in the SULS publication portfolio that deals exclusively with legal issues and topics. In line with previous editions, this year's issue showcases diverse critical and original perspectives from law students. We had an overwhelming amount of interest in Law in Society this year, with an incredible number of abstracts submitted that spoke in innovative ways to the theme. Only fourteen articles were eventually published, encompassing a diverse range of legal issues in both the domestic and international spheres.

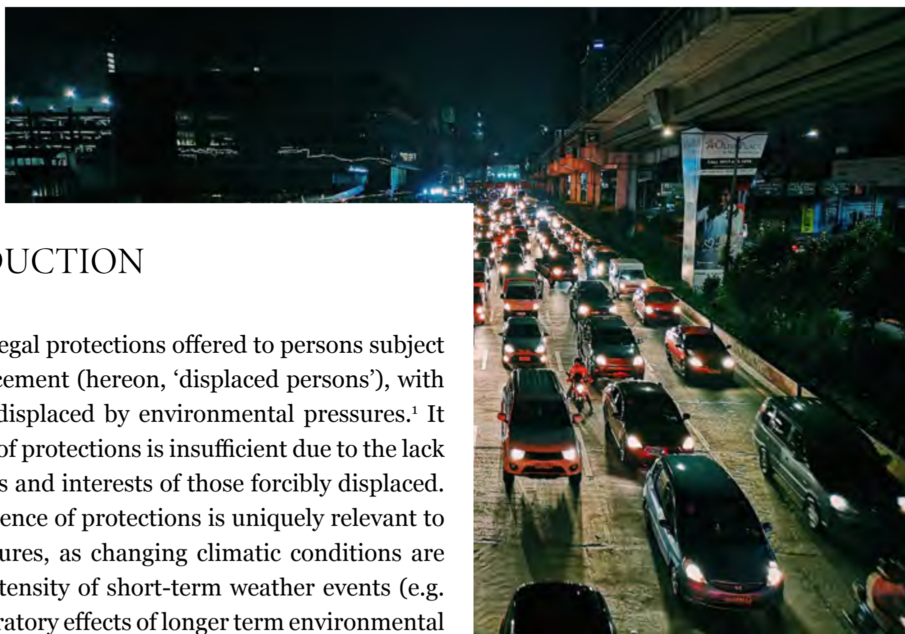
In my view, the journal provides an essential avenue for sophisticated discussion of important contemporary legal issues and topics which struggle to arise in the traditional law school curriculum. Learning from one another is fundamental to the student experience at the University of Sydney. SULS publications have always provided a valuable forum for students to develop their analytical, editorial, and independent thinking skills in a variety of topics, as well as bridging the social gap between cohorts. This edition of the journal should bring much hope and anticipation for the meaningful contributions that Australia's next young lawyers, policymakers, and advocates can make to discussion on a wide range of issues that are pertinent to our world in 2020.

On behalf of the Law in Society editorial team, I would like to express my gratitude to the SULS Publication Director, Alison Chen, who has provided constant support throughout the editorial process, and the SULS Design Director, Daniel Lee Aniceto, and his creative team for bringing to life each journal article. Thanks must also go to my team of editors, including Alexander Bird, Annie Chen, Alexander MacIntyre, and Vanessa Li, whose countless volunteered hours, hard work, and enthusiasm, accumulated into an exceptionally high-quality and diverse piece of work. Finally, I cannot forget the students themselves, who worked diligently to provide submissions that exceeded expectations of law students and contributed original perspectives to their respective areas of the law. For that, I am incredibly proud to have helped facilitate such academic discourse. I hope that reading the journal gives you as much food for thought as curating and editing these articles did for me. With that, I present to you Law in Society 2020.

ZACHARY O'MEARA, JD III

JOHN MCCRORIE, JD II

Climate Change Related Environmental Displacement in International Law: The Conceptual, Legal and Logistical



I. INTRODUCTION

This article will consider the international legal protections offered to persons subject to forcible or otherwise involuntary displacement (hereon, 'displaced persons'), with specific reference being made to persons displaced by environmental pressures.[1] It will be argued that that the current scheme of protections is insufficient due to the lack of reliable safeguards that protect the rights and interests of those forcibly displaced. Furthermore, it will be argued that this absence of protections is uniquely relevant to persons displaced by environmental pressures, as changing climatic conditions are predicted to increase the frequency and intensity of short-term weather events (e.g. cyclones and flooding) and magnify the migratory effects of longer term environmental trends (e.g. sea-level rise and desertification).[2] A discussion of these matters will proceed in three parts. Firstly, the concepts of displacement, climate change related displacement and environmental displacement will be discussed to determine the scope of this article. Secondly, the legal protections afforded to displaced persons will be discussed to identify the lack of sufficient safeguards. Thirdly, a logistical framework that attempts to address environmental displacement will be suggested, with particular focus being given to the logistical issue of establishing the identity of displaced persons.

II. DISPLACEMENT AND CLIMATE CHANGE ('THE CONCEPTUAL')

A. *Displaced Persons*

While the terminology relating to displacement varies in the relevant literature,[3] consistent between most definitions of displaced persons is the notion that an individual or population has been involuntarily or forcibly moved from their locality or environment.[4] Defined in this way, the term covers an indeterminate list of factors that contribute towards displacement (e.g. conflict, environmental change economic impoverishment so forth).[5] The term also covers displacement within a State's territory (i.e. internal displacement) and across State boundaries (i.e. external displacement).[6] As such, several classes of persons are covered by the term 'displaced persons', including internally displaced persons, environmentally displaced persons, refugees and so forth.[7] While these terms are frequently used interchangeably, they have distinct legal meanings that determine the scope of relevant international legal protections.[8] For example, a person displaced by ethnic or racial violence may satisfy the definition of refugee per the Convention Relating to the Status of Refugees ('Refugee Convention'), entitling the person to a range of protections that would be unavailable to many other classes of displaced persons (e.g. those displaced by extreme weather events or natural disasters).[9] In determining the relevant subclass of a displaced person, regard should be had to the cause of displacement and whether the person has been displaced across State boundaries.[10] Those displaced by environmental or climatic pressures (either internally or externally) can be described as environmentally displaced persons,[11] and are afforded few protections in international law.[12] Before explaining these legal protections, the relationship between climate change and displacement will be analysed.

B. *Causation and Climate Change Related Displacement*

Climate change involves the continued warming of the climate system's average temperature,[13] contributing to phenomena such as extreme weather events, desertification and sea-level rise.[14] The International Panel on Climate Change ('IPCC') observed in 1990 that climate change would magnify occurrences of human displacement, noting specifically the effects of shoreline erosion, coastal flooding and agricultural disruption.[15] These direct physical impacts are accompanied by attendant socio-economic effects that encourage migration, including difficulties in sourcing appropriate shelter, food and water.[16] Due to these wide-ranging effects, conventional estimates of displacement hover between 150–200 million people by 2050.[17] Such figures illustrate why climate change is a focus of modern migration literature, though it should be noted that they are disputed. Three factors are relevant to this dispute.[18] Firstly, these estimates have been argued to be insensitive to factors such as planned government responses and the adaptive capacities of populations, meaning relevant variables are not accounted for.[19] Consequently, these estimates have been criticised for their inaccuracy, with the International Organisation for Migration ('IOM') commenting that many are merely 'educated guesswork'.[20] Secondly, while climate change may be a cause of displacement (e.g. where sea-level rise displaces coastal populations), it may not be the sole or dominant cause of displacement.[21] For example, a person may proactively migrate in search of better economic conditions, knowing that climatic pressures may reduce the standard of living in their present locality. Consequently, it has been suggested that climate change should be understood as a 'threat multiplier' that exacerbates underlying environmental and socio-economic vulnerabilities, rather than as an isolated 'cause' of displacement.[22] Thirdly, while climate change is predicted to increase the intensity and frequency of extreme weather events,[23] the extent to which specific events are causally related to anthropogenic climate change is subject to debate.[24] This is due to extreme weather events occurring independently of specific climatic trends, meaning attempts to identify which events are 'caused' by climate change is difficult.[25] These conceptual challenges in understanding the relationship between climate change and displacement are accompanied by further challenges pertaining to international legal protections. Such challenges will now be considered.

C. *Environmental Displacement*

These conceptual challenges are relevant to international law as any instrument that uniquely or incidentally addresses this form of displacement would likely need to demonstrate that climate change was a 'cause' of the related movement. The need to establish causation can be observed in relation to other classes of displaced persons, such as refugees displaced by religious persecution, as religious persecution would need to be established as a major cause of flight.[26] By analogy, those displaced by the apparent effects of climate change would need to establish their movement was caused by climate change.[27] For the reasons identified above, this could be difficult, and it would likely be more effective to require the identification of a cause of displacement that can be reliably established. For example, the IOM uses the language of 'environmentally displaced persons' in reference to those:

> *... who are displaced within their country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one.*[28]

By focussing on the environmental dimension of displacement, rather than the climatic dimension, a causal relationship can be more dependably established. For example, events such as cyclones and floods (and to an extent, desertification and sea-level rise) can be shown to displace populations.[29] Framing displacement as 'environmental' rather than 'climatic' therefore vitiates the need to establish causation between instances of displacement and climatic change. Defining the issue of climate change related displacement in this manner pre-emptively resolves some issues relating to legal causation and identifying legal mechanisms that would effectively protect those displaced by the effects of climate change.[30] Consequently, this article will proceed on the basis of discussing climate change related displacement in terms of environmentally displaced persons (hereon, 'EDPs').

III. LEGAL PROTECTIONS FOR THE ENVIRONMENTALLY DISPLACED ('THE LEGAL')

A. *Introduction*

The legal protections offered to displaced persons have been described as 'scattered [between] various discrete areas of international law'[31] and only afforded to specific classes of protected persons.[32] Such a description highlights the presence of a 'normative gap' in the international scheme of legal protections, and the absence of an instrument that protects EDPs.[33] This article will proceed by identifying areas of international law that offer protections to EDPs and those which could offer protections through jurisprudential development.

B. *International Refugee Law*

The Refugee Convention and Protocol Relating to the Status of Refugees are the key international legal instruments that regulate the status of, and protections afforded to, refugees.[34] Wide-ranging protections are afforded to refugees,[35] with rights not to be penalised for unlawful entry and not to be unjustly expelled from a State being particularly relevant to EDPs.[36] These rights are relevant as specific populations (e.g. those in the low-lying Pacific States) are predicted to be displaced across State boundaries,[37] meaning protections relating to entering and remaining in foreign States becomes critical. However, several barriers prevent the Refugee Convention from being a source of protection for EDPs.[38] Firstly, the definition of a refugee requires a fear of 'being persecuted'.[39] While 'persecution' is a concept open to varied interpretations, it is unlikely that EDPs are describable as 'being persecuted' as no readily identifiable 'persecutor' is evident.[40] While industrial States who have

majorly contributed to anthropogenic climate change could be characterised as 'persecutors',[41] this connection has been described as being too tenuous and 'not meet[ing] the threshold of 'persecution' as currently understood in international and domestic law'.[42] Secondly, persecution must relate to 'race, religion, nationality, membership of a particular social group, or political opinion'.[43] As climate change is a global phenomenon that lacks agency, it does not have the capacity to 'persecute' in relation to these grounds.[44] Thirdly, the Refugee Convention is only enlivened in circumstances where there is cross-border travel.[45] This is relevant as most environmental displacement is predicted to be internal, rather than across State boundaries.[46] However, it is likely that there will be some cross-border movement,[47] in which case this condition would present no barrier. Nevertheless, these barriers mean that EDPs cannot reliably access the protections of the Refugee Convention.[48]

C. *International Human Rights Law*

Environmental displacement will impact various human rights through the disruption caused by extreme weather events, sea-level rise and so forth.[49] While there is 'no human right to enter a country of which person is not a national',[50] this body of law nevertheless provides protections to those at risk of 'arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment'.[51] The right to life and the right to not be subject to inhuman or degrading treatment are of particular note in this context.[52] The right to life is expressed by a range of international instruments,[53] and is recognised as including access to the minimum necessities of life (i.e. food, water and shelter).[54] Relevantly, this right also provides for an obligation upon States regarding non-refoulment (i.e. an obligation to not send a person back to a State from which they are seeking protection).[55] The nexus between the environment and the right to life has received recognition in Gabčikovo-Nagymaros Project,[56] but it is doubtful that this recognition reflects a broader jurisprudential understanding that entails that the impacts of climate change are included within the scope of the right to life.[57] A narrow scope can also be found in relation to inhumane or degrading treatment, whereby there has been a reluctance to understand this right as a general-purpose remedy that addresses topics such as poverty, unemployment or a lack of resources.[58] The lack of breadth in relation to both the right to life and the right to not be subject to inhumane or degrading treatment means that international human rights law is limited in its capacity to protect EDPs. However, if a person were to establish these rights were to be infringed on other grounds, they would be entitled to protections under non-refoulment.

D. *International Humanitarian and Criminal Law*

While international humanitarian and criminal law are distinct bodies of law, they offer similar protections relating to displacement and environmental destruction. Broadly, international humanitarian law regulates conduct during conflicts to protect persons and property.[59] The Geneva Conventions and Additional Protocols are central to this body of law and provide protection in the form of prohibiting the displacement of persons,[60] and severe damage to the environment.[61] It is therefore likely that displacement caused by deliberate damage to the environment would be covered by humanitarian law.[62] However, the connection between displacement and the environment is not directly addressed; thereby 'disregard[ing] the correlation between environmental degradation and human migration' and being unresponsive to environmental displacement.[63] International criminal law – as reflected through instruments such as the Rome Statute – offers similar prohibitions relating to displacement,[64] and the destruction of the environment.[65] Similar to humanitarian law, this body of criminal law is restricted to circumstances of conflict (e.g. genocide, war crimes, crimes against humanity and crimes of aggression) and therefore offers few direct protections against environmental displacement.[66] While both international humanitarian law and international criminal law do not offer direct or reliable protections, they have nevertheless been identified by migration authors as expressing 'relevant provisions for [the] protection' of EDPs.[67] This is because both of these bodies reflect an awareness that mass displacement and deliberate acts of environmental destruction are worthy of prevention and criminal sanction. It is therefore conceivable that if this focus on displacement and environmental destruction were combined, express prohibitions on actions which contribute to environmental displacement could be established.

E. *International Climate Change Law*

International climate change law focuses on: (i) mitigation and prevention of anthropogenically induced climate change, (ii) adaption to the consequences of climate change, (iii) organisation of financial structures to support prevention, mitigation and adaptation and (iv) international oversight of the construction and implementation of global climate change policies.[68] This body of law is largely treaty based, with the United Nations Framework Convention on Climate Change (as extended by the Kyoto Protocol and Paris Agreement) being central.[69] However, as noted by the Inter-Agency Standing Committee, '[n]either the UN Framework Convention on Climate Change, nor its Kyoto Protocol, includes any provisions concerning specific assistance or protection for those who will be directly affected by the effects of climate change'.[70] Therefore, while this is the body of international law that is most sensitive to the nature of climate change, no protections are offered to those displaced by its effects.

F. *'Soft', Regional and State Law*

An additional three instruments relevant to international migration and displacement will be discussed. Firstly, the adoption of the Guiding Principles on Internal Displacement that provide for protections against displacement,[71] protections during displacement,[72] frameworks for the humanitarian assistance,[73] and protections relating to the return and resettlement of persons displaced within their own country.[74] Such principles are directly relevant to the majority of EDPs as they are predicted to be displaced internally (including climate change related displacement).[75] Secondly, the proliferation of regional instruments – such as the OAU Convention Governing Specific Aspects of Refugee Problems in Africa ('Kampala Convention').[76] The Kampala Convention adopts a broad definition of 'refugee', including those fleeing from events 'seriously disturbing the public order'.[77] This breadth, it has been suggested, 'fill[s] the legal vacuum with respect to those displaced as a result of factors including climate change, natural disaster and environmental degradation'.[78] Thirdly, the implementation of domestic law that contains broad provisions characteristic of the Kampala Convention. For example, both Sweden and Finland have historically extended their protection of refugees to those seeking refuge from environmental disasters – likely including climate change induced weather events.[79] While other relevant legal instruments exist, these referenced instruments seem most pertinent to the concept of climate change related environmental displacement.[80] Furthermore, while these additional legal instruments undoubtedly signify the development of international awareness and commitments to patterns of displacement,[81] they either remain in the domain of non-binding 'soft law' or are geographically restricted to particular regions or States.[82] Therefore, while they contribute to the international scheme of law relating to environmental displacement, they offer few protections to the environmentally displaced.

IV. A LEGAL, LOGISTICAL AND BIOMETRIC SOLUTION

A. *Introduction*

The preceding discussion of law demonstrated that current legal protections are (i) not afforded to EDPs, or (ii) afforded to EDPs in geographically or legally restricted manners. The proceeding discussion will canvas proposed solutions to these protection gaps and will argue that solutions based on binding regional and State instruments may be the most effective. Furthermore, this article will consider how the logistical challenge of establishing identity is uniquely relevant to EDPs and how biometric technology could be used to address this challenge.

B. *Addressing the 'protection gap'*

Solutions to the 'protection gaps' relating to environmental displacement can be derived from each of the bodies of law identified above:

(i) the definition of refugee could be expanded to include displacement caused by environmental pressures;[83]

(ii) the rights relating to life and degrading treatment could be expanded in international human rights law to include protections relating to environmental displacement;[84]

(iii) the protections in international humanitarian and criminal law could be extended beyond contexts of conflict to climate change related environmental displacement;[85]

(iv) the regulation of climate change in international climate law could be developed to become more sensitive to environmental displacement,[86] and;

(v) the creation of a novel legal instrument, or instruments, that robustly protect EDPs.[87]

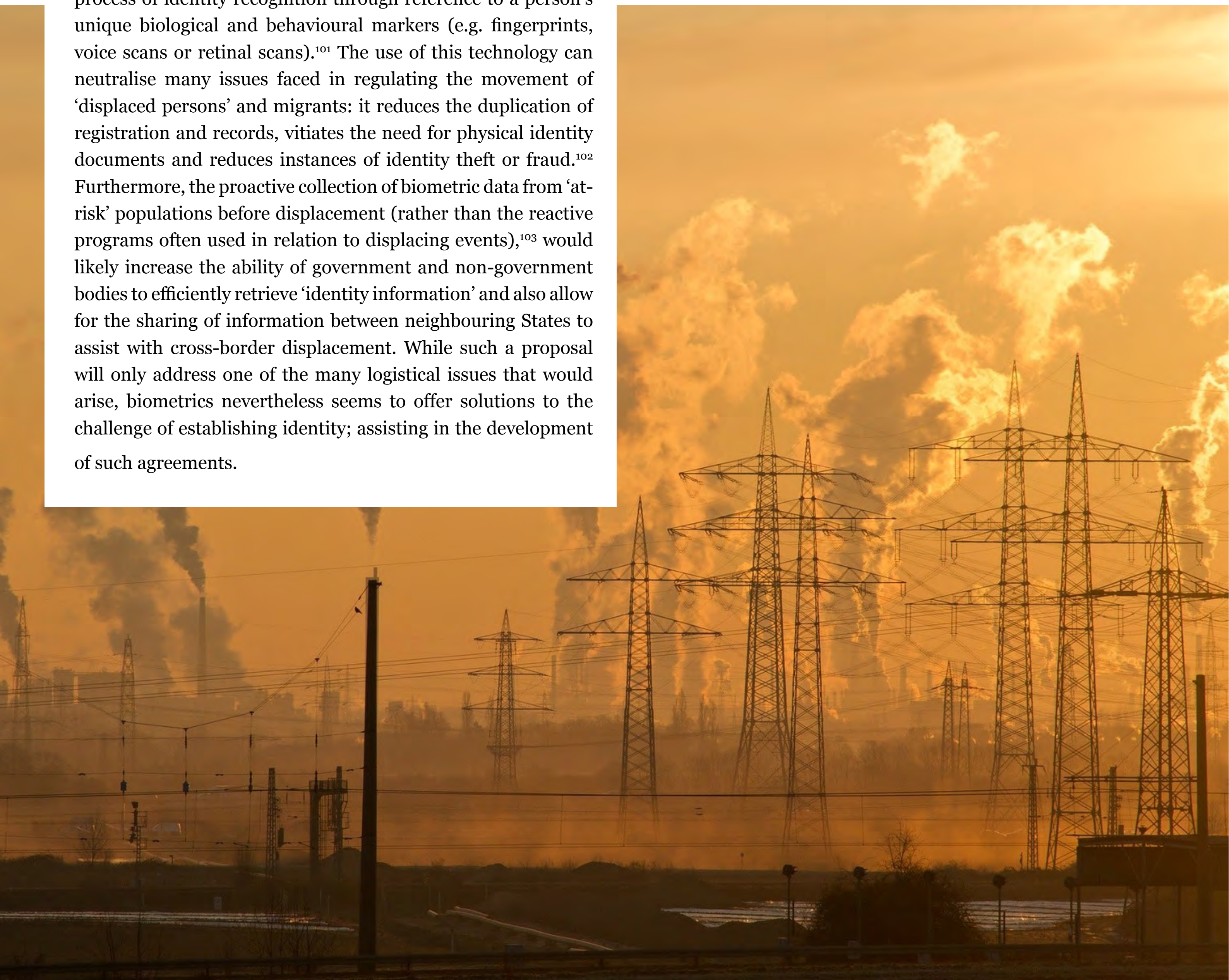
While each solution has its respective merits and demerits, this article endorses the proliferation of treaties and resettlement agreements that are sensitive to climate change related environmental displacement, and between regionally proximate States.[88] Arrangements of this nature would include the identification of regional climatic pressures, the likelihood of cross-border displacement and the design of structures that could absorb and repatriate EDPs. Most importantly, the treaties which would form the basis of these regional arrangements would address the environmental displacement 'protection gap' discussed in the preceding sections of this article. Such protection could be afforded through broad language such as that used in the Kampala Convention, or through narrower language that focusses solely or primarily on environmental displacement.[89] In defence of this solution, three features will be emphasised. Firstly, treaties of this nature would eliminate many issues relating to causation between climate change and instances of displacement through the use of broad language.[90] Secondly, the regional nature of these arrangements would reduce the difficulties in forming international consensus,[91] as only those States affected by the particular effects of climate change would need to be parties.[92] Thirdly, these arrangements can be used pre-emptively (i.e. moving populations before displacement),[93] and reactively (i.e. managing populations post displacement).[94] The proactive style of this solution would allow States to develop strategies to prevent and mitigate the effects of environmental displacement through identifying 'at-risk' populations (contrasting to most instruments and resettlement agreements that address displacement in a reactive manner).[95] Broad arrangements of this scale will require the consideration of a range of legal and logistical challenges; this article will now consider those logistical issues relating to establishing identity.

C. *The Utility of Biometrics*

Of the logistical challenges States would encounter in designing and implementing agreements of this nature, the challenge of 'establishing identity' is notable. Commonly, State immigration authorities require 'proof of identity' to be admitted into their territory.[96] However, no international consensus exists on how to establish a person's identity,[97] with the resulting inconsistencies being identified as 'significant barriers' by migration law authors.[98] This is because conventional markers of identity (such as passports and birth certificates) are often required, but seldom accessible to those seeking the protection of foreign States.[99] For example, a lack of adequate documentation can be fatal to a migratory application into Australia as identity documents are a central component to establishing identity (which is itself required to gain admittance).[100] While a lack of adequate identity documentation is endemic to the phenomena of displacement, it is particularly relevant to environmental displacement because (i) some populations at risk of displacement also lack access to adequate identity documents and (ii) in circumstances of sudden-onset weather events, the likelihood of identity documents being damaged or lost increases. Consequently, consideration should be given as to how biometric technology could be used to mitigate the migratory and logistical challenges relating to establishing identity. Biometrics automates the process of identity recognition through reference to a person's unique biological and behavioural markers (e.g. fingerprints, voice scans or retinal scans).[101] The use of this technology can neutralise many issues faced in regulating the movement of 'displaced persons' and migrants: it reduces the duplication of registration and records, vitiates the need for physical identity documents and reduces instances of identity theft or fraud.[102] Furthermore, the proactive collection of biometric data from 'at-risk' populations before displacement (rather than the reactive programs often used in relation to displacing events),[103] would likely increase the ability of government and non-government bodies to efficiently retrieve 'identity information' and also allow for the sharing of information between neighbouring States to assist with cross-border displacement. While such a proposal will only address one of the many logistical issues that would arise, biometrics nevertheless seems to offer solutions to the challenge of establishing identity; assisting in the development of such agreements.

V. CONCLUSION

This article has addressed the conceptual, legal and logistical dimensions of climate-change related environmental displacement. Through a discussion of forced displacement, it was identified that framing climate change related displacement as 'environmental displacement' is favourable because it neutralises issues pertaining to causation. The legal protections afforded to the environmentally displaced were then canvassed; identifying that those who are environmentally displaced across international borders lack adequate protection. To address this 'protection gap', it was suggested that (i) novel treaties and arrangements could be adopted between regionally proximate States to address common challenges in climate change related environmental displacement and (ii) biometric technology could be used to proactively canvass 'at-risk' populations to neutralise the challenge of establishing identity following displacing events. While regions and States are currently adopting plans and legal instruments to address the challenge of environmental displacement, developed and proactive arrangements such as those suggested in this article will likely be required to manage the movement of environmentally displaced persons effectively in the 21st century.



The Public Listing of Law Firms

WENDY HU, BCOM/LLB IV

I. INTRODUCTION

The floating of Australian-based Slater and Gordon in 2007 was an epoch-defining moment. As the first publicly listed law firm in the world, an 'identity crisis' was induced whereby law firms ostensibly no longer serve client interests in disregard for profit but have an overriding duty to maximise shareholder wealth. Today, Shine Lawyers, IPH, QANTM and AF Legal Group feature alongside Slater and Gordon on the Australian Securities Exchange ('ASX'). As other law firms contemplate undergoing an Initial Public Offering ('IPO'), discussion of the ethical impact of identifying as a publicly traded business must be had. This article seeks to open that dialogue.

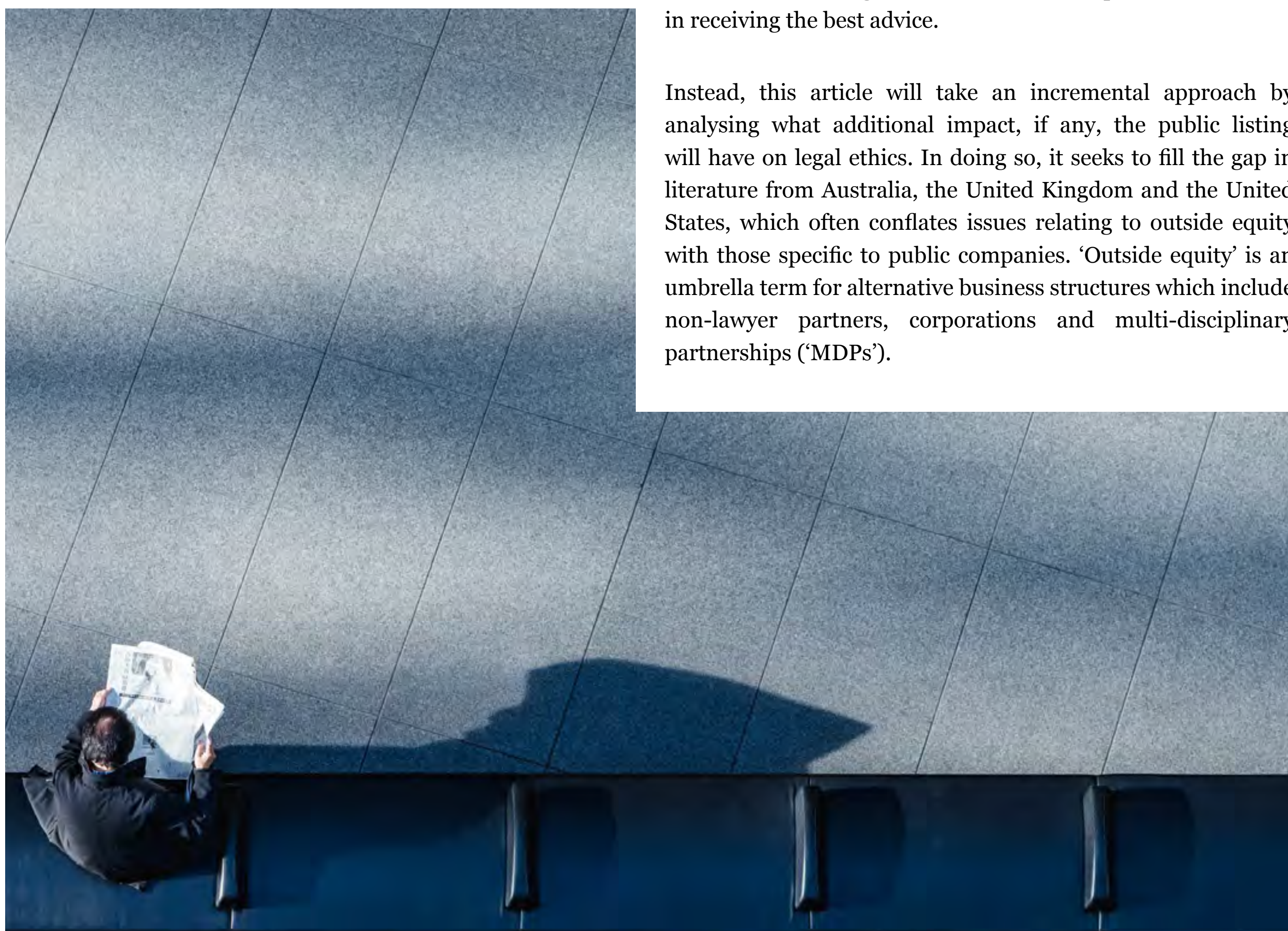
I will begin by arguing that a dichotomic characterisation of law firms as representing a 'profession' or 'business' is reductive. I will then distinguish between arguments against outside equity investment generally, and public listing specifically. In doing so, I will refute the argument that public listing does not present new ethical challenges. By contrast, I argue that the market forces influencing share price will have a pernicious influence on the client-lawyer relationship. Even though clients may benefit from better regulation of issues relating to metaethics and applied ethics, these are outweighed by the normative consequence of the erosion of law as a public good. While problems concerning financial incentives in law firms currently exist, normalising public listing will likely be the critical juncture at which the positivist notion of law will irrevocably lose its legitimacy.

II. REDEFINING THE DEBATE

The identity of law firms has traditionally been tied to private practice being regarded as a 'profession', rather than a 'business'.[1] The Honourable Murray Gleeson, former Chief Justice of the High Court of Australia, helpfully supplies clarification around the slippery term. In the widest sense, a profession is 'any organised pursuit or calling.'[2] In the narrower sense, professions have four attributes. First, they involve providing a specialised skill based upon systematic instruction. Secondly, members enjoy some degree of exclusivity in providing their services, usually circumscribed by accreditation. Thirdly, there is an ethical obligation to temper the pursuit of self-interest. Fourthly, they are self-regulated. Businesses are often conceived of as the antithesis of a profession, selling goods and rendering services for the overarching goal of profit maximisation.

A bottom-up analysis of the identity crises from the opposing 'profession' and 'business' camps is unhelpful.[3] At one point in history, lawyers found it undignified to charge for services.[4] We have long departed from that model. Modern law firms often sue clients to recover fees, solicitation of clients through advertising is commonplace, and competition policy governs fee structures. Indeed, a dichotomic framing presupposes that pursuing profit will inevitably lead to unethical legal services, which is empirically unfounded.[5] Furthermore, client interests are necessarily multi-faceted. On the one hand, payment for services raises a 'business' interest in keeping costs low. On the other, clients face legal issues and there is a 'profession' interest in receiving the best advice.

Instead, this article will take an incremental approach by analysing what additional impact, if any, the public listing will have on legal ethics. In doing so, it seeks to fill the gap in literature from Australia, the United Kingdom and the United States, which often conflates issues relating to outside equity with those specific to public companies. 'Outside equity' is an umbrella term for alternative business structures which include non-lawyer partners, corporations and multi-disciplinary partnerships ('MDPs').



III. A NEW ETHICAL DIMENSION

Prior to 2004, law firms could not trade on the ASX. The situation only changed with the enactment of relatively homogenous Legal Profession Acts ('LPAs')[6] by all States and Territories following the adoption of the Model Laws by the Law Council of Australia.[7] Incorporation was the necessary precondition. From the 1990s, the rigid rule that law firms must operate under sole practitioner or partnership models began to be relaxed. Drivers for incorporation included limited liability, tax efficiency and greater flexibility in transferring ownership interests.[8]

Consequently, the influence of outside equity on a lawyer's ability to execute their primary duty to clients has been a primary concern since at least the 1990s. These ethical pressures have been examined extensively in the context of non-lawyer partners, incorporation and MDPs.[9] First among these is the influence on a lawyer's independent judgment by skewing incentives to favour the pursuit of individual interests. Secondly, concerns that non-lawyers will breach client confidentiality and accidentally venture into the unauthorised practice of law.[10] Thirdly, conflicts of interest between the duties of a director and legal practitioner, and agency-costs from monitoring these.[11] Fourthly, the demise of pro bono practices and other philanthropic endeavours.[12]

Given that such a broad suite of ethical issues already exists, does public listing raise any new concerns? Professor Christine Parker of Melbourne Law School does not believe so. She argues that public listing only accentuates and formalises the already perverse 'degradation of personal moral responsibility.'[13] The tendency to place profits above ethics is 'rife in legal practice'[14] and many law firms are teetering on an 'ethical precipice.'[15]

Respectfully, I would disagree. Public listing presents significant new ethical challenges because practising to a share price is more insidious than other forms of outside equity investment. This is true both at the lawyer-employee and lawyer-director level.

At the employee level, the share price is a new metric for performance that creates financial pressure. Professor Milton Regan of Georgetown Law argues that such pressure already exists in the form of Profits per Equity Partner ('PEP') and Revenue per Lawyer ('RPL') metrics which are widely used to benchmark performance. [16] The American Lawyer magazine, for example, publishes a list every year which ranks law firms by PEP and RPL.[17]

However, the existence of a share price is a further temptation for lawyers to put their financial self-interest above their client's interests when the two collide. This is especially true if stock-based compensation is part of a remuneration package. Even where not, the openly accessible and real-time nature of a price-earnings multiple acts as a constant reminder of the shareholder wealth maximisation agenda. Moreover, unlike PEP and RPL, a share price is subject to the whims of speculative investors, such as hedge funds and predatory private equity. Just as market capitalisation may not reflect the strength of a company, it may not be an accurate measure of the value and quality of legal services provided by a law firm. In this way, short-termism is incentivised, and resources are diverted to activities which are promotionally favourable but may conflict with client interests.

The Board of Directors is in an equally compromising position. In an illuminating example, Steve Mark AM, who oversaw the incorporation reforms as NSW Legal Services Commissioner,[18] admitted that he was unsure how a solicitor-director disagreeing with the other Board members would resolve a conflict of interest between their duty as a legal practitioner and duty as a director to shareholders.

In a different vein, US academics Edward D. Adams and John H. Matheson[19] argue that public listing would in fact operate against unethical decision-making. In their view, market forces are a policing mechanism by which law firms with dubious practices will suffer a tarnished reputation and be penalised by a falling share price. It is therefore not in the interest of shareholders to interfere with a lawyer's professional judgment.

However, their argument relies upon the Efficient Markets Hypothesis which, while theoretically elegant, lacks an empirical foundation. Furthermore, I will argue that neither retail shareholders (non-professionals trading in small quantities, also known as 'mom and pop investors') nor institutional shareholders (organisations such as superannuation funds, banks or insurance companies which trade in large quantities) are effective regulators.

Retail shareholders are unaware of ethical breaches when they occur due to information asymmetry. Most unethical decisions fall short of warranting disciplinary action which would receive media attention. Undesirable behaviours may be subconscious and covert. These are difficult enough to police by internal compliance departments, and near-impossible for external parties to recognise. Furthermore, a genuine complaint requires verification by the regulatory body, which cannot be guaranteed.[20]

By contrast, institutional shareholders may occupy a regulatory role via the disciplinary effect of public market takeovers. Unlike retail shareholders, they often have substantial voting power and influence on share prices. A fear of takeover is especially pronounced in the current low interest rate environment and for poorly performing firms. However, rather than bolster the ethical framework, the new majority institutional shareholder will likely eliminate underperforming practice groups or lay off staff to increase firm value. Client relationships may be jeopardised in the process.[21] The unfortunate reality is that the financial advantages of reinstating ethical practices are too distant and uncertain. Under pressure to improve shareholder returns, cost-cutting is the path of least resistance to improving profitability.

Although written in the context of non-lawyer equity partnerships, US academic Cindy Alberts Carson's warning that legal services could be monopolised rings even more ominously for a public market environment. A deep-pocketed institutional investor capable of multiple acquisitions could very much gain control of a significant portion of the legal services market by strengthening its bargaining power, influence against regulators and competitors, and pricing ability.[22]

Overall, the practical outcome is a gradual diminution of service quality where the publicly listed firm competes on price, rather than value.[23] To illustrate this, Professor Paul A Grout of the University of Bristol uses medical services as an analogy. Lawyers swear an oath to the courts and have a professional duty to clients. Similarly, doctors take the Hippocratic Oath and have a primary duty to patients. As Grout elucidates through numerous case students, however, the quality of treatment appears to change as economic incentives change.[24]

In the Maine Addiction Treatment System, for example, the introduction of performance-based contracting led to greater falsification of information on patients' alcohol consumption patterns. Clinicians exaggerated the length of abstention and the decrease in drinking levels, to the detriment of the patient's recovery. The upside? Higher remuneration for those clinicians. Performance-based contracting, much like stock-based compensation or practising to the share price, had made profit the superseding pursuit.

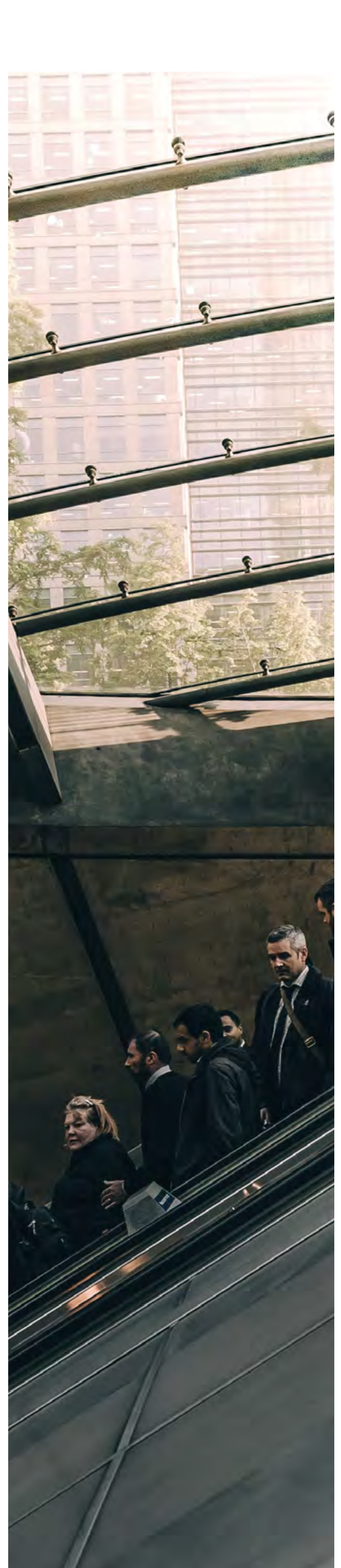
IV. LAW AS A 'PUBLIC GOOD'

Having argued that public listing presents new ethical concerns and will result in poorer service quality, the article will now canvass the normative implications of public listing. To begin, it will address the case that public listing creates positive outcomes.

First, proponents of public listing argue that lawyers in publicly listed firms can better represent client interests from an economic standpoint. Parker writes that law firms that trade on the stock market have a superior ability to raise equity and debt. As such, they can better prosecute actions against large multi-national corporations which have well-funded litigation teams. Additionally, there will be more appetite to take on 'meritorious, yet uncertain'[25] cases which are overlooked by law firms with small sums of capital. 'No-win-no-fee' plaintiff firms like Slater and Gordon benefit the most as they incur significant up-front expenses.[26] It is one explanation for why two out of the five law firms that trade on the ASX specialise in personal injury compensation law. The argument goes that the more plaintiffs receive representation, the greater the economic utility, as access to justice is a public good. However, the link to a lawyer's ethical duty is more tenuous as only prospective clients are affected, not clients currently represented.

Second, proponents argue that governance structures can effectively mitigate ethical concerns.[27] At least in NSW, the requirement for solicitor-directors to have 'appropriate management systems' under the previous Legal Profession Act[28] resulted in comprehensive internal regulatory policies being developed.[29] NSW was the first jurisdiction in the world to fully deregulate the business structure of legal practices in 2001. Furthermore, the company constitutions of Slater and Gordon, Shine Lawyers and AP Legal make clear that the primary duty is to the client, rather than the shareholder. Public announcements to this effect are also frequently made to assuage investor concerns.

Empirically, the NSW approach has had a 'dramatic and positive impact.' Whether the rest of Australia has had a similar experience is questionable. Regardless, at best, corporate governance structures only govern issues of metaethics and applied



ethics. They do not address the concerns of normative ethics. I will briefly address the difference. Metaethics questions what morality itself is, while applied ethics questions what one should practically do in their circumstances. Internally developed policies give content to moral conduct and provide a checklist of what a lawyer should do in different scenarios. However, they do not address the normative ethical question of how law firms should be run. Indeed, Parker, Gordon and Mark in their empirical study acknowledge that NSW 'appropriate management systems' may replace professional, ethical judgment with proscriptive 'box-ticking' measures.[30] Normative ethics needs to be the focal point of discussion given the public good nature of law.[31]

V. ETHICS AT THE INDIVIDUAL OR FIRM-LEVEL

Prior to examining the normative ethical implications, an important preliminary question must be answered: whether it is the responsibility of the individual to police ethical behaviour or that of a larger organisation such as a law firm. Former Attorney General of NSW, Jeffery Shaw AC, argued, and the New South Wales Law Society agreed,[32] that incorporation was only permitted because Australian legislators no longer saw it as 'appropriate to use business structures as a way to regulate legal practice. Responsibility to maintain professional and ethical rules should be placed solely with individual solicitors.'[33] However, Shaw, writing in 1999, underestimated the influence of paradigm shifts in how institutions are defined due to stock market phenomena such as 'bubbles', as popularised by Nobel Prize winner Robert Shiller.

The legal profession has traditionally been regulated by three institutions: professionalism, professional organisation and personal liability.[34] The latter two remain robust. Law societies still set rules for membership. Moreover, lawyers can be found negligent, in breach of contract and guilty of a crime, in addition to being disbarred. However, 'professionalism' has changed its identity. The legal profession was founded upon public service and as such, aspires to ideals of sincerity, integrity, and reliability. These are notionally incompatible with the identity of a publicly listed firm whose foremost duty is to generate higher shareholder returns, profits and dividends. Without those ideals, the informal social prohibitions on unscrupulous behaviour dissipate. Most decisions are made at the individual level, but even then, it is business structures which shape the institutions guiding individual conceptions of ethics.

VI. THE NORMATIVE EFFECT

The principal source of legitimacy for law was juridical and not economic.[35] While I would not put law as highly as a 'charitable profession',[36] Carson persuasively abstracts the public good nature of law by describing a lawyer's independence as being held 'in trust' for the benefit of clients and broader society.[37] To clarify, this article is not saying law is a public good in the traditional economic sense of being non-excludable and non-rivalrous. Instead, it is describing law as having a public good nature.

Law differs from other goods in numerous ways. First, a greater quantity, lower prices and more efficiency in access to justice are not necessarily desirable. Justice is a nuanced concept that is served in complex ways. One way this is displayed is in the balancing considerations of 'just, quick and cheap' as the overriding purpose of NSW civil procedure.[38] In this way, law cannot be commodified and pursued solely for its ends 'like access to clean water'[39] or other social goods, like education and healthcare. Second, from a social contract theory perspective,[40] obeying the law is predicated on respect for it. People agree to follow the rules established by their state, known as laws, on the condition that they are offered rights and protections in return. Due to the precarious nature of this relationship, even the perception of lawyers contravening client duties to inflate a share price can undermine the legitimacy of the legal system.

Hence, as law has a public good nature, any normative changes in the characterisation and perception of law must be carefully scrutinised. Even if we were to accept Parker's argument that public listing only underscores problems that already exist, there would be an inflection point at which law firms will have to confront the identity crisis precipitated by Slater and Gordon's IPO in 2007. If not addressed, law, in its positivist conception, will irrevocably lose all legitimacy.

VII. CONCLUSION

Prohibiting public listing will not shield the legal profession from unethical behaviours which compromise a lawyer's ability to fully represent client interests, but the normative effect of law firms identifying as public companies invites serious concern. While Slater and Gordon has lost most of its market capitalisation,[41] IPH and QANTM are trading remarkedly well. On August 23, HWL Ebsworth, Australia's largest law firm by partner count, announced that it was preparing for an IPO that would value the firm at $1 billion.[42] As other law firms contemplate listing, it would be remiss not to heed the Honourable James Spigelman's exhortation that 'if lawyers are treated as if they are only interested in money, that is what they become'.[43]

Competition Law In Crises:

A Comparative Study in Authorising your Toilet Paper

JEREMY D CHAN, LLB VI

[This opinion piece explores the interaction between Australian competition law and market conduct during times of crisis. It highlights how Australia's unique authorisation provision, that is, *Competition and Consumer Act 2010* (Cth) ('the Act') section 88, has provided the crux for the coordinated Australian business response to panic buying in the Australian economy. This piece draws upon the authorisation request made by Coles, Woolworths, Aldi, and Metcash during the COVID-19 pandemic, to explore the impact of section 88 of the Act on the incentives for businesses to respond to panic buying of essential household products like toilet paper in Australia. Comparing the approach of the United States under the Sherman Act (which does not include an authorisation regime) to that of Australia, the piece highlights the importance of section 88 in times of crisis to overcome potentially inequitable market dynamics in favour of more equitable crisis responses. By providing an "out" from the harsh penalties of Australia's cartel prohibitions, section 88 reduces the "chilling effect" these harsh penalties have on business incentives to mitigate inequitable market dynamics. It concludes that Australian consumers should appreciate the safeguard of section 88 in times of crisis, particularly in relation to its impact on the supply of essential household goods like toilet paper.]

> *"It's the new game in the suburbs for all the family – the great toilet paper chase."*[1]

I. INTRODUCTION

Unbeknownst to most Australian consumers, Coles Group Limited lodged an urgent application on 20 March 2020 ('the Application') to the Australian Competition and Consumer Commission ('ACCC') on behalf of itself and other major supermarkets including Woolworths, Aldi, and Metcash.[2] The Application sought a request for urgent interim authorisation that would allow the applicants to engage in "limited coordination … as soon as possible ".[3]

The Application sought immunity for a business response to the growing problem of panic buying and stockpiling of essential household items including toilet paper, which accompanied the COVID-19 pandemic in Australia.[4] While Australian consumers (sometimes literally)[5] fought to ensure that they had a spare square, Coles and other major supermarkets sought immunity for "limited coordination"[6] between themselves, which would allow them to enter into arrangements with each other to promote fairer and more equitable access to these essential household items.[7]

But why did supermarkets need to seek authorisation from the ACCC? And is there a problem with this business response?

Generally, competition promotes innovation, efficiency, and lower prices between competitors, as firms are required to compete with each other for consumers. Thus, diminished competition can cause serious harm to consumers by giving competitors the ability to set supracompetitive prices and reduce consumer welfare. Under normal economic conditions, a request for the ACCC to authorise "limited coordination" between major competitors would ordinarily raise suspicion of cartel conduct, whereby firms reduce competition between each other to push prices up.[8] For example, economists have previously estimated that cartels, on average, overcharge customers in the range of 31 to 49 per cent.[9]

Accordingly, such coordinated activity between competitors has been made illegal in many jurisdictions. In Australia, cartel conduct is subject to both a civil prohibition and criminal offence under part IV of the Act. These seek to meet the overarching aim of the Act, which is to enhance the welfare of Australians through the promotion of competition.[10] Contraventions of these prohibitions can result in harsh pecuniary penalties or up to 10 years imprisonment.[11]

In unconventional economic times, however, these prohibitions and offences can actually discourage equitable business responses to inequitable market dynamics. For example, as consumers stockpiled essential household items and supply accordingly diminished during the COVID-19 pandemic, many consumers were left without these essential goods or resorted to purchasing these goods from third-party sellers at exorbitant prices.[12] The harsh penalties for contravention can result in a "chilling effect" on business incentives to coordinate effective responses to these inequitable market dynamics, even if they may result in consumer benefits, for fear of contravening the Act.

Fortunately, Australia's competition law offers some flexibility by providing businesses with a legal pathway to counteract unfair outcomes within the market during crises. Section 88 affords the ACCC with the power to trade-off competition for more equitable outcomes by granting authorisations for conduct that would or might otherwise be a contravention of the Act, as was the case in the Application.[13] An authorisation under section 88 of the Act has the effect of rendering specified provisions under pt IV inapplicable, giving the applicant (or other designated parties) immunity for the authorised conduct. This mitigates the "chilling effect" of the cartel prohibitions during times of crises.[14]

However, Australian consumers should not take section 88 of the Act for granted. Comparing Australian and US competition laws, I highlight that the Australian authorisation regime is relatively unique as no such regime exists in the US. Using the panic buying phenomenon that occurred during the COVID-19 pandemic as the case study, I demonstrate that section 88 opens an important pathway for Australian businesses in responding to the impacts of COVID-19 and is a crucial element of Australia's competition law, particularly during crises and extreme economic conditions.

Section II outlines the rationale and substance of competition law in conventional times. It focusses on the relevant cartel offences and prohibitions which seek to prevent coordinated behaviour. Section III discusses exemptions to the harsh cartel offences and prohibitions and compares the Australian regime to the US regime. Section IV analyses the impact of section 88 of the Act during the COVID-19 pandemic. Section V concludes that Australia's relatively unique authorisation regime is a benefit to consumers.

II. COMPETITION LAW IN CONVENTIONAL TIMES

A. *Cartel Offences and Prohibitions*

(a) *Rationale*

Competition law is founded on orthodox economic principles of efficiency and consumer welfare. It seeks to protect competition within economies because competition leads to increased efficiencies, innovation, and economic growth.[15] Competition benefits consumers by increasing rivalry between firms, which encourages lower prices and better quality products. As recognised in the seminal case of *Re QCMA*[16]:

> *Competition may be valued for many reasons as serving economic, social and political goals ... It is a mechanism, first, for firms discovering the kinds of goods and services the community wants and in the manner in which these may be supplied in the cheapest possible way.*[17]

Cartel behaviour poses a significant threat to competition and thereby, consumers. It involves competitors colluding with one another in a way that results in higher prices or lower quality products for consumers.[18] This means that if cartel behaviour were to arise, consumers would bear the cost of the cartel behaviour while colluding firms would simply benefit from higher profits.[19]

Accordingly, many jurisdictions prohibit cartel behaviour. This protects conventional competitive market dynamics for the benefit of consumers and makes it illegal for firms to collude with one another.

(b) *Australia's Cartel Offences and Prohibitions*

Australia's competition law is contained in the *Competition and Consumer Act 2010* (Cth). The object of the Act is to enhance the welfare of Australians through the promotion of competition. The Act is enforced by the ACCC, the peak regulatory body for competition and consumer affairs.[20]

Australia's cartel offences and prohibitions are provided within pt IV of the Act. Although these offences and prohibitions have been amended in recent years, the current civil prohibition against creating cartels is found under s 45AJ of the Act:

A corporation contravenes this section if:

(a) The corporation makes a contract or arrangement, or arrives at an understanding; and
(b) The contract, arrangement or understanding contains a cartel provision.

Section 45AK of the Act proscribes giving effect to a cartel in similar terms.

There are three key elements to the civil prohibitions under sections 45AJ and 45AK of the Act. First, the corporation must have made (or given effect to) a contract or arrangement, or arrived at an understanding. This broadly involves, at a minimum, communication between the parties.[21] Second, that contract, arrangement or understanding must contain a 'cartel provision'. This broadly involves some kind of price-fixing, bid-rigging, or collusive behaviour.[22] Third, the parties to the contract, arrangement or understanding must be in competition with one another.[23]

Parallel criminal offences are proscribed under ss 45AF and 45AG of the Act. These are worded in the same manner as the civil prohibitions under ss 45AJ and 45AK but require the additional fault element of knowledge or belief.[24]

Contravening these provisions can result in serious penalties. Individuals found engaging in cartel behaviour may be liable to pay up to $500,000 per civil contravention,[25] or may face up to 10 years in jail and/or fines of up to $420,000 per criminal cartel offence.[26] Corporations may face a maximum penalty for each offence or contravention that is equal to the greater of: (1) $10,000,000, (2) three times the total value of the benefits obtained that are reasonably attributable to the offence or contravention, or (3) when that cannot be fully determined – 10 per cent of the annual turnover of the company in the preceding 12 months.[27] These harsh penalties deter firms from engaging in coordinated behaviour that may harm competition.

These provisions broadly prohibit competing firms from reducing competition between themselves by colluding with each other. For example, the High Court of Australia in 2017 upheld a decision by the Full Federal Court which held that a number of airlines had contravened a predecessor of the current pt IV prohibitions by forming arrangements which sought to fix and coordinate fuel surcharges in relation to air freight services from Hong Kong, Singapore and Indonesia to Australia.[28] Rather than utilising a collusive arrangement, the airlines should have instead competed over air freight services on their own merits. This demonstrates how the pt IV prohibitions in the Act can serve to protect competitive market dynamics.

III. COMPETITION LAW IN UNCONVENTIONAL TIMES

A. *Providing an "Out"*

Although competition laws are generally drafted with a strong presumption that competition will benefit consumers, in some exceptional cases, protecting competitive market dynamics may not result in favourable consumer outcomes.[29] Indeed, it has been recognised that sometimes:

> It may be necessary to restrict competition in some way to promote efficient outcomes and hence there may be justification for providing an exemption from the competition provisions of the Act.[30]

In these exceptional circumstances, strict adherence to the competitive dynamics that these provisions seek to protect, may result in poor consumer outcomes.

Panic buying during the COVID-19 pandemic provides a clear example. In March 2020, reports of increased consumer demand for essential household products like toilet paper emerged worldwide. This so-called "great toilet paper chase"[31] resulted in significant shortages and exorbitant prices (by third-party sellers) being charged for these essential products.[32] The Sydney Morning Herald reported that across nine supermarkets, 84 toilet paper products were sold out.[33] Some Australian newspapers even printed extra pages as "backup loo roll".[34]

Although this type of behaviour might seem absurd, the consumer outcomes of significant shortages and exorbitant prices are predictable results of panic buying behaviour. When demand for these products suddenly increases and supply is unable to meet this demand, economic principles predict that there will be significant shortages and increased incentives to raise prices for these goods.[35] This may also harm the most vulnerable members of our communities, who typically lack the means to take more strenuous measures to obtain these household products.

Importantly, during extreme circumstances, these inequitable market outcomes occur *even if there is competition between firms*. This is because shortages and the increased incentive to raise prices stems from the lack of supply and excessive demand, not from a lack of competition.[36]

Thus, rigid adherence to doctrines of competition under such conditions can be ill-advised, and in fact, precludes recourse to a key way of mitigating inequitable market outcomes. It is in these circumstances that the harsh penalties associated with the pt IV prohibitions in the Act may have a "chilling" effect on effective coordinated business responses to poor consumer outcomes. Fearing criminal charges or harsh civil penalties, businesses may take no steps (or less effective steps) to prevent these inequitable consumer outcomes and sustained shortages across the economy. Thus, competition law may instead harm consumers if applied strictly, because it could prevent an efficient business response to extreme economic circumstances .

Fortunately, Australia's authorisation and exemption procedures provide an "out", that is, an avenue through which businesses can seek immunity from certain provisions of the competition law, if they can prove that the conduct results in a net public benefit.[37] In the current COVID-19 pandemic, these procedures encourage efficient business responses by providing certainty to participating businesses that they will not be subject to the harsh penalties of the competition law, thereby mitigating the "chilling" effect of the pt IV prohibitions.

B. *Australia's Authorisation Procedure*

Section 88 of the Act provides the ACCC with the power to grant authorisations for conduct that would or might otherwise be a contravention of the Act.[38] An authorisation under section 88 has the effect of rendering specified provisions under pt IV as inapplicable, giving the applicant (or other designated parties) immunity from the pt IV provisions approved by the ACCC.[39] This includes immunity from the cartel provisions under pt IV .

The ACCC must not grant an authorisation unless it satisfies sections 90(7) and 90(8) of the Act. This requires the ACCC to be satisfied that the proposed conduct in the authorisation application is likely to result in a public benefit that outweighs public detriment (including a substantial lessening of competition). The ACCC can also specify conditions in the authorisation.[40] However, the ACCC cannot grant authorisation for past conduct.[41]

Where there are time constraints such that the parties seeking authorisation wish to engage in the proposed conduct prior to the ACCC's determination, the parties can seek an interim authorisation. Under section 91(2)(a) of the Act, which is an ancillary provision to the ACCC's authorisation power under section 88 of the Act, the ACCC can grant an authorisation that is expressed to be an 'interim authorisation' if the Commission considers it appropriate to do so for the purpose of enabling it to give due consideration to an application for authorisation. However, the ACCC may deny an interim authorisation if, on its preliminary assessment, it finds that the public detriments of the proposed conduct outweigh the public benefits.[42]

ACCC determinations under the authorisation regime are made public on the ACCC register. The authorisation procedure under section 88 of the Act has been used fairly often. In 2017 and 2018, the ACCC granted 44 authorisations with only 5 of those authorisations being accompanied by conditions under section 88(3).[43]

C. *The Uniqueness of Section 88: Aus vs US*

Although other jurisdictions provide this "out" from inequitable market outcomes that the competition law might inadvertently protect, the Australian authorisation procedure is relatively unique because: (1) it allows businesses to seek clarity prior to engaging in the conduct, and; (2) is formalised within the Act.

In the United States, cartel conduct is prohibited by the Sherman Antitrust Act §1. This states:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal.

Unlike the Australian approach to cartel behaviour, the US approach relies on a "rule of reason" analysis. Under this analysis, US courts will take into consideration a broad range of elements, including public benefits when determining whether conduct breaches the Sherman Antitrust Act §1. If these elements result in a net public benefit, then it will not amount to a contravention.

The US does not have a parallel authorisation procedure. If firms were to engage in coordinated conduct in response to extreme or inequitable economic conditions, firms would be required to prove a net public benefit in court. Importantly, this would occur after the conduct has occurred. Firms would not be able to seek authorisation or exemption prior to engaging in such conduct.

It can be argued that the Australian authorisation regime and the rule of reason analysis under the Sherman Antitrust Act §1 produce similar outcomes as in both scenarios, conduct that results in a net public benefit would be allowed. However, because firms cannot seek authorisation prior to engaging in the conduct under the US competition law, firms experience significant uncertainty when responding to crises. This may create a "chilling effect" on effective business responses, discouraging valuable approaches that could address panic buying or other related behaviour during crises.

IV. CASE STUDY: AUTHORISING YOUR TOILET PAPER

To illustrate the importance of section 88 of the Act in responding to consumer behaviour during crises, this section analyses the Coles authorisation application during the COVID-19 pandemic and draws a comparison to the experience in the US.

A. *The Australian Experience: The Coles Application*

The global COVID-19 pandemic saw a dramatic increase in panic buying and stockpiling by Australian consumers. On 20 March 2020, in response to extreme consumer behaviour, Coles lodged the Application for authorisation under section 88(1) of the Act including a request for an urgent interim authorisation. The Application was submitted on behalf of itself, Woolworths, Aldi, Metcash, and 'any other grocery retailer who in future wishes to engage in the conduct the subject of the application providing the ACCC is notified'.[44]

The Application sought authorisation to:

Discuss, enter into or give effect to any arrangement between them … or engage in any conduct, which has the purpose of:

(i) facilitating or ensuring the acquisition and/or supply of Retail Products in Australia (especially of those Retail Products in short supply);

(ii) ensuring fairer access to Retail Products among the general public;

(iii) providing greater access to Retail Products to

those in most need (including the elderly and disadvantaged members of the public, such as consumers who may be too unwell to travel to the supermarket); or

(iv) facilitating access to Retail Products in remote or rural areas.

[or to engage in conduct which has any of the above purposes and] has been recommended by the Supermarket Taskforce convened by the Department of Home Affairs ... and approved by the Minister for Home Affairs.[45]]

On 23 March 2020, just three days after Coles lodged the Application, the ACCC granted interim authorisation. Noting that there was a 'shortage of certain stocks on shelves especially toilet paper…',[46] the ACCC allowed the participating supermarkets to engage in coordinated activities with the broad purpose of ensuring 'the supply and fair equitable distribution of retail products to consumers during the COVID-19 pandemic'.[47]

For example, the interim authorisation allows retailers to share data on sales and stock levels across the supply chain, to coordinate when working with manufacturers, suppliers, and logistics providers, and to coordinate when setting opening and closing hours. However, it does not allow supermarkets to coordinate prices, thereby reducing the risk of cartel behaviour.[48] Despite granting the interim authorisation, the ACCC continues to assess the Application for a final determination which is scheduled for September 2020.[49] In the meantime, however, the participating businesses can engage in the approved behaviour, until such time as revoked by the ACCC.

Although it is difficult to pinpoint exactly when shortages in toilet paper ceased, reports suggest that supermarkets were able to respond effectively within a few weeks to the increased panic buying.[50]

B. *The US Experience: Not a Square to Spare*

The US also did not escape the "great toilet paper chase" of 2020. In March, there were reports of toilet paper shortages, similar to Australia, across the US.[51] However, unlike Australia, toilet paper shortages in the US continued to be reported two months later in May.[52]

There were some business responses by retail supermarkets to overcome panic buying behaviour. For example, Costco limited purchases to a single 'jumbo pack' per member and stopped selling toilet paper online.[53] However, it is possible that these uncoordinated business responses were insufficient to overcome the demand and supply imbalance caused by extreme consumer behaviour, particularly given reports of shortages in May.[54]

There were no reports of coordinated business responses to panic buying behaviour. This suggests that the harsh penalties under the Sherman Antitrust Act for cartel conduct have had a significant "chilling effect" on coordinated business responses. As the Sherman Antitrust Act simply proscribes cartel coordination without an equivalent authorisation mechanism, businesses are discouraged from engaging in such conduct under pain of penalty. This "chilling effect" could prolong product shortages, rule-out efficient and effective avenues for crisis response, and thereby harm consumers.

An alternative explanation for the lack of reports of coordinated business responses is that businesses might be engaging in such behaviour but not revealing the behaviour to the public (due to the risk of investigation and contravention of the Sherman Antitrust Act). This would also not be advantageous over Australia's authorisation regime as it would reduce the scrutiny the regulator and the public have over the coordinated business conduct. Thus, there is a higher risk that such coordination could result in detriments to the consumer, rather than benefits.

C. *The Impact of Section 88*

The extent to which the Coles authorisation impacted the presence of toilet paper on supermarket shelves remains unclear. This is because, at the same time, there were many changes in the prevalence and severity of COVID-19 in Australia, the response by government, and overall consumer behaviour. These factors may have also influenced the supply of toilet paper in retail supermarkets. Nevertheless, there are two key benefits to the authorisation regime during crises that can be identified.

First, the presence of a formalised authorisation regime provides businesses with an avenue to engage in pro-competitive conduct without fear of retrospective findings of legislative contraventions. Businesses can proceed with certainty that their response to crisis behaviour will not draw the harsh penalties of the Act. This reduces the "chilling effect" created by the harsh penalties of the Act for cartel conduct and encourages efficient business responses, particularly during extreme circumstances that are expected to be temporary.

Second, the authorisation regime allows the ACCC to encourage public input and set conditions for the benefit of Australian consumers. This allows the ACCC to balance the public benefits against the anti-competitive risks of collusive behaviour, to ensure equitable market outcomes. As the authorisation regime is public, this means affected parties can also have input into the potential conditions that can be applied. During crises, this allows the ACCC to chart a course that both mitigates the risks of anti-competitive cartel behaviour and promotes the welfare of Australian consumers.

In crises, section 88 of the Act opens a key avenue for efficient and equitable business responses. As evidenced by the COVID-19 pandemic, authorisation procedures like section 88 can benefit rather than harm consumers by adding flexibility to the competition law in extreme economic conditions.

V. CONCLUSION: YOU CAN THANK SECTION 88

Although we may never know the exact impact that section 88 of the Act had on the supply of toilet paper to Australian supermarket shelves, the provision does give the green light to efficient, coordinated business responses whose importance cannot be underestimated in times of crisis.

Section 88 ensures that businesses obtain certainty when engaging in coordinated crisis responses. This can encourage efficient and effective business responses that would normally not be open under the Act. This reduces the "chilling effect" of the harsh penalties under the Act for cartel conduct. The ACCC can also set conditions to ensure that the conduct does not harm consumers. Although such coordinated behaviour would likely be anti-competitive in conventional economic times, they can be effective in crises to respond to sudden and extreme consumer behaviour like panic-buying.

Comparing the Australian experience to the US experience during the COVID-19 pandemic, we can likely conclude that the little-known section 88 of the Act was an important building block to the Australian response to the pandemic. In particular, it was crucial to ensuring the equitable supply of essential household goods like toilet paper.

So, the next time we as consumers benefit from the 8 pack Quilton Classic or the 9 pack Kleenex Complete Clean, maybe we should also take a moment to thank section 88.

Cost of Business

Process Corruption and Tort Litigation Against the New South Wales Police Force

OLIVER CREAGH, JD II*

ABSTRACT

Each year, the State of NSW pays millions of dollars in compensation for unlawful abuses of power by the New South Wales Police Force ('NSWPF'). As the Wood Royal Commission flagged twenty-five years ago, these abuses of police power remain a frequent, systemic and entrenched form of 'process' corruption within the NSWPF. This article considers Wood's articulation of 'process corruption' in the contemporary setting, and explores actions in tort that provide redress for individuals who fall prey to said corruption. It also briefly examines how civil litigation fails to achieve accountability and broad-ranging structural reform in the NSWPF.

I. INTRODUCTION

"In today's [New South Wales] Police Service,
institutionalised corruption does not exist".
- NSW Police Commissioner Lauer to the Wood Royal Commission (1994). [1]

"...the [NSW] police have been treating damages paid in civil suits as "the cost of doing business". The cost to society both in terms of damages paid and the legal costs of the civil litigation are horrendous."
- Patrick Saidi, Law Enforcement Conduct Commissioner of Oversight, (2019).[2]

If corruption in the NSWPF is a "cyclic phenomenon",[3] then NSW may be currently experiencing the turn of the screw. In December 2019, the Law Enforcement Conduct Commission ('LECC') heard evidence from 'GEN13C', a 15-year old boy strip-searched by officers of the NSWPF at a music festival in Homebush. The complainant recounted how he was "shaking with nerves"[4] as the searching officer instructed him to "pull down your pants...hold your dick and lift your balls up and show me your gooch."[5] Despite the absence of a legally-required parent or guardian, police officers proceed to examine GEN13C's genitals.[6] The search mirrored that of 'BRC', a 16-year old LECC complainant[7] who wept as a Byron Bay officer squatted beneath her and examined her vaginal area.[8] Both BRC and GEN13C's searches found nothing,[9] as with 12, 014 other strip searches conducted by the NSWPF since 2014.[10] Ultimately, LECC reports deemed both searches unlawful.[11] Months later, the LECC's inquiries had been stifled due to political heat;[12] internal LECC memos from a former Commissioner of Oversight decried the frequency and scope of police misconduct;[13] and hundreds of individuals commenced mass tort action against the State of NSW for unlawful strip-searches.[14] Twenty-five years after Commissioner Lauer's hubristic denial of institutionalised corruption to the Wood Royal Commission, his assessment of the NSWPF could not appear further from the truth.

This article examines unlawful abuses of police powers, a form of entrenched and systemic corruption experienced by GENC13, BRC, and many other NSW citizens. This essay considers the scope of process corruption from the 1994 Wood Royal Commission ('the Commission') to present, and reviews salient components of actions in tort that provide redress for these abuses of power. Finally, this essay briefly considers whether tort litigation is an adequate accountability mechanism for the NSWPF.

II. FROM CRIMINAL COPS TO PROCESS CORRUPTION: THE WOOD ROYAL COMMISSION & THE CURRENT SCOPE OF CIVIL LITIGATION

The Wood Royal Commission was revolutionary in its approach towards corruption in the NSWPF. Police accountability academics Chan and Dixon describe the Commission as one "in which authoritative definitions of reality are reconstructed...producing a new

authoritative truth about policing".[15] Prior to the Commission, the authoritative "truth" of police corruption - in both public and political discourses- revolved around the nexus between police, crime and drugs. By 1994, the "commonplace cynical Sydney conversation[s]" about corruption involved knowing "who bribed whom for what".[16] When Independent MP John Hatton moved for the Wood Royal Commission to be established, his vision of entrenched corruption expressly referenced a "network" of organised crime involving senior police, criminals and retried cops.[17] Admittedly, Hatton's vision of corruption was not- and is not-[18] inaccurate. Much of the corruption identified by the Wood Commission involved criminal networks within drug law enforcement, including protection, bribery and direct drug use and trade by officers.[19]

While the Commission's Terms of Reference indicated "possible criminal activity" as being of "public interest"[20], the overall ambit was more ambitious. Wood was to inquire into "corruption" more broadly, particularly of "any entrenched or systemic kind".[21] Taking up the mantle, both the First Interim and Final Reports posed an expansive definition of 'corruption', one that included the mala fide exercise of police powers. 'Corruption' was defined as:

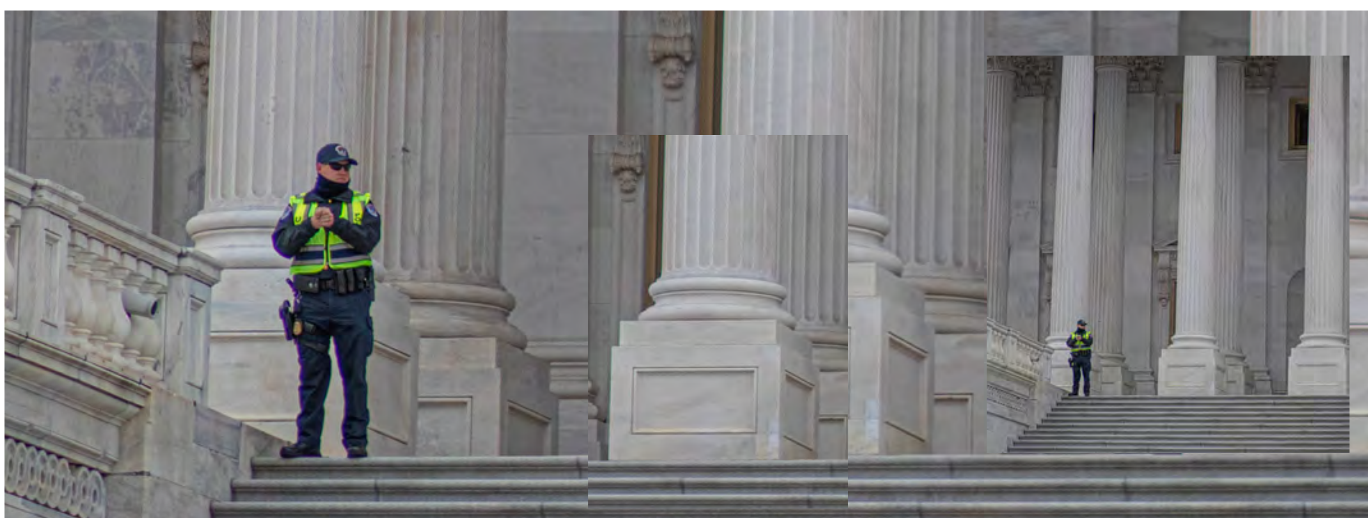
"deliberate unlawful conduct (whether by act or omission) on the part of a member of the Police Service, utilising his or her position, whether on or off duty, and the exercise of police powers in bad faith."[22]

This expansive approach encompassed not only criminal associations,[23] but what the Commission termed 'noble cause' or 'process' corruption. This classification broadly included the application of unnecessary physical force, abuse of police powers [including unlawful arrest and imprisonment], [24] as well as fabrication and tampering of evidence.[25]

Curiously, there is inconsistency in the Commission's approach to abuses of police powers. Despite identifying such abuses as a form of corruption,[26] Wood proceeded to downplay both the significance of these abuses, as well as their position in the broader corruption tapestry. The Final Report describes numerous police assaults as "individually unremarkable", mere symptoms of a Service with "a number of ill-disciplined and aggressive members" who lack appreciation of the responsibilities of their office.[27] Other sections of the Commission's Final Report do not define 'process corruption' to include unlawful physical interactions,[28] but only encompassing back-end subversions of the judicial process.[29]

The Commission's inconsistent approach is unsatisfactory for a contemporary discussion. Wood's broad definition is correct; abuses of police power are a form of systemic and entrenched 'process corruption'. To semantically sever these abuses from 'corruption' denies their place in the corruption tapestry and taxonomy. Further, categorising these abuses as "individually unremarkable" and caused by one-off, deviant officers is simply inaccurate. This 'rotten apple' approach towards police corruption- which roots the cause of police corruption in individual 'bad apple' officers -[30] has been vehemently criticised and dismissed, most notably by the Commission itself.[31] Indeed, Wood described this conceptualisation of police corruption as a "myth", perpetuated by the NSW Police in an attempt to impede long-term reform.[32]

The current scope and nature of abuses of police power confirm them as entrenched and systemic. Since 2016, damages and costs paid by the State of NSW for civil suits against the NSWPF are estimated[33] to range from $45 million[34] to $238 million.[35] The recent LECC strip search investigations reiterate these abuses as far from one-off aberrations, finding unlawful practices in geographically dispersed Local and Police Area Commands; from Inner-City Sydney[36] to Western Sydney,[37] Byron Bay[38] and regional North-Western NSW.[39] Importantly, the LECC identified the source of these practices not as individual 'bad apples' and one-off rot, but structural maladministration. This included a culture of officers expecting strip-search subjects to guard their own legal rights;[40] a distinct lack of education and training,[41] and failure of officers to understand and correctly administer the law.[42] If the scope of unlawful abuses within the NSWPF is to be addressed, it must be discussed accurately as systemic and entrenched process corruption. To do otherwise would perpetuate a contemporary myth, stifling meaningful reform.



III. ACTIONS IN TORT AGAINST THE NSWPF

Beyond advocating for widespread reform, how can individuals experiencing these abuses seek redress? For those who fall foul of process corruption by the NSWPF, several actions in tort provide mechanisms for compensation and vindication. The following section reviews the salient features of these torts, highlighting components that impede individuals from successfully bringing actions against the NSWPF.

A. *The "High Frequency" Torts*

Most actions in tort against the NSWPF arise during and following unlawful arrests.[43] These so-called "high frequency"[44] torts against police officers are the intentional torts of trespass to the person and malicious prosecution. In regards to trespass, it is uncontroversial that a NSWPF officer who intentionally or negligently[45] touches,[46] causes reasonable apprehension of touch,[47] or detains an individual[48] must do so within the confines of their common law and statutory powers.[49] If they move beyond these confines,[50] the officer's actions are not authorised by lawful authority, and are tortious.[51] In successful actions for trespass, the High Court of Australia has emphasised the importance of a legal system that punishes public officers who act unlawfully,[52] and tend to guard sternly against easy justifications to trespass. For example, if an officer uses excessive or unreasonable force during a lawful arrest, the force is considered ultra vires; trespass will be made out, despite the legality of the arrest.[53] Additionally, the judiciary appears extremely unwilling to interpret statutory authorities for police powers, such as the *Law Enforcement (Powers and Responsibilities) Act* ('LEPRA'),[54] in a manner that allows officers to avoid common law obligations, and easily subvert legal rights and freedoms.[55]

The recent High Court authority of *New South Wales v Robinson* [56] exemplifies this approach. In *Robinson*, the Respondent successfully claimed damages in tort against the State of NSW after he was arrested, interviewed and released without charge. A majority of the High Court of Australia held that the arrest was unlawful.[57] Neither the common law[58] nor LEPRA[59] authorised Mr. Robinson's arrest for any other purpose than to charge him, and take him before a magistrate to answer said charge. Diverging from the dissent,[60] the majority noted that an officer must have formulated their decision to charge the individual at the time of the arrest.[61] As such, it was unlawful for the NSWPF officer to arrest Mr. Robinson in order to investigate, via questioning, whether to charge him or not.[62] The majority's approach in Robinson exemplifies the apparently high bar the State must clear when attempting to defend ultra vires police conduct.[63]

B. *Malicious Prosecution: The Problem with Malice*

The tort of malicious prosecution holds accountable and responsible those who commence prosecutions maliciously.[64] For a plaintiff to succeed in an action for malicious prosecution against the NSWPF, four limbs must be established.[65] First, the defendant must initiate or maintain proceedings, of the kind to which the tort applies, against the plaintiff.[66] In regards to police misconduct, the tort typically applies to criminal proceedings[67] brought by the police against the plaintiff.[68] Relevantly, 'proceedings' may include applications for Apprehended Violence Orders[69] and search warrants.[70] In regards to initiating or maintaining proceedings, anyone who is "responsible for initiating the prosecution is relevantly regarded as a prosecutor".[71] Accordingly, not only may police and police prosecutors directly commencing prosecutions commit the tort,[72] but also an officer who lies to public prosecutors, who then commence formal proceedings based on the lie.[73] The second limb requires said proceedings to be terminated in favour of the plaintiff.[74] The third limb requires that the prosecutor acted without reasonable and probable cause, which can be examined subjectively and objectively by the Court.[75]

The main obstacle is the tort's fourth requirement: malice. In initiating or maintaining proceedings, the defendant must have acted maliciously. In other words, the "dominant purpose of the prosecutor must be a purpose other than the proper invocation of the criminal law."[76] While this definition of malice is purposefully broad,[77] the burden of proving malice is "a heavy one",[78] and severely limits the scope of the tort. In the realm of malicious prosecution, malice is a complicated creature. It may be inferred when the prosecutor has no subjective belief that the prosecution is warranted on the evidence before her;[79] this must be proved rather than based on suspicion.[80] More problematically, ignorance (or a veneer of ignorance) to one's malice is bliss; an objectively malicious police officer who is blinded to their wrongful intentions will escape the tort's reach. This was recently articulated in *Wood v State of New South Wales*.[81] In *Wood*, the NSWCCA upheld[82] a primary finding from Fullerton J of the NSWSC that malice was not satisfied in criminal proceedings that had been initiated without reasonable and probable cause. As Fullerton J noted, "as a matter of law, malice will not be made out simply by evidence that reveals that a prosecutor is blind to his or her failings of judgement."[83] As such, malice was not made out due to the prosecutor's "unerring belief in the rectitude of his own intellectual processes and prowess."[84] This approach to malice is unsatisfactory, weakening the protection of the tort. The lack of objective inquiry of the Court allows officers engaged in process corruption to be relieved of liability, due purely to their own subjective ignorance as to how egregious their prosecutions are.

C. *An Emerging Suitor: Misfeasance in Public Office*[85]

Misfeasance in public office is a "very peculiar tort"[86] concerning the misuse of public power.[87] It protects against "conscious maladministration rather than careless administration"[88] by providing redress for those injured by such misuses.[89] Only public officers can commit misfeasance; it is therefore generally considered the only 'pure' public law tort.[90] Derived from case law,[91] the tort has four limbs;[92] it requires an unauthorised act or omission, performed maliciously,[93] by a public officer, in the discharge of their public duties. Due to the tort's through-line of 'bad faith' or malicious misuse of power, an ultra vires act performed in 'good faith' will not sustain the tort.[94]

The confines of what constitutes the discharge of public duties are somewhat vague and dexterous. Misfeasance may apply to a sergeant covering up a rape by one of his constables,[95] or police who fraudulently prevent a cobbler from voting in his local parliamentary election.[96] In the recent *Ea v Diaconi*,[97] the NSW Supreme Court was hesitant to clip the tort's wings by unnecessarily narrowing the scope of what public duty and power entail. In Ea, the plaintiff complained of misfeasance against an officer who, in view of a jury at the plaintiff's trial, had scoffed from the galleries during the plaintiff's cross-examination.[98] While the scoffing was not performed under a statutory or common law power of the officer,[99] the Court considered it a de facto power.[100] The officer had the capacity to influence the jury and thus harm the plaintiff by virtue and misuse of her office.[101] Simpson AJA was particularly critical of a narrow inquiry regarding the concept of 'public power' as outlined by the High Court in the seminal Mengel.[102] Her Honour noted that the tort broadly protects against 'misfeasance', which may include misbehaviour, use of position, or other variable breaches and abuses of office[103]. The Court rejected summarily dismissing the applicant's claim,[104] nodding to a progressive understanding ways that police officers may wield their office to harm individuals.

D. *Negligence*

At common law, there is no absolute immunity protecting a police officer from an action in negligence.[105] The main obstacle to such action is establishing a duty of care. At this juncture, claims commonly fail,[106] partially due to a lingering "judicial reluctance" by courts to find public officers liable in negligence.[107]

English jurisprudence in this area remains strongly influenced[108] by the precedent set *Hill v Chief Constable of West Yorkshire*.[109] The case favours public policy arguments against finding a duty of care owed by officers. In *Hill*, an action in negligence was brought against officers by the estate of Jacqueline Hill, claiming that the police had been negligent in failing to apprehend a prolific serial killer before he murdered Ms. Hill.[110] In the lead judgement, Lord Kinkel considered that, while the existence of liability "may in many instances be in the general public interest...I do not, however, consider that this can be said of police activities".[111] His Lordship identified various policy factors against finding a duty of care, including potential litigation frequency, lack of public interest in such liability, and drain on police resources.[112]

Frankly, Kinkel's approach is unsatisfactory. It rings of a traditional mythologisation of police officers, one that erroneously segregates them from other professionals with large amounts of responsibility, such as builders, doctors, and teachers. One would be surprised if the Australian public were legitimately interested in protecting police officers who have, for example, carelessly failed to stop well-known domestic abusers from assaulting their children and raping their wives- particularly when responding to such complaints appears the very definition of a police officer's job.[113] The idea that these scenarios would result in an erroneous drain on police resources begs the question as to what exactly police resources are then for. Further, Kinkel's concern for increased litigation stings of a 'race to the bottom' aftertaste, and ignores how innately difficult the tort of negligence is to make out.

While occasionally referring to Hill,[114] Australian Courts rightly tend to critique its policy approach,[115] talking down pure policy determinants in favour of multiple salient features.[116] As such, whether an Australian officer owes a plaintiff a duty of care "must be considered in light of its facts".[117] Notwithstanding, establishing a duty of care against officers remains difficult. Fact scenarios for negligence claims against police officers generally fall into two broad, overlapping categories,[118] with each presenting its distinct obstacles to establish a duty of care.

E. *Category 1: A Duty of Care to Individuals Investigated by the Police*

This category involves claims for purportedly negligent police investigations, brought by those being investigated and reported on by police. These often include claims for psychiatric injury, such as those resulting from a carelessly completed police report,[119] carelessly investigating individuals for sexually abusing their children,[120] incorrectly raiding and harassing the wrong person,[121] or prolonged imprisonment caused by an officer's failure to expedite a drug analysis test.[122] Establishing a duty of care in such scenarios is incredibly unlikely,[123] primarily due to judicial concerns of imposing contradictory obligations[124] on officers that would actively undercut criminal investigations. In *Sullivan v Moody*, the High Court noted the public interest in police completing investigations to the best of their ability.[125] The Court observed that a "common law duty of care could not be imposed on a statutory duty" if the observance of such a duty was inconsistent with, or discouraged the due performance of the statutory duty.[126] The subsequent Tame reiterated concerns of inconsistent duties,[127] where a majority of the High Court finding that it would be incongruous,[128] inconsistent[129] and would constrain proper performance[130] if an officer owed simultaneous duties to the person they were investigating and a duty to investigate honestly and frankly.[131]

F. *Category 2: A Duty of Care to Victims of Third Party Conduct*

These claims are brought by victims of third party conduct, often as a result of criminal wrongdoing. [132] These can include negligently conducted criminal investigations such as in *Hill*, or claims for 'pure' negligent omissions where officers have failed to engage their powers. Examples of the latter include claims brought by a widow who experiences nervous shock when officers fail to prevent her husband's suicide,[133] or claims from abuse victims for police failure to intervene in well-reported domestic violence scenarios.[134] These scenarios raise two related considerations that are typically fatal to finding a duty of care; imposition of legal responsibility for third party conduct,[135] or, in the case of pure omissions, imposing an affirmative duty to prevent harm to others.[136] In these circumstances, the Australian Courts have tended to adopt the default position expressed in *Hill*, stating that:

> *"police officers owe no duty to a member of the public to take reasonable care in investigating a crime so as to be able to apprehend a criminal before he commits a further crime by injuring that member of the public".*[137]

However, this rule is not absolute. Liability for the actions of a third party may arise where specific knowledge of the threat or danger from the third party was known,[138] and where police assumed responsibility or control over the third party[139] or victim.[140] This appears most relevant in domestic violence contexts, where police operate within statutory frameworks that create exceptional and protective relationships between police and victims of abuse, thus avoiding the overarching concerns of "inconsistent duties" as in Category 1 claims.[141] In two recent cases brought by victims of domestic violence, *Smith v State of Victoria*[142] and *New South Wales v Spearpoint*,[143] the Court was unwilling to dismiss claims of a common law duty of care due to the *Hill* default alone. Instead, they contemplated that a duty of care for 'pure' negligent omissions may arise from domestic violence scenarios,[144] particularly where police have the ability to control the perpetrator and assume responsibility for victims.[145]

IV. AN ELUSIVE CREATURE: ACCOUNTABILITY AND TORT LITIGATION

"Corruption within policing tends to be a cyclical phenomenon. Following a period of scandal and disclosure, there comes commitment and reform which lasts for a time, and then the cycle begins again." [146]

Wood's sentiment captures the frustrating elusiveness of accountability; a creature that seems close for a time, and then dissipates. Unfortunately, tort litigation does not appear to be breaking the cycle of process corruption within the NSWPF. While the ability of individuals to claim redress for unlawful action cannot be understated, the reality is harsh; litigation costs the taxpayer millions per year, and abuses of police powers persist. If civil litigation is to precipitate changes to police accountability, it is worth considering that an 'accountable' NSWPF would embody dual obligations; a retrospective obligation to account for misconduct, and a forward-looking, a priori obligation to prevent future misconduct.[147] Currently, civil litigation does not appear to be precipitating either of these desirable obligations within the Force.

Reasons for this are varied. Primarily, feedback mechanisms that encourage behavioural changes amongst offending officers appear non-existent. Plaintiffs in police litigation sue the State of NSW, not the individual officers who have committed the tort.[148] Most matters likely settle confidentially, and so many offending officers see neither the inside of a courtroom, nor hear how their actions are unlawful. Recent LECC memos suggest that individual officers are often not informed that they are the subject of civil actions by their commanders, nor told the amount of compensation that their unlawful actions cost the taxpayer.[149] Further, punitive measures against offending officers appear infrequent.[150] As such, officers do not appear to have a consistent obligation to retrospectively account for their tortious conduct. They are shielded by the State, the hierarchy above them, and perhaps their own ignorance.

Further, the LECC memos suggest an apathy within the Force to prevent future misconduct. The NSW State and Police Force appear to consider the millions spent in tort litigation as 'cost of business' for productive policing.[151] This attitude once again highlights how the cycle of corruption is perpetuated; not by lack of civil suits, but by the structure, activity and culture of the Force.[152] Unfortunately, civil litigation cannot address these more fundamental causes of process corruption.

Until these fundamental causes are addressed, NSW appears left with a government and Police Force that feels little, if any, obligation to remedy systemic unlawful conduct. The NSW citizens are the ones who suffer from this failure, left with a Force that is not transparent with them about the exact scope, cost, and internal disciplinary responses for such abuses. The onus shifts from those with immense power to enact change, to those with little. It is a system that relies on complainants to have the bravery, perseverance and finances to commence civil action before any dues are paid- and all while corruption's wheel keeps turning. It is a dubious interpretation of "keeping and preserving Her Majesty's peace".[153]

A Crisis of Conscience Resolved – Revitalising the Jury in Modern Australia

MATTHEW JOYCE, BA/LLB III

The English Common Law rests upon a bargain between the Law and the people. The jury box is where people come into the Court: the Judge watches them and the jury watches back. A jury is the place where the bargain is struck. The jury attends in judgment, not only upon the accused, but also upon the justice and humanity of the law... Men and women must consult their reasons and their consciences, their precedents and their sense of who we are and who we have been.[1]

Nearly 65 years after Lord Devlin's lauded Hamlyn Lectures described trial by jury as the 'lamp that shows freedom lives',[2] any author now writing on the topic must confront its increasing irrelevance. Of 138,215 criminal defendants before courts in New South Wales in 2019, less than 1% put themselves upon the Country and had their matters heard before a jury.[3] The civil jury, which at the beginning of the 20th century decided all but Chancery matters is now,[4] with the exception of defamation,[5] extinct, with civil law now under exclusive possession of a 'secular priesthood' of judges and lawyers.[6]

Nonetheless, two key distinctions exist between trial by jury and trial by judge alone. First, a jury is barred from giving reasons for their decisions.[7] Second, while rights of appeal have been created for the majority of civil decisions and criminal findings of guilt, a jury acquittal is unimpeachable by virtue of the rule against double jeopardy.[8] Hence, while the maxim of the law is that the judge does not decide questions of fact and the jury does not decide questions of law,[9] the jury has long been recognised to hold power to 'nullify' the law, that is, to return a verdict in accordance with their conscience, rather than return the verdict that would arise from the proper application of the law. Nonetheless, juries are generally never directed about this power to return such 'merciful' or 'perverse' acquittals, but instead told that they must follow the judge's direction on the law.

This essay will contend that the resolution of this crisis between what the jury believes to be the just answer, and what the law believes to be right is unsatisfactory. It will argue that precedent and policy support jurors being told that while they are, they are generally expected to follow a direction as to the law, they are permitted to depart from it if the returned verdict would be repugnant to their conscience. One necessary consequence of this proposal will be a need for the High Court to reconsider its decision in *Yager v The Queen* ('*Yager*').[10]

I. THE HISTORY OF JURY NULLIFICATION

At common law, the verdict of not guilty by a jury has always been unimpeachable. The writ of attaint, which allowed a second 'attaint jury' of 24 to be summoned to examine the first jury's decision, and orders a new trial if disagreeing with the first jury, never applied to criminal juries, for attaint would not lie where the Crown was a party to a trial.[11] Indeed, even the Star Chamber, which held power to punish jurors for improper acquittals,[12] could not taint the acquittal itself, for it 'would not be right to put a man in jeopardy again, any more than it would be right to make him fight a second battle or endure another ordeal.'[13] Chief Justice Vaughan's celebrated judgment in Bushell's Case would end the ability for Courts to punish Jurors for their verdict.[14]

Thus, the independent-minded jury began acquitting in a series of cases, most notably in the trial of the leveller John Lilburne, who convinced a jury that they, not the Bench, were the true judges of law and fact.[15] The 17th and 18th centuries would be the heyday of the debate over the question of whether the jury did have the power to determine the law, and would centre around the offence of seditious libel. In seditious libel, the question of whether a publication was libellous was a question of law to be determined by a judge, with juries only being directed to return a special verdict as to whether the accused had published the material.[16]

In England, the jury in the Dean of St Asaph's Case forced the issue when, following the invitation of the great Thomas Erskine, they refused to accept the ruling by Mr Justice Buller that the publication was libellous, instead stating that the accused had only published the material.[17] Following this trial, Parliament would enact Fox's Libel Act, which resolved much of the English debate by allowing juries to determine the whole matter of seditious libel, allowing for what had hitherto been a question of law to be decided by the jury,[18] but not extending this principle to the general corpus of the criminal law.

However, even after the public debate ended, jurors were not completely accepting of legal directions. Juries in the 18th and 19th centuries would often engage in 'pious perjury' by undervaluing stolen goods so as to save the accused from execution,[19] while in the 20th century, anecdotal evidence describes the difficulty in obtaining a conviction for abortion,[20] or manslaughter by dangerous driving.[21]

Indeed, in modern times, juries have been willing to return perverse acquittals when facing unpalatable and politically motivated prosecutions. In *R v Ponting*,[22] civil servant Clive Ponting was tried and acquitted under the Official Secrets Act for having revealed that government ministers had misled the Commons over the sinking of the Belgrano during the Falklands War. Despite having no good defence at law, Mr Justice McCowan in summing up to the jury, noted that, while all the elements of the offence had made out, the jury's verdict was ultimately a question 'between God and their conscience',[23] echoing the famous statement of Lord Mansfield.[24] In *R v Randle & Pottle*,[25] both of the accused were charged for aiding the prison escape of a double agent, and had even confessed, in a book, to have done the crime on the indictment. However, Pottle, representing himself, would deliver what the contemporaneous reports would describe as a 'magnificent speech from the dock', reminding the jury that:

> *No judge, no prosecutor, no force on earth could stand between English jurors and their conscience... [you are] free to ask if it was morally right to go along with governments and spies who lie, cheat and manipulate.*[26]

Despite the judge telling the jury that they had no choice but to consider whether the accused were guilty in law, Pottle and Randle were duly acquitted.

II. THE ARGUMENTS FOR JURY NULLIFICATION

Two major arguments exist in favour of jury nullification. First, the history above highlight how jurors are an important check on overzealous governments beginning prosecutions for political reasons, or against those who have embarrassed it. Such prosecutions are not a relic of the past, as prosecutions of whistle-blowers such as Julian Assange reveal. In such cases, a direction to the jury that, while they are ordinarily expected to apply the law, they may depart from its application. As a result, it would likely have a determinative impact and lead to a morally questionable result.

Second, Westminster democracies increasingly resemble Lord Hailsham's 'Elective Dictatorship',[27] where the Executive is rarely unable to have its will done in Parliament. To this extent, a jury is the only real check on the Executive in a modern Parliamentary system,[28] as a law repellent to the ordinary citizen's sense of right and wrong will be rendered nugatory if and when a jury refuses to apply it.[29] Further, a jury can even force the law to reform and adapt to the community's notions of justice by refusing to apply the existing law. In addition to the examples of abortion and manslaughter by dangerous driving, the Bar Council has noted how civil juries in New South Wales would refuse to apply the old common law rule that contributory negligence was a complete defence, but instead award the plaintiff a verdict but for a reduced sum.[30]

However, critics of jury nullification will note that noble history of jury nullification obscures the reality of what happens when juries actually ignore the law.[31] It is telling that discussion of juries returning 'merciful verdicts' has arisen in Appellate Courts seeking to interpret seemingly inconsistent verdicts in sexual assault trials, where juries may have relied upon misconceived prejudices as to the culpability of the victim, so as to believe that the accused has received their 'just deserts' for being found guilty for some, but not all, charges.[32]

Nonetheless, it is notable that the passage of Fox's Libel Act saw jurors become more willing to convict than acquit.[33] Furthermore, psychological research concerning obedience to authority suggests that a direction which both informed the jury of their general obligation to follow directions of law, and their right to disregard the law if it upset their conscience, would be unlikely to open the floodgates of perverse acquittals.[34] Finally, the biased or bigoted jury will likely return objectively 'perverse' acquittals even without a specific nullification direction. Kalven and Zeisel, comparing the decisions of the jury and the private opinion of the presiding judge in 3,500 trials, found that 19 per cent of the time a jury would acquit, while a judge would convict.[35] Kalven and Zeisel found that jury sentiments towards the law accounted for half of these disagreements.[36] This suggests that jurors already make use of their power to ignore certain directions on law. As such, the direction this essay proposes would only facilitate acquittals in circumstances where there is no real dispute as to the facts, and the jury was told in no uncertain terms that they must follow the judge's directions independent of their own sense of right and wrong.

Lord Justice Auld, in his Review of Criminal Courts, argued that Parliament should declare that juries have no right to acquit defendants in defiance of the law.[37] He did so on the basis that a random selection of twelve jurors should not have the power to dispense with laws passed by a Parliament representative of the population. This reflects a view, expressed most notably by Forsyth and Lord Mansfield,[38] that, while juries may have the power to pass judgment on the law, they have no right to do so. However, it is difficult to comprehend what is actually meant by this, because, as Alexander Hamilton wrote, if the law gives the jury the power, then it also gives them the right, since the acquittal of a jury is final, and the jury cannot be held responsible for such an acquittal.[39] Further, no Commonwealth country has chosen to adopt his recommendation. Rather, as noted by Lord Bingham,[40] the praise which followed such acquittals indicate that the public does not resent having the laws passed by Parliament nullified.

III. AN AUSTRALIAN ROADBLOCK

In Australia, adoption of this proposal would require a reconsideration of *Yager v The Queen*. In *Yager*, the High Court held that, where all elements of a criminal offence have been made out at law, a judge could direct a verdict of guilty, with Barwick CJ going so far as to state that a Judge could refuse to accept a verdict other than guilty where all the elements of the offence had been made out without dispute.[41] Mason J, with whom Stephen J agreed, also suggested it would be permissible to direct a jury to return a conviction.[42]

Disagreeing with the majority on this point, Gibbs and Murphy JJ delivered judgments more in line with the common law orthodoxy. Gibbs and Murphy JJ noted that, while a judge may comment adversely on the accused and even tell the jury that it is their duty to return a verdict of guilty, it must remain at the jury's discretion to decide the verdict that they shall return.[43] Further, Gibbs J noted that the jury, since Bushell's Case, cannot be intimidated into returning a particular verdict, and have the right to disregard any direction to return a guilty verdict.[44] Murphy J thought that the direction made by the trial judge in *Yager*, in which they were told that 'the appropriate verdict, as I have told you in my opinion, quite clearly is one of guilty' was contrary to the role of the jury under Section 80 of the Constitution and was a substantial miscarriage of justice, as Yager's guilt had been decided by the Court, and not by the jury.[45]

The decision of the High Court to permit directed guilty verdicts is at odds with the power of a jury to return a perverse acquittal. It is also contrary to the position in the majority of common law nations.[46] For example, in *R v Wang*,[47] the House of Lords held that it was impermissible for a judge to direct a jury that they must return a verdict of guilty, because the application of the law to the facts was a role for the jury. In delivering their Lordships judgment, Lord Bingham acknowledged the possibility of perverse acquittals, but noted Lord Devlin's opinion that this was the only real check that exists on the modern Executive's power.[48]

IV. CONCLUSION

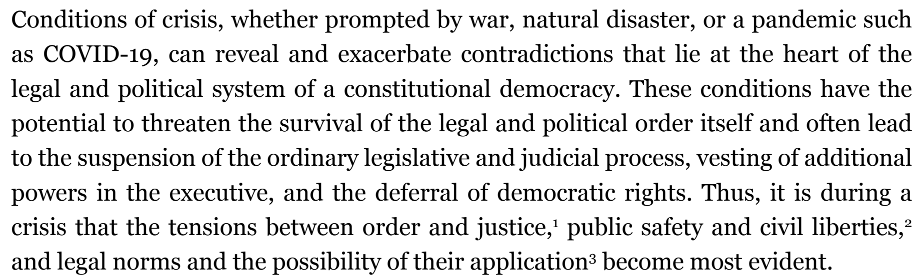
The common law currently stands in an awkward 'half-way house', with jurors having the power to nullify laws, but not being expressly informed of this power. An honest system of law cannot pay homage to 'perverse acquittals' where juries have protected liberty by defying the Judiciary, Legislature, and Executive,[49] and yet not inform modern jurors of this power exercised by their predecessors. In an era where the list of charges warranting a jury trial,[50] the coroner's jury,[51] the dock statement,[52] and committal proceedings,[53] have all been abandoned in pursuit of 'modernisation', [54] to explicitly direct the jury as to the power they have to follow their conscience would act as an important bulwark against this trend.

In 1966, Lord Devlin predicted that the jury would be extinct within 50 years.[55] While this prediction has not eventuated in the criminal law, it would also be foolhardy to think that, in the 21st century, civil rights have been protected to the extent that the juror could never again face a crisis between what their conscience and the law tells them to find. Rather, particularly in a country with no Bill of Rights, juries in Australia must be reminded of their power to return a verdict in accordance with its conscience, even if this is perverse to the legally trained mind. To the extent that this may lead to undeserving individuals being acquitted, and be contrary to a current trend of being 'tough on crime', the statements of Blackstone concerning proposals that erode the power of juries are, as ever, worthy of commendation:

> *However convenient [New and arbitrary methods of trial] may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient), yet let it be again remembered, that delays and little inconveniences in the forms of justice are the price all free nations pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.*[56]

States of Exception and Radical Hope: Agamben and Lear on COVID-19

NOAH CORBETT, LLB VI



Conditions of crisis, whether prompted by war, natural disaster, or a pandemic such as COVID-19, can reveal and exacerbate contradictions that lie at the heart of the legal and political system of a constitutional democracy. These conditions have the potential to threaten the survival of the legal and political order itself and often lead to the suspension of the ordinary legislative and judicial process, vesting of additional powers in the executive, and the deferral of democratic rights. Thus, it is during a crisis that the tensions between order and justice,[1] public safety and civil liberties,[2] and legal norms and the possibility of their application[3] become most evident.

The difficulties posed by conditions of emergency have been the subject of extensive discussion and debate within political and legal theory.[4] In this essay, I will draw on works inspired by the controversial German Jurist, Carl Schmitt, and his concept of the 'state of exception', whereby a sovereign decisionmaker suspends the law in order to protect the very existence of the legal order.[5] The Italian philosopher Giorgio Agamben has expanded upon Schmitt's work by arguing critically that the state of exception has become a paradigm of government in many democratic states.[6]

I will explore the relevance of Agamben's work in allowing us to understand and respond to government reactions to COVID-19. In particular, the declaration of a 'National Biosecurity Emergency' under the *Federal Biosecurity Act* on 18 March 2020,[7] the states of emergency declared in a number of Australian States and Territories,[8] and the 'deferral' of fundamental democratic rights to public assembly and free protest under the NSW Restrictions,[9] will be explored with reference to the state of exception. The use of COVID-19 as a pretext for increasing authoritarianism in Hungary will be used to illustrate the risks that arise when democratic norms are suspended in the name of safety.

While acknowledging the risks posed by emergency powers and the apparent state of exception prompted by the pandemic, I will argue that this moment is also one of opportunity. Thus, I contend that Agamben's explicit response, which is characterised by a deep pessimism,[10] does not reflect the most appropriate reaction to the present crisis. This argument will draw on both Agamben's work and that of the American philosopher Jonathan Lear.[11] Ultimately, supplementing Agamben's critical concepts with Lear's notion of 'radical hope' will be suggested as the appropriate stance for our present moment of crisis.

I. THE STATE OF EXCEPTION

Both Schmitt and Agamben define the state of exception as the suspension of law by a sovereign decisionmaker in order to guarantee the continued existence of the legal order.[12] Although legal norms and rights are not abolished, they are suspended for a period of time, which allows authorities to exercise force without restraint. Accordingly, the power that is exercised during the state of exception is not extralegal in the strict sense because it seeks to protect the very legal system that it has suspended.[13]

For Agamben, the clearest historical example of the state of exception is the Third Reich,[14] which was a regime that Schmitt actively supported. Agamben notes that upon taking power, Hitler proclaimed the Decree for the Protection of the People and the State, which suspended the articles of the Weimar Constitution concerning personal liberties.[15] This suspension remained in force for the next twelve years and the Weimar constitution was never formally abolished.[16] The suspension of these basic constitutional rights facilitated the waging of what Agamben calls a 'legal civil war' whereby the regime was able to eliminate its political adversaries and entire segments of the population.[17]

Building on this extreme example, certain aspects of the state of exception become evident. The state of exception acts as a juridical 'border concept'– an ambiguous zone – wherein legal norms and political decisions become indistinct.[18] In a state of exception, every forceful action by the government can be considered 'legal' in nature since legal and democratic norms limiting the exercise of force have been suspended. Conversely, the very fact of suspension also means that no action can be considered entirely legal.[19] It is, as Agamben describes, a 'zone of indeterminacy' where legal and extralegal actions become indistinguishable, and democracy approaches absolutism.[20]

Agamben argues that the border concept of the state of exception has become central to the juridical and political order of Western democracies as it is the way in which the law attempts to deal with the 'zone of anomie' between abstract legal norms and reality.[21] For Agamben, there is a fundamental 'fracture' between the law and its application to reality or between the 'law' and its 'force'.[22] In an extreme situation, this gap becomes most evident and can be filled only by means of the state of exception that suspends the law yet maintains its forceful application.[23]

This leads to force-of-law without law, stylised by Agamben as 'force-of-law'.[24] Such 'force-of-law' can lead in the extreme case to a situation where sovereign proclamations can be used to sanction the elimination of entire populations.[25] However, Agamben argues that contemporary democratic states have come to rely increasingly on the state of exception as a paradigm of governance.[26]

For example, during the war on terror, the USA *Patriot Act* and military orders issued by George W. Bush allowed noncitizens suspected of terrorist activities to be taken into custody, subjected to military trial, and detained indefinitely.[27] These laws effectively suspended the normal functioning of both US domestic criminal law and international law.[28] Thus, during the state of exception prompted by the war on terror, the exercise of unmitigated force by the US government against people stripped of all juridical personhood was made possible.[29] Anti-terror legislation which suspends rights in the name of security has since become fundamental to contemporary governance.[30]

A. *A COVID-19—The exception as the norm?*

So far, the following aspects of Agamben's exploration of contemporary states of exception have become evident. There are fundamental gaps between legal norms and the possibility of their application to reality. This fracture at the heart of the juridical order becomes most apparent in times of crisis. The response of governments is to declare a state of exception in an attempt to reinscribe anomie within the legal order by suspending the law. This leads to the exercise of 'force-of-law', which is legally sanctioned violence that operates in a legal vacuum. The state of exception is a concerning step towards absolutism and one which Agamben argues 'has become one of the essential practices of contemporary states, including supposedly democratic ones.'[31]

Agamben's state of exception is of relevance in analysing the response of governments to COVID-19. In two articles published online this year, Agamben argues that governmental responses to the pandemic reflect how the state of exception has become the norm.[32] COVID-19 acts as an ideal pretext for broadening sovereign powers, which reduces humanity to a state of mere survival without legal rights and validates the perpetual state of fear which characterises the current moment.[33] Agamben argues that this has the potential to become a 'civil war' waged against an invisible enemy that might exist within any person.[34]

Agamben's response is not surprising when one considers the measures that governments have implemented in response to COVID-19 in light of his theory. The outbreak of over 19 million cases and 700,000 deaths worldwide to date necessitates a serious and coordinated global reaction.[35] However, governments have responded to the pandemic with metaphors of war,[36] the suspension of civil and political liberties and the enactment of measures that Agamben would describe as states of exception.

The Australian example illustrates this trend towards suspending legal and democratic norms in the interests of protecting public health. Under section 475 of the *Biosecurity Act 2015* (Cth), the Australian Governor-General declared a 'human biosecurity emergency' on 18 March 2020,[38] which was extended on 14 May 2020.[39] This declaration functions as a non-disallowable instrument granting extensive discretionary powers to the Health Minister to determine emergency requirements[40] and give any direction to any person[41] to prevent or control the entry of COVID-19 to Australian territory, the emergence, establishment or spread of COVID-19 within Australia or internationally, or to give effect to a recommendation of the World Health Organisation. These requirements and directions can be made despite any provision of any other Australian law.[42] Thus, the powers of the Health Minister during a declared state of exception have become 'remarkably unfettered' at a time of limited parliamentary scrutiny.[43]

A number of Australian states have also declared 'states of emergency' and issued restrictive laws.[44] A salient example is that of the *NSW Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020*, issued by the NSW Health Minister under Section 7 of the *Public Health Act 2010* (NSW) which limits public gatherings generally to no more than 20 persons.[45] There are certain exceptions made for social and economic reasons, and workplaces can still operate subject to COVID safety requirements.[46] However, the exceptions do not include the right to assemble in public in order to protest. Thus, a fundamental aspect of maintaining a system of responsible and representative government has been suspended.

On 6 June 2020, the NSW Court of Appeal in *Raul Bassi v Commissioner of Police*[47] declared that a 'Black Lives Matter' protest in Sydney was authorised under the *Summary Offences Act 1988*. It did not, however, decide on the 'competing public interests of great importance' at issue in the original decision.[48] In the initial judgment of Justice Fagan in the NSW Supreme,[49] his Honour held that the 'exceptional circumstances of the present health crisis in New South Wales'[50] meant that the 'exercise of the fundamental right of assembly and of expression of political opinion by gathering in numbers' while 'not taken away by the current Public Health Order ... is deferred.'[51]

Subsequently, on 11 June 2020, with respect to a smaller protest organised by the Refugee Action Coalition, Justice Walton in the NSW Supreme Court agreed with the decision of Justice Fagan and ruled that 'the balancing of those public health risks, even in their now mitigated form, as a result of the success of Governmental public health measures, outweighs, in the balance, the rights to public assembly and freedom of speech in the present context.'[52] Justice Walton also upheld Justice Fagan's reference to rights 'deferred' by reason of the present health crisis.[53] Thus, in the name of safety against the exceptional circumstances of COVID-19, norms that are fundamental to the functioning of a democratic government have been suspended.

The Public Health Association of Australia has stated that peaceful protest can proceed safely at this time.[54] However, the NSW Supreme Court has held that the right to protest is currently 'deferred'[55] and the Prime Minister has called for protestors to be arrested and charged.[56] Therefore, it appears that COVID-19 has prompted Australia to react to a genuine public health crisis by inculcating a state of exception.

The consequences of this state of exception are becoming apparent. On 26 July 2020, the NSW Supreme Court granted an order prohibiting the holding of a 'Black Lives Matter' protest in Sydney on 28 July.[57] The NSW Court of Appeal subsequently dismissed an appeal against this decision.[58] On 28 July, around 40 protesters nevertheless attended the planned rally.[59] Witnesses reported to the media that the protesters were maintaining social distance, wearing masks and protesting peacefully.[60] However, protesters were met by several hundred police officers, including the riot, dog and mounted police squads, and six arrests were made.[61] This demonstrates how a state of exception can sanction the exercise of force at the expense of fundamental democratic norms.

The risks of a state of exception being declared in response to COVID-19 are also evident in the example of Hungary. In March 2020, the Hungarian Parliament authorised President Viktor Orban to rule by decree indefinitely, purportedly on the basis of the risk from COVID-19.[62] This rule by decree, which follows the increasingly anti-democratic consolidation of power in the hands of Orban and his ruling Fidesz party, was widely decried as a cynical action intended not to combat COVID-19, but instead to remove the legal and democratic obstacles to implementing a wide-reaching set of policy goals.[63] While the period of rule by decree ended in June, critics of Orban have suggested that the legislation which purports to restore normalcy instead entrenches extraordinary powers.[64] In this instance, the state of exception has explicitly become the norm.

Thus, the risks that arise from the 'state of exception' as the governing paradigm are real and presently relevant. The suspension of law and vesting of additional powers in authorities may be the 'threshold of indeterminacy between democracy and absolutism.'[65]

II. REVOLUTIONARY VIOLENCE AND RADICAL HOPE

Having explored the nature of the state of exception and its relevance to government responses to COVID-19, Agamben's analysis may seem appropriately pessimistic. However, Agamben's work also advocates for the possibility of severing the nexus between law and violence as a way to enable creative political engagement and achieve 'justice'. I argue that a stance of radical hope, as drawn from the work of Jonathan Lear, can facilitate such a positive project in the face of our current state of exception.

A. *Schmitt and Benjamin on pure violence*

Central to Agamben's presentation of political praxis and the possibility of justice is his exploration of the debate between Schmitt and Walter Benjamin on the state of exception.

An important distinction that emerges is that, while Schmitt views the sovereign decision to exercise 'force-of-law'[66] as successfully reinscribing the state of exception within the juridical order, Benjamin views this as an impossible task. Instead, Benjamin presents the state of exception as containing within it the possibility of 'pure violence' whereby the 'fiction' of any nexus between violence and law disappears.[67] The sovereign declaration of the state of exception is thus a catastrophe whereby violence without any juridical form acts disguised behind the fictio iuris of upholding the law in its suspension.[68] For Benjamin, such a moment is one of 'human action that has shed every relation to law' which manifests itself in either civil war or revolutionary violence.[69]

As opposed to Schmitt, Benjamin insists on the existence of 'pure violence' which neither makes nor preserves the law.[70] The pure 'revolutionary violence' of the mass working-class strike serves as Benjamin's best example, as it has no instrumental relation to law but instead works to depose it.[71] While Schmitt's sovereign seeks through 'force-of- law' to reinscribe the pure violence of the exception within the juridical order, Benjamin argues that pure violence properly understood as revolutionary in nature can dissolve the connection between force and law, and hence the order as a whole.[72]

Pure violence without a connection to the law also allows for a law that has no connection to violence. Agamben draws on Benjamin to argue that such a law which has shed its force and is 'studied but no longer practiced' will act as the 'gate' to justice.[73] Justice, in this conception, arises when 'the world appears as a good that absolutely cannot be appropriated or made juridical'.[74] Thus, the nexus between the law and its violent application, which the state of exception seeks to forcefully maintain must, in Agamben's view, be severed in order to attain justice. This deactivation of both force and law, which is prevented by Schmitt's 'state of exception', can ultimately provide for new and creative uses of the law.[75]

Agamben describes this creative approach as 'studious play' whereby we are able to both study the law and creatively re-apply it for new purposes that have no connection to violence.[76] This is what Agamben considers to be the 'only truly political action' which can serve to de-instrumentalise violence and hence neutralise the state of exception.[77]

B. *Radical Hope*

Agamben's emphasis on creative political actions that can sever the instrumental relation between violence and law is a positive possibility within his exploration of the state of exception.[78] This possibility emerges at a time when we come to understand that the state of exception has become the norm.[79]

As Benjamin argues in his Theses on the Philosophy of History, once we understand that the fictitious state of exception has become the norm, we can strive towards introducing a 'real' state of exception wherein revolutionary activity has the potential to sever the connection between law and violence.[80] While Benjamin, writing in 1939, considered that this realisation would improve the position of those struggling against Fascism,[81] it is of continued relevance for those who seek to challenge the exercise of 'force-of-law' by contemporary states. Thus, while Agamben's bleak analysis of the state of exception prompted by COVID-19 is arguably justified, I contend that this moment of genuine crisis may also be a moment of opportunity, whereby the introduction of a real state of emergency severs the relationship between violence and law.

On a more practical level, genuine political mobilisations have arisen during this moment of exception. This is exemplified by the global 'Black Lives Matter' Protests currently taking place.[82] The NSW Court of Appeal's last-minute decision to authorise such a protest in Sydney on 6 June 2020[83] obscures the fact that, despite the lack of legal authorisation up until fifteen minutes before the planned start of the rally, people were nonetheless gathering in large numbers to protest police and carceral violence towards Indigenous Australians. As Leetona Dungay, the mother of David Dungay Jr, a 26-year-old Dunghutti man killed in Long Bay Jail in 2015, said prior to the 6 June rally: 'We don't care what an act of law says, because those acts of law are killing us'.[84]

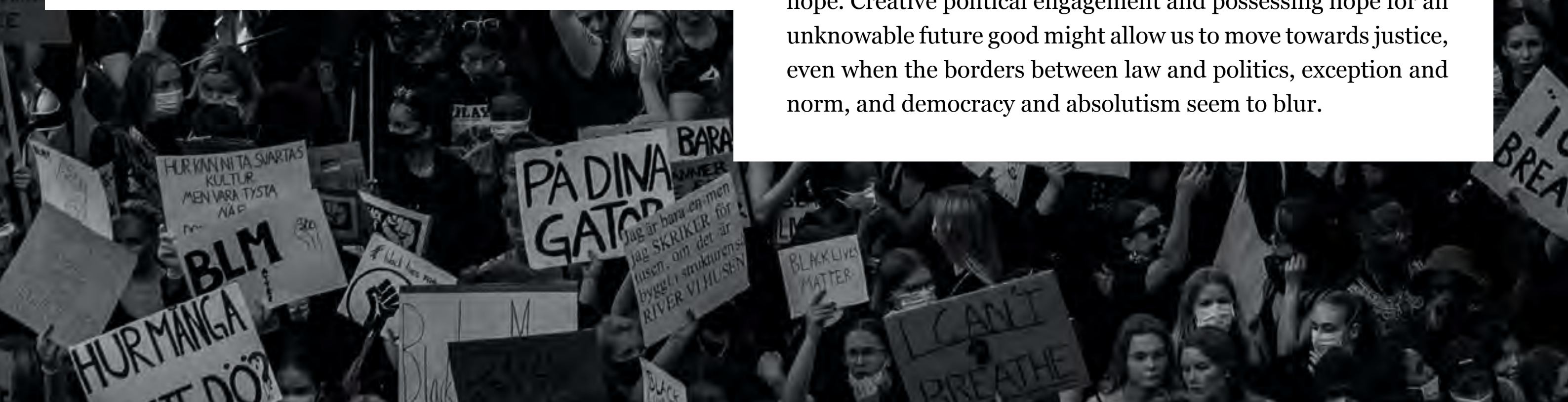
These mass-mobilisations can validate an approach that acknowledges how the 'state of exception' has become a dominant paradigm and yet continues to agitate for 'justice' that exists beyond our current conception of law. Such an approach would reflect what Jonathan Lear has called 'radical hope'.

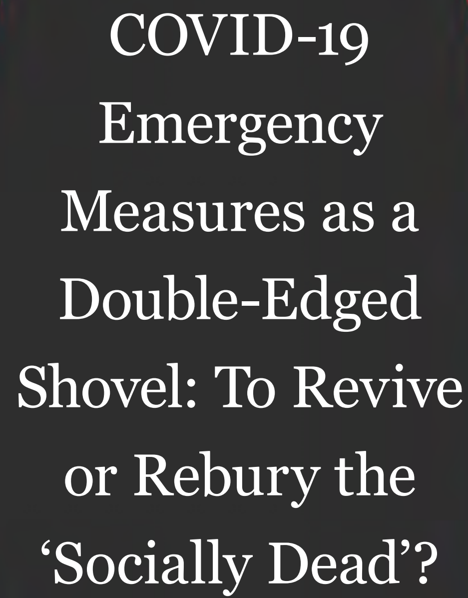
Lear also explores how societies respond to the failure or collapse of their central concepts.[85] However, unlike Agamben, who critiques the failures of our legal and political order, Lear's focus is on how people can respond to a collapse of cultural meaning. Arguing that we all inhabit a particular way of life expressed in culture, Lear explores how culture structures our worldview, inform our sense of what it is to live a 'good life', and is ultimately that which gives meaning to our actions.[86] This also exposes us to a particular 'ontological vulnerability' whereby, if the conditions of possibility for our way of life are removed, we are no longer able to structure our lives and the world around us.[87] Hence, actions and events can cease to have meaning.[88] As Lear quotes Plenty Coups, the Chief of the Native American Crow Tribe who oversaw the Crow's transition to a reservation saying, 'after this [losing the conditions of possibility for the Crow way of life] nothing happened.'[89]

Lear proposes the concept of 'radical hope' as a possible response to cultural devastation. I suggest that this stance can also be appropriate for structuring responses to the political and legal devastation caused by the COVID-19 state of exception. Lear defines radical hope as a hope 'directed toward a future goodness that transcends the current ability to understand what it is.'[90] The person possessing radical hope is able to approach a world in which their traditional way of life is no longer possible without nostalgia or despair. Instead, they anticipate a future good even though they currently 'lack the appropriate concepts with which to understand it.'[91] Lear emphasises that this is not mere wishful optimism and instead requires a genuine engagement with difficult realities.[92] Through radical hope,` we can courageously and imaginatively face a future where some of our most important concepts are no longer liveable.[93]

A stance of radical hope is compatible with an analysis such as Agamben's. In fact, I contend that Agamben's concept of 'studious play' as the path to a future justice that cannot be appropriated or made juridical is only possible when approached with a stance of radical hope. This is because such a non-juridical justice is not currently conceivable within our political and legal landscape, dominated as it is by the state of exception as governing paradigm. It constitutes a future good we cannot yet conceptually grasp but for which we are able to hope.

The state of exception prompted by COVID-19 could be a moment of genuine exception, where a 'revolutionary violence' is able to sever the nexus between law and violence. Continuing mass-mobilisation and political engagement, as seen in the recent protests, may realise this possibility. I have argued that a valuable stance to adopt in response to this crisis is one of radical hope. Creative political engagement and possessing hope for an unknowable future good might allow us to move towards justice, even when the borders between law and politics, exception and norm, and democracy and absolutism seem to blur.





COVID-19 Emergency Measures as a Double-Edged Shovel: To Revive or Rebury the 'Socially Dead'?

SHEREE KUAN, BA/LLB III

The coronavirus has unravelled the social fabric that normally weaves the individual with the collective. We attend work through screens, feel a little more alienated from the regular humdrum of bustling crowds, and find ourselves pitted against (Heaven forbid) the greatest terror of all – some long-repressed introspection. Walls away, the inmate seeks solace in a weekly phone call to the outside world. To broader society he is anonymous, or 'socially dead', to recall the language of sociologist Orlando Patterson, meaning those whose individual identities are rejected by wider society as sub-human and rebranded to signify a collective social condition.[1] Amidst the commotion of a worldwide lockdown, the inmate becomes all the more forgotten behind a bundle of case records.

COVID-19 is a crisis which has unmasked a pre-existing lattice of inequalities in which our prisoners are viewed not so much as individuals, but a category to be acknowledged on a purely symbolic level. With public attitudes in 21st century Australia arguably slanting towards liberalism and human rights, it is unsurprising that the New South Wales ('NSW') Government enacted the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* (NSW) ('COVID-19 Emergency Measures Act') in March 2020 to enable the early release of vulnerable prisoners. However, it is dubious whether these measures truly purport to safeguard prisoner welfare or rather exist as a mere token of political correctness, given these new powers have not yet once been implemented despite rising dangers faced by the incarcerated. Not only do Australian prisons provide the perfect "breeding ground"[2] for COVID-19 due to operating at 116 per cent of design capacity,[3] but Indigenous Peoples are also disproportionately represented within prison populations and statistically more likely to suffer from health conditions rendering them susceptible to the virus.[4]

With this thorny backdrop in mind, Australian law becomes a double-edged shovel with which to revive or rebury the 'socially dead'. I shall attempt to justify this variation of the age-old 'double-edged sword' by summarising the argument which underpins this article: that the NSW early release legislation is a proportionate and even optimistic measure in and of itself, yet the continuing failure to act upon this legislation subverts it into a tool with which to further obscure and disregard the risks posed to inmates. This position will be explored through first situating these new provisions within the context of traditional executive measures for early release, followed by an analysis of both the proportionality of these measures and the emerging Australian case law pointing to COVID-19's physical and mental burden on the incarcerated. Should the NSW Government continue to stall the release of low-risk and vulnerable prisoners, this article subsequently considers the alternative of a judicial remedy: the writ of habeas corpus.

I. EXECUTIVE MEASURES FOR EARLY RELEASE

Criminal law theory has long encompassed the conception of 'compassionate release', whereby prisoners may be entitled to early release on the grounds of there being 'particularly extraordinary or compelling circumstances which could not reasonably have been foreseen by the court at the time of

sentencing.'[5] This notion has been codified in jurisdictions across the world, such as s 10 of the *UK Crime (Sentences) Act* 1997 allowing the Secretary of State to release prisoners upon being satisfied of the existence of exceptional circumstances, America's 18 U.S. Code 3582(c)1(A) and 4205(g), enabling federal inmates to petition the warden for compassionate release, and section 41 of New Zealand's *Parole Act 2002*, through which the Parole Board may direct compassionate release for offenders who have either given birth to a child, or are suffering from serious and terminal illnesses. Oddly, Australia has no such legislation specifically pertaining to the notion of 'compassionate release'. However, section 19AP of the *Crimes Act 1914* (Cth) appears to enable a similar function through language echoing that of the UK legislation, whereby the Attorney-General may prematurely release federal prisoners upon 'exceptional circumstances.' The term 'exceptional circumstances' is not defined by the Act, but is usually interpreted in case law to include serious medical conditions which cannot be treated within the prison.[6] It was also under this provision that the Attorney-General most recently directed the release of Rayan Abdul in March

2020, on the basis that the length of his sentence had been inappropriately imposed for an accused who had been under 18 at the time of offending.[7]

Further entrenched within the history of early release measures is the Royal Prerogative of Mercy derived from section 61 of the Australian Constitution, which deserves a passing mention despite being seldomly exercised in 21st century Australia. This prerogative enables prisoners to be pardoned at the executive discretion of the Governor-General, and was last deliberated in 2012 with regard to the posthumous pardons for war criminals Harry Harbord Morant, Peter Handcock and George Witton.[8] Although the outcome of the matter was ultimately unsuccessful, it emphasises the enduring function of the prerogative in the Australian criminal justice system. Nevertheless, full pardons are very rarely granted, while case law emphasises that such exercise is starkly divorced from the assessment of legal rights, and hence unamenable to judicial review.[9]

At present, the new release powers conferred by the COVID-19 Emergency Measures Act appear to be nothing more than a symbolic token of fair dinkum equality, given that no releases have yet taken place, nor are there plans to do so in the near future. Despite the temporary easing of restrictions mid-2020, one staff member at NSW Long Bay Prison Hospital has already contracted the coronavirus,[14] and six Victorian prisons are in lockdown following infections in both a prisoner on remand and a prison guard.[15] Although medics and advocates continue to call for the release of low-risk offenders with susceptible health issues so as to prevent a 'wildfire'[16] of infection, their pleas have been to no avail.

Yet at the dawn of the COVID-19 pandemic, NSW became the first Australian government to adopt legislation allowing for a specific form of compassionate release so as to prevent the potential spread of coronavirus in prisons. As of 25 March 2020, section 276 of the COVID-19 Emergency Measures Act enables the NSW Corrective Services Commissioner to discretionally release prisoners belonging to a prescribed 'class of inmates',[10] which necessitate the consideration of factors such as health, age, offence and remaining time until release. These factors are non-exhaustive, and are to be considered on a case-by-case basis completely subject to the discretion of the Commissioner. It is further necessary to note that section 276 limits release to solely 'inmate[s] on parole', thus disregarding the 54 per cent (as of March 2020)[11] of Australia's prisoners who are on remand. Lawyers and criminologists have protested this limitation as abhorrent to the very purpose of the Act, firstly because remand centres are hotspots for COVID-19 by reason of the high numbers entering the centres from the wider community,[12] and, secondly, due to the vast unlikelihood that individuals on remand would pose a serious threat to society given that 'at least half...will not eventually receive a prison sentence.'[13]

II. THE PROPORTIONALITY OF EARLY RELEASE

At the core of the debate on the new early release measures, the question of proportionality arises, namely whether the release of low-risk offenders with health issues (as prescribed by the COVID-19 Emergency Measures Act) strikes the proper balance between prisoner health rights and public safety. In the author's opinion, such release is indeed proportionate, especially given the set limitations conferred by section 276, which preclude the order of release for serious offenders, those convicted of murder, serious sex offences, terrorism offences, as well as any national security interest inmates and inmates of certain classifications. Other considerations such as the availability of accommodation, and the impact of the release on victims in relation to the inmate (especially for domestic violence offences) are to be further addressed on a case-by-case basis pursuant to section 276(4). These legislative constraints would appear to counter the trite argument that the early release of vulnerable prisoners would endanger public safety, its tacit implication that saving those

behind bars is not worth the expense of community welfare because we would essentially be unleashing a swarm of feral animals into civil society. A grotesquely embellished image that feeds on the fear of the 'Other'. Besides, a brief peruse through history shows that large-scale amnesties rarely have fermented hotbeds of crime – this did not happen in 2013 when the Czech Republic issued a mass pardon to over a third of the incarcerated population to mark the anniversary of its independence,[17] nor did it occur in 1963-1965 when Florida released over 1000 prisoners following the influx of new trials arising from the United States' Supreme Court's landmark decision in *Gideon v. Wainwright* 372 U.S. 335, which held that the court must provide attorneys for those unable to afford their own.[18]

A more cognisant argument cautioning against early release is expounded by Australian psychology Professors Stephane Shepherd and Benjamin Spivak,[19] who point to existing trends of high mortality and self-harm rates post-release from custody. Such trends will understandably be exacerbated if prisoners are released into a community in lockdown, in which support services comprising mental health resources and government social security are depleted or delayed.[20] That being said, lockdown restrictions in Australia and worldwide have targeted and been limited to non-essential services, which would fall outside the presumably essential nature of community support services. With the fluctuating easing of restrictions moving into July-August 2020, this argument further loses its weight.

III. THE EMERGING LEGAL POSITION

While it cannot be said that emerging Australian case law slants explicitly in favour of releasing low-risk and vulnerable prisoners, the state courts in deciding sentencing cases have recognised and taken into account the unduly onerous physical and mental effects of COVID-19 upon those detained. First with regard to physical health, the NSW Court of Appeal held in *RC v R*; *R v RC* [2020] NSWCCA 76 (22 April 2020) that a respondent's age and medical conditions in the context of the present pandemic are relevant to sentencing.[21] In that case, the accused's old age and debilitating respiratory condition were sufficient factors to uphold his sentence of a community corrections order in place of imprisonment, despite such a sentence having been held to be otherwise manifestly inadequate in ordinary circumstances.[22] Of further concern to the legal community was the finding in *Rowson v Department of Justice and Community Safety* [2020] VSC 236 (1 May 2020), that the prison authorities in Victoria's Port Phillip Prison had likely prima facie breached their duty to take reasonable care of Mark Rowson by failing to follow hygiene guidelines prescribed by the Communicable Diseases Network Australia.[23] With resource-depleted prisons continuing to shirk their maintenance of sanitisation procedures, this simply adds fuel to the simmering fire of precarious medical conditions faced by the incarcerated.

Secondly, with regard to mental health, the Courts have appreciated that imprisonment amidst the current environment will spur psychological distress, particularly aggravating conditions of depression and anxiety.[24] At the core of such mental health deterioration is the physical isolation of prisoners, with the NSWCCA in *Scott v R* [2020] NSWCCA 81 (30 April 2020) emphasising that the suspension of all social and family visits have placed an onerous burden on inmates.[25] The NSWCCA in *McKinnon v R* [2020] NSWCCA 106 (27 May 2020) further underlined that severing these lines of communication have had a significant impact not only on the prisoner (*McKinnon*) but also his wife and children.[26] Although correctional centres are striving towards offering additional telephone and AVL services to mitigate disruption to family relationships, these resources remain largely limited. At present, prisoners in NSW receive a maximum of three free phone calls per week,[27] while it is unclear whether video services are made as readily available. With tensions rising and ardent calls for release falling on deaf ears, this inaction has incited riots both internationally and domestically, with the recent unrest in Goulburn maximum security prison[28] serving as a cautioning echo of Italy's violent prison revolts on the 9 March which resulted in 7 deaths, 18 hospitalisations and 50 escaped prisoners.[29]

IV. THE GREAT WRIT: A POTENTIAL JUDICIAL REMEDY

Given such lack of action from the NSW Government, and even less from the other states which are yet to enact legislation, the Australian legal community has begun pursuing an extension of the Great Writ as an alternative and non-discretionary legal remedy for the release of vulnerable prisoners.[30] The Great Writ, or habeas corpus, is a prerogative writ derived from common law under which a prisoner may challenge the lawfulness of his or her detention.[31] The key advantage of the writ is that it includes a presumption in favour of the appellant, as well as imposing an obligation on the Courts to then order the prisoner's release if shown that their detention was unlawful.[32]

Upon first glance, the position in Australia on habeas corpus may seem futile for the issue at hand. That is, the application of the writ to challenge intolerable prison conditions rather than the substantive lawfulness to detain has been raised (and rejected) by the High Court, in only one case – *Prisoners A to XX inclusive v NSW* (1995) 38 NSWLR, in which a group of prisoners challenged the conditions of their confinement upon the refusal of the NSW Department of Corrective Services to supply them with condoms. However, jurists have since then argued that habeas corpus might extend beyond this limited scope, especially in more severe circumstances whereby mere incarceration may expedite exposure to a fatal disease. Indeed, this position appears to be impliedly accepted by the House of Lords in *R v Deputy Governor of Parkhurst Prison; ex parte Hague* [1992] 1 AC 58, where the court, although rejecting the application of habeas corpus in conditions of mere discomfort, suggested that a different outcome may flow in circumstances where incarceration would entail 'physical injury or an impairment of health'.[33] Although a controversial and tenuous grounds for the release of susceptible inmates, habeas corpus remains an avenue for the courts to act should the government fail to do so.

V. CONCLUSION

The NSW COVID-19 emergency measures currently exist as a double-edged shovel, not a sword in that they would unduly injure community safety with the amnesty of prisoners, but rather that a failure to act on such measures would merely rebury the 'socially dead' beneath an increasing class divide. Legislating early release was a step in the right direction, and it appears further promising that the Courts are acknowledging the onerous nature of incarceration during the pandemic. Yet this emergency legislation can either be wielded to enact substantive change or left to fester as an empty token of the Australian 'fair go'. The question remains – will the NSW Government decide to revive or rebury the 'socially dead'?

Toeing the Borderline – The Impact of Brexit on Ireland's Borderlands

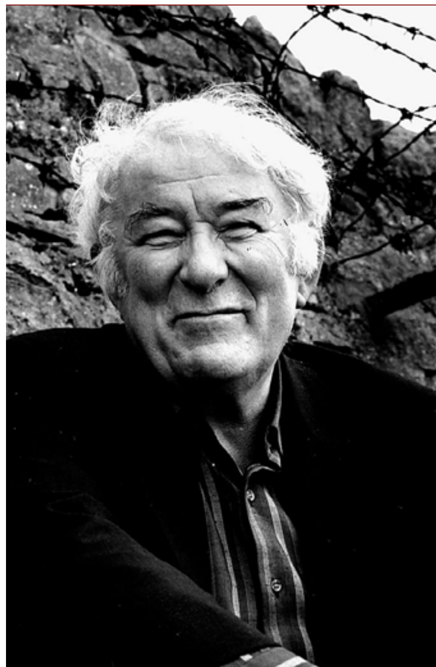
AIOFE HOGAN, JD I

I. INTRODUCTION

Seamus Heaney (1939 – 2013) is widely described as the everyman's poet. A Nobel laureate, Harvard and Oxford professor, and one of Ireland's most prolific literary voices, Heaney wrote for his country's farmers and world leaders in equal measure. In his 1974 essay 'Feeling into Words', Heaney likened writing and reading poetry to archaeology. Poems are "elements of continuity, with the aura and authenticity of archaeological finds, where the buried shard has an importance that is not diminished by the importance of the buried city."[1] His emphasis on the city, the polis, is striking, given that Bellaghy, his home place and final resting place in county Derry, Northern Ireland, is not remotely metropolitan. A long line of Irish poets have found continuity and connection in their search for the shards which make up the "buried cit[ies]" of which Heaney speaks.[2] Many of these searches take place along the border between Northern Ireland and the Republic in the south. In many ways, the Irish border defies the definition of "crisis" in that it is a permanent crisis zone. It is an aperture, a "between", to use Heaney's words, which has been thrown further into limbo in the wake of Britain's exit from the European Union ("EU").[3]

II. SURVEYING THE FIELD - A (VERY BRIEF) INTRODUCTION TO THE ANGLO-IRISH DYNAMIC

"Between my finger and my thumb The squat pen rests; snug as a gun."[4]



In 'Digging', the opening poem in Heaney's first collection Death of a Naturalist, Heaney's conception of Irishness is intimately bound to the ground itself. His grandfather's shovel, used for cutting turf, is substituted with the nationalist's gun and the poet's pen. British rule in Ireland began with the Anglo-Norman invasion of the island in the late 12th century.[5] Of the ten counties that today touch the border between Northern Ireland and the Republic, six had been marked out for plantation by James I in 1609.[6] Two others, Monaghan and Down, had already been "planted" at this point.[7] Centuries of conflict between the English and the Irish followed, coming to a dramatic head when the border was forged in the early 20th century. The border was established, fixed, and, as Peter Leary puts it, "copperfastened" by the Government of Ireland Act 1920, the Anglo-Irish Treaty 1921, and the Tripartite Boundary Agreement of 1925 respectively.[8] Economic consolidation came in 1923 with the introduction of a customs barrier.[9] The Republic was not formed until the passage of the Republic of Ireland Act in 1949. The hard border between North and South physically and symbolically defined the Troubles, a period of civil unrest between Unionists and Republicans across the island from the early 1970s to late 1990s. During the Troubles, there were British military checkpoints on main border crossings and UK security forces made some, although not all, of the remaining crossings impassable. The threshold remained highly-wrought until peace was, to some extent, secured through the Good Friday Agreement in 1998. In 2005, in phase with the implementation of the Good Friday Agreement, the last of the border checkpoints was finally removed.

III. WRITING PEACE

"Between my finger and my thumb The squat pen rests. I'll dig with it."[10]

So ends 'Digging', and so begins the Belfast Agreement – the most notable attempt to formally "dig" peace along the borderland. Widely known as the Good Friday Agreement, the Belfast Agreement constitutes a pair of agreements signed on 10 April 1998 and approved by voters across the island in two referendums on 22 May 1998. The "Agreement reached in the multi-party negotiations" ("the Multi-Party Agreement") and the "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland" ("the British-Irish Agreement") are appended to one another, and neither have force at law in their own right.[11] In Northern Ireland, voters were asked whether they supported the Multi-Party Agreement, while in the Republic, voters were asked whether they would allow the state to sign the Agreement and allow changes to the constitution (the Nineteenth Amendment of the Constitution of Ireland) to facilitate it. The provisions we are here concerned with have force at law as the establishing texts of the Northern Ireland Assembly, the devolved legislature of Northern Ireland. The Assembly is empowered to legislate in a wide range of areas not explicitly reserved for the Parliament of the United Kingdom, and to appoint the Northern Ireland Executive.[12]

A. *The Multi-Party Agreement*

The Multi-Party Agreement was signed on behalf of the British and Irish governments and eight political parties in Northern Ireland.[13] The Democratic Unionist Party (DUP), which later became the largest unionist party, did not support the Belfast Agreement. The DUP currently holds a majority in the Northern Ireland Assembly, and it is the fifth-largest party in the House of Commons of the United Kingdom.

The "Constitutional Issues" section endorsed a commitment to recognise the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status and recognise that it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination.[14] It was argued in *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583 that the Agreement meant that the consent of Northern Ireland's voters was required to leave the EU. Though the UK Supreme Court unanimously held that this was not the case, the Agreement has nevertheless strongly shaped the Brexit process.[15]

B. *The British-Irish Agreement*

The British-Irish Agreement is a draft (and subsequently executed) international treaty, Article 2 of which affirmed the solemn commitment of both governments to support and implement the Multi-Party Agreement. The British Government agreed to repeal the *Government of Ireland Act 1920* which had established Northern Ireland, partitioned Ireland and asserted a territorial claim over the island. The Irish Government agreed to propose draft legislation to amend Articles 2 and 3 of the Constitution of Ireland, which asserted a territorial claim over Northern Ireland. Those conflicting territorial claims were to be removed, and it was to be:

"for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that ***this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland****".*[16] *(my emphasis)*

The Good Friday Agreement is widely described as a document plagued with "constructive ambiguity".[17] The institutions, established by the deal, effected a sense of dual nationality upon Northern Ireland, reinforcing "imaginative elements of co-sovereignty", to use Brendan O'Leary's words.[18] EU membership also played a part in writing peace along the border into existence, though the connections between the two states were perhaps more imagined than reified in this regard, too. While both the UK and Ireland joined the European Economic Community (EEC) in 1961, they did so with vastly different motivations.[19] For Ireland, international recognition of the young state was of paramount importance.[20] Conversely, the UK had already established a track record of reluctance, rejecting offers to join the European Coal and Steel Community in 1951 and the EEC in 1957.[21] Membership of the EEC did not require human rights violations or territorial conflicts to be addressed. The UK and Ireland's membership of the EU has, as Schiek contends, been based on the assumption that such problems would be solved by the membership itself.[22]

These 'imaginings' are now being called into spectacular question as the United Kingdom's Revised Protocol on Ireland and Northern Ireland, included in the most recent Withdrawal Agreement drawn by the United Kingdom ("UK") and the EU and published on 17 October 2019, seems as ambiguous and lofty as the Good Friday Agreement and its predecessors. In the wake of the Brexit vote, Irish writer Fintan O'Toole wrote that "English nationalists have placed a bomb under [the] peace process"; "[t]he rather patronising English joke used to be that whenever the Irish question was about to be solved, the Irish would change the question. And now, when the Irish question seemed indeed to have been solved, at least for a generation, it is the English who have changed the question."[23]

IV. BREXIT

"A cobble thrown a hundred years ago Keeps coming at me, the first stone Aimed at a great-grandmother's turncoat brow. The pony jerks and the riot's on."[24]

In the UK's EU membership referendum on 23 June 2016, Northern Ireland voted 55.8 per cent in favour of remaining in the EU.[25] The successful vote rendered the Republic of Ireland – Northern Ireland border an external EU border once again, throwing the promises of the aforementioned agreements into spectacular question. On both sides, it was immediately asserted that the reinstatement of a hard border would be avoided at all costs, leading to a period of over and back eventually resulting in the "backstop" plan. Two areas, in particular, have dominated the resultant negotiations – the customs regime and the Irish Sea.

A. *Customs regime*

Keeping the border between Northern Ireland and Ireland "soft" or invisible—to guarantee avoidance of "a hard border, including any physical infrastructure or related checks and controls", as the Preamble to the Withdrawal Agreement has it, must loosely involve Northern Ireland remaining within the EU's customs union and its internal market, and committed to its rules and institutions.[26] The now-defunct Irish backstop (formally the Northern Ireland Protocol) plan, an appendix to a draft Brexit withdrawal agreement developed by the May government and the European Commission in December 2017 and finalised in November 2018, sought to prevent a border with customs controls between the Republic and Northern Ireland by keeping Northern Ireland in some aspects of the EU Single Market, until an alternative arrangement was reached. The proposal also provided for the UK as a whole to have a common customs territory with the EU until a solution was determined, in order to avoid the need for customs controls within the UK (between Northern Ireland and Great Britain). The "backstop" element was that the arrangement would have continued to apply potentially indefinitely unless the UK and the EU were both to agree on a different arrangement, such as a trade agreement between UK and EU at the end of the transition period.

While Article 5(3) of the Revised Protocol ties Northern Ireland into the EU customs regime, the two preceding articles lay a different foundation. Article 5(1) states:

"No customs duties shall be payable for a good brought into Northern Ireland from another part of the United Kingdom by direct transport [...] unless that good is at risk of subsequently being moved into the Union, whether by itself or forming part of another good following processing."[27]

Under this calculus, EU rules will only be triggered where goods are "at risk of subsequently being moved into the Union".[28] The breadth of "at risk" remains unclear.

However, Article 5(2) directs that a good brought into Northern Ireland from outside the Union "shall be considered to be at risk of subsequently being moved into the Union" unless it is established that it "will not be subject to commercial processing in Northern Ireland and that it meets the governing criteria to be drawn up by the Joint EU/UK Committee.[29] Stephen Weatherill cautions "the assumptions and presumptions which attach to these to-be-elaborated criteria" in light of the wide definition of processing as any alteration or transformation of goods.[30] It follows, Weatherill argues, that "flour imported into Northern Ireland would be subject to the EU customs regime even if the bread made from it is not intended to be sold outside Belfast."[31] Under this model, the UK Trade Policy Observatory estimated that 75 per cent of the number of goods imported into Northern Ireland would be liable to pay duties.[32]

B. *The Irish Sea*

Given that the whole idea of the Protocol is that this should not occur at the border between Northern Ireland and the Republic, it follows that it must instead newly occur at the border between Northern Ireland and the UK. This problematises the assertion in Article 4 that Northern Ireland is part of the customs territory of the UK, and, as Weatherill writes, adds "a fresh deception" to the assertion in the Withdrawal Agreement's Preamble of the "importance of maintaining the integral place of Northern Ireland in the UK's internal market" and Article 6 of the Protocol (titled "Protection of the UK internal market") which asserts that the UK is not prevented from "ensuring unfettered market access for goods moving from Northern Ireland to other parts of the UK's internal market".[33]

Other than through the adoption of a UK–EU agreement to replace the Protocol in whole or part, the regulatory alignment envisaged by Articles 5 to 10 of the Protocol is terminable only according to the procedure foreseen by Article 18, titled "Democratic consent in Northern Ireland". This means that the Northern Ireland Assembly may bring alignment to an end, which may well reinstate a hard (albeit invisible) boundary between North and South.[34]

C. *Consent Mechanisms*

Article 18 of the Protocol proposes a "consent mechanism" which would allow the Northern Ireland Assembly to vote periodically on adherence to EU rules on goods and customs, the Single Electricity Market, VAT and state aid.[35] This is clarified by further detail provided in the separate "Unilateral Declaration on Consent", published by the UK Department for Exiting the European Union on 17 October 2019, and resonating strongly with the rhetoric of mutual consent in the Good Friday Agreement. However, the UK Parliament's Withdrawal Agreement Bill includes no specific provision for the consent mechanism to operate, though the Government could use its delegated powers to give force to the consent mechanism.

In August 2020, UK Cabinet Office minister Michael Gove pledged £200,000,000 to the establishment of a trader support service to assist firms in navigating the movement of goods across the Irish Sea.[36] A further £155,000,000 is set to be spent on digital technology to streamline processes required by the new internal border created by the Northern Irish protocol, consolidating the government as a de facto customs agent of sorts, though the UK Government has firmly asserted that the £355,000,000 package is by no means an admission of an Irish Sea border.[37]

V. CONCLUSIONS: "ME IN PLACE AND THE PLACE IN ME"

Heaney's final collection Human Chain (2010) features the poem 'A Herbal', wherein the poet hovers, as he frequently does, between his sense of himself as the son of a Derry farmer, a Catholic living in the North, a world citizen and a mouthpiece for his nation:

> *"As between clear blue and cloud,*
> *Between haystack and sunset sky,*
> *Between oak tree and slated roof,*
> *I had my existence. I was there.*
> *Me in place and the place in me"*[38]

For all his "betweenness", Heaney's voice is effortlessly consistent. We are always returning to where we began – "me in place and the place in me".[39] The consistency of the Revised Protocol on Ireland and Northern Ireland in its own right and as a cog in larger frameworks remains to be seen. It has very much taken the floor already; the question of whether consistency or flexibility is paramount was this year considered by the Court of Appeal of Northern Ireland.[40] Stephens LJ (Treacy LJ and Colton J agreeing) cited the 2018 decision of the UK Supreme Court in *R (Gallagher Group & Ors) v Competition and Markets Authority* [2019] AC 96 at 108, agreeing that consistency between and across jurisdictions is merely a "generally desirable" objective, "[w]hatever the position in European law or under other constitutions or jurisdictions".

In *Robinson v Secretary of State for Northern Ireland and Others* [2002] UKHL 32 at [12], Lord Bingham stated that where constitutional arrangements "retain scope for the exercise of political judgment they permit a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude." In a similar vein, in Robinson, Lord Hoffman relied upon "the flexibility which could allow scope for political judgment in dealing with the deadlocks and crises which were bound to occur."[41]

Peter Leary describes the border as a "thread linking the grant topographies of national and international history to the most seemingly humdrum aspects of people's lives".[42] Heaney pulls on this thread, inciting his readers to see themselves reflected in broader political exchanges, and to stake their claim to their place along and beyond the borderline. It remains to be seen how the threshold will be renegotiated into the future, in legislation and lyric.

SHALL ANY MAN BE ABOVE JUSTICE?

A History of Impeachment and its Place in the American Constitution

ALEXANDER BIRD, JD II

UNCLASSIFIED

Good

people i Giuliani is a highly respected man. and I would like him to call you.

There's Biden's son,. stopped the and a lot of can do with Biden went around bragging that he stopped the prosecution sounds horrible to

I would like you to do us a favor find out what happened with this whole situation with Ukraine, ... I guess

The chamber that houses the United State Senate is not large. Looking down from the public gallery, the room presents a cross between a surgical theatre and a bear pit – an environment that would give an epidemiologist a cold sweat. That is, in large part, the point. Completed in 1859, the current home of America's upper house borrows its architectural thrust from the United Kingdom's Houses of Parliament.[1] Like the cramped benches in Westminster, the Senate's close quarters are intended to foster a combative environment – a rhetorical colosseum where senators can draw swords, clash over policy and determine a victor. Senatus populusque Americanus – with a dash of bread and circus.

In January, this arena was witness to the impeachment trial of President Donald John Trump. Under the watchful eyes of Chief Justice John Roberts, seven members of the U.S House of Representatives came before the Senate to argue that the President had committed two offences that warranted his removal from office – the abuse of executive power and obstruction of Congress.[2] In the end, the Senate was unmoved by the House's arguments and voted to acquit the President on both counts. While this was largely chalked up to contemporary partisan politics, a more fundamental issue underly the President Trump's acquittal: whether the conduct alleged by the House had the right to impeach the President in the first place.

Much to the dismay of House impeachment managers and law students alike, the United States Constitution and its framers are surprisingly tight-lipped on what qualifies as impeachable conduct. The American Constitution has one exhaustive clause stating what gives rise to legislative removal. "The President, Vice President and all civil Officers of the United States," it states, "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[3] There are no additional guidelines, no chapter detailing definitions. The legendary draftsmen of America's governing charter left precious little else to guide the implementation of this extraordinary check on executive authority.

Notes of Debates in the Federal Convention of 1787, a comprehensive play-by-play of the rhetorical boxing matches that gave rise to the constitution's final form, notes only two significant discussions during the constitutional convention concerning the what would qualify as impeachable conduct. The final discussion, recorded 8 September 1787, concerns a quibble over the wording of the section. Under the forceful hand of the Virginian delegate James Madison, the word "maladministration" was removed from the final text and four words – "high crimes and misdemeanours" were left to cover the gambit of impeachable offences beyond treason and bribery.[4]

The mercurial American statesman Alexander Hamilton attempted to hammer out a general threshold in No. 65 of The Federalist Papers, a full-throated defence of the American constitution published in the late 1780s. According to Hamilton, impeachment is "a method of national inquest into the conduct of public men" who have been accused of offending the "public trust."[5] Despite providing a workable definition, Hamilton leaves the reader in the dark on what would qualify as a violation of this trust. Aside Hamilton's impassioned editorials in the Federalist Papers and a few mentions in the debate record, America's founding generation is conspicuously silent on the application of the nation's most extreme check on presidential power.

To understand why the craftsmen of America's constitution steered clear of specificity when defining impeachable conduct, it helps to look at the broader legal tradition that followed America's delegates into halls of the constitutional convention. As Winston Churchill put it, "the farther back you can look, the farther forward you are likely to see." By digging into the history of impeachment, we find the terse phrasing utilised by founding fathers to define the gambit of impeachable conduct is the product of rich history, one that more clearly defines both the nature of the American impeachment process why these words used were chosen to define the scope of impeachable conduct. Another Churchill-ism comes to mind: "short words are best and the old words, when short, are best of all." Like much of America's legal DNA, impeachments origins can be traced beyond the Delaware tidal basin to the banks of the River Thames. In fact, the first use of the term "impeachment" predates the soaring rhetoric used in the American constitution's preamble by a cool five hundred years.[6]

While catalysts for the development of a parliamentary tool to check executive power in medieval England are not clear, they appear various – the gradual development of a primitive bicameral legislature and the growth of baronial power made it possible to impose a formal system of address for those kingsmen deemed troublesome by England's early parliaments. Legal scholar Frank O. Bowman argues the reason for impeachment's entry to parliament's medieval war chest may have stemmed from a kind of a macabre practicality – a desire to avoid the inefficiency that accompanied more traditional methods of confronting monarchical tyranny such as armed rebellion and regicide. "A system," Bowman writes, "that requires strapping on your chainmail and rallying the rest of the barons for a rebellion any time that you disapprove of the chancellor of the Exchequer or the Keeper of the Privy Seal is tiresome in the last degree."[7]

Regardless of impeachment's precise origins, successive generations of parliamentarians made it clear they preferred to address executive excesses from the comfort of Westminster than on the field of battle. As parliament gained greater control over the purse strings of government in the 14th century, it became increasingly necessary to for England's emerging legislatures to reign in the monarchical urge to dictate where funds from the Exchequer flowed. Impeachment was a natural tool to assert a tight grip on government funds. As Bowman observes, "parliament found it could hobble unpopular royal policies by removing the minister charged with carrying them out without disrupting the continuity of royal rule."[8] Doing so not only gave parliament the ability to effectively protect their emerging right to control the allocation of Crown resources – it increased the efficiency with which parliamentary oversight could be exercised over errant executive actors.

It is widely held that the first recognisable impeachments occurred towards the end of the reign of Edward III at the hands of what is commonly known as the "Good Parliament". Beginning in 1376, parliamentarians began a string of impeachment trials in an effort to remove royal ministers they believed were taking advantage of both the elderly Edward III and his sickly heir, Edward the Black Prince.[9] Despite their antiquity, these impeachment proceedings set three key precedents that form the bedrock of the impeachment procedure utilised over the last 700 years on both sides of the Atlantic.

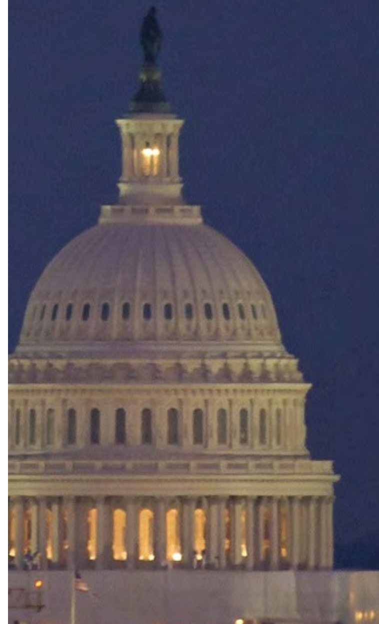
First, each impeachment proceeding against Edward III's ministers was initiated by a set of charges laid out in the lower house of parliament followed by a trial in the upper house. In this way, the proceedings mirrored those of an ad-hoc criminal trial – representatives of the "common" interest were responsible for identifying executive usurpations while the Lords, being of similar social status to those charged, would assume the role of a jury of peers and evaluate the veracity of the charges.

Second, after defining the scope of the charges, select members of the lower house would act as prosecutors for the Commons, advocating for the cause of the lower chamber in the upper house. Finally, while many of the charges laid against Edward III's ministers violated existing laws, some did not allege any breach of statutory authority. Rather, they accused the minister of a moral shortcoming – an act or omission that illustrated a failure in an individual's character and therefore, made them unfit for a position of responsibility and leadership. In short, one did not need to commit a statutorily recognised offence in order to be impeached. As we will see, these procedures created by the Good Parliament set precedencies for the impeachment process that remain the foundational elements of the procedure today.

The die-cast by the Good Parliament in the 14th century, impeachment and its procedures became a relative mainstay of the legislature's defences against executive encroachment, waxing and waning in usage with the fluctuation of English parliamentary power over the course of the 15th and 16th centuries. After a long hibernation under the near-autocratic rule of the Tutor Dynasty, the increasingly bold parliaments of the 17th century wielded articles of impeachment with a renewed vigour in an effort to assert the "primacy of law over executive branch absolutism."[10]

Upon ascending to the British throne in 1603, the Stewart king James I brought with him an aggressive view of monarchy not dissimilar from his Tutor predecessors. However, James wielded it with greater ferocity, treating parliament as an advisory body that played a ceremonial role in the creation and implementation of the law. "Before any parliaments were holden," wrote James, "kings were the authors and makers of the laws, and not the laws of kings."[11] For the Stewart Kings, the rule of law emanated from the throne and did not bind its creator. Unsurprisingly, James' parliaments found this attitude hard to swallow.

In 1621, parliamentarians dusted off impeachment in an attempt to reign in the royal excesses fostered by James' permissive approach to executive tyranny. Implementing the procedures of impeachment developed in the 14th century, parliamentary investigators managed to successfully remove a royal favourite, Sir Giles Mompresson, from office for profiting from illegal financial activities.[12] A subsequent impeachment trial against the head of the Court of Chancery resulted in the Chancellor's removal for improperly accepting gifts from chancery case litigants. As Bowman notes, these two cases built on the framework established by the Good Parliament in the 14th century and signalled that parliament was "awakening from a long torpor as a serious legislative counterweight to royal authority." Equally important, both impeachments "struck blows against the misuse of government office for self-enrichment."[13]



The impeachments of 1621 would kick off a decade's long struggle in Westminster to prevent executive abuses – a struggle that ultimately devolved into in a civil war causing the death of nearly 4 per cent of the British population and the execution of Charles I.[14] In many ways, the English Civil War was a return to the "strapping on your chainmail" approach to resolving disagreements with the Crown – it indicated a failure to strike a balance between the power of the executive and the will of crown subjects as expressed through parliamentary representation. The brutality of English civil war and its ultimate failure to create a system of government that checked executive excesses gave rise to a concerted effort to impose permanent restrictions on Crown authority.

This effort came to a head in 1688 when, in an effort to oust the catholic monarch King James II, the Dutch Prince William of Orange was installed on the British throne. Known as the Glorious Revolution, William's accession was swiftly followed by the adoption of the Bill of Rights 1689, which vastly increased parliamentary authority and reigned in royal prerogatives.[15] The adoption of the Bill of Rights precipitated the entrenchment of parliamentary superiority as an essential pillar of the Westminster system of government. Once the scourge of parliamentary independence, the monarch played an increasingly ceremonial role in government affairs – a far cry from omnipotent expectations of James I.

With parliament now firmly holding the reign of governance, impeachment slid into obsolesce as a serious tool of executive oversight in Great Britain. The monarch's ministers were now well under the thumb of parliament – it was unnecessary to prosecute any royal missteps by legislative trial. Though there was the occasional prosecution of a crown officer, the use of impeachment as an often-implemented tool of parliamentary oversight came to an end in 1725.[16] By the time of King George III's accession in 1760, the threat posed by an unchecked tyrannical executive was widely regarded as a thing of the past in Great Britain.

While impeachment largely faded into Westminster's historical record, it gained new life on the other side of the Atlantic in the 18th century. Britain's North American colonies did not enjoy the same relation with the Crown as the mother of parliaments – the gradual concessions of the Crown's prerogative power following the English Civil War were not imported wholesale to Britain's rapidly growing settlements on the Atlantic seaboard. Many of these colonies remained crown dependencies and were deprived of the kind of legislative authority secured by Westminster. To promote their interests, colonial legislatures regularly turned to older parliamentary tools to check executive decision making – including the now unfashionable instrument of impeachment.

A prime example is colonial efforts to protect judicial independence. Following the 1703 Act of Settlement in Great Britain, judges no longer served as the pleasure of the Crown, but rather quamdiu se bene gesserint (so long as they demonstrated good behaviour).[17] This statute was intended to prevent the the improper removal of judges if the Crown grew dissatisfied with a particular justice. However, the Act of Settlement was held to not apply to Britain's colonial settlements – the crown could still exercise control over the appointment and salary of colonial judges. As a result, colonial justices often demonstrated a tendency to favour the interests of the Crown over that of the local colonial communities. Colonial legislatures turned to impeachment as a way to push back against crown judicial appointments and express dissatisfaction with the close grip crown officials exercised over colonial affairs – it served as an effective "mechanism to express displeasure with proprietary or royal appointees."[18]

Indeed, impeachment's prevalence in colonial America all but ensured it was on the minds of the former crown subjects who gathered in Philadelphia in May 1787 to draft a new constitution for the fledgling republic. A little over a decade earlier, the nation's first continental congress adopted a Declaration of Rights, stating all citizens of the newly established states were "entitled to the common law of England" and should benefit from all English statutes that "existed at the time of colonisation."[19] In short, citizens of the American republic were to be fully enfranchised with the protections often denied to them as colonial subjects. For delegates in Philadelphia, a primary goal of the convention was to ensure the rights they were once entitled to as "Englishmen" were effectively insulated from threats that could arise from centralising power in the young republic. As the Virginian delegate George Mason put it during the constitutional debates, "some mode of displacing an unfit magistrate is rendered indispensable by the fallibility of those who choose, as well as by the corruptibility of the man chosen."[20]

Impeachment emerged as the preferred mode of displacing any potential unfit American magistrate due, in large part, to its familiarity. In addition to being a mainstay of the colonial legislatures' arsenal to ward off executive abuses, the delegates to the constitutional convention were, for lack of a better term, absolute anglophiles when it came to political and legal history. Thirty-three of the convention's fifty-five delegates were trained lawyers and at least ten of them had been judges. It followed that a majority of the delegates of the convention had spent some of their formative years studying English common law and Britain's political systems.[21] As Bowman notes, "to study law in their England or North America in the 1700s necessarily meant studying the constitutional arrangements of Great Britain and interactions between the Crown, the courts and parliament."[22] Thomas Jefferson, the writer of the American Declaration of Independence, is illustrative of the point. In his 1774 pamphlet, A Summary View of the Rights of British North America, Jefferson makes reference to the impeachment of a minister for Edward II – a trial he likely read about in Blackstone's Commentaries on the Laws of England, which was in wide circulation in North America by the time of Jefferson's adolescence.[23]

The subsequent adoption of "high crimes and misdemeanors" to define the scope of impeachable conduct was a direct application of this historical knowledge to address potential issues in the emerging constitution. A key problem arose in relations to bills of attainer. In an effort to shore up the separation of powers outlined in the constitution, the delegates banned bills of attainder in Article I, Section 9 of the Constitution.[24] This prevented congress from passing an act that accused an individual or group of a crime and prescribing punishment without a trial. Historically, when impeachment failed to remove errant executives' officers, English parliaments often turned to bills of attainer as an alternative means to discipline the Crown. While eliminating bills of attainder may have reinforced the sanctity of due process, it had the effect of leaving impeachment as the main legislative tool available to remove the executive officers.

To ensure impeachment could effectively fulfil this role, its legal parameters had to be broad – an exhaustive list of defined statutory offences would not suffice. More importantly, it was widely believed that any threat to the constitutional structure emanating from the executive was likely to take a more existential form – they would "reach beyond mere violations of the criminal code to any dangerous assault on the foundation of the political order."[25] Therefore, the power of impeachment had to be wide enough to cover both statutory offences and conduct that would threaten the democratic norms of the republic not protected by legislation. In a stirring speech on the convention floor, George Mason captured the necessity when arguing for the subequently adopted expansive definition.

"Why is the provision restrained to treason and bribery only? Treason, as defined in the Constitution, will not reach many great and dangerous offences...attempts to subvert the Constitution may not be treason, as above defined. As bills of attainder, which have saved the British constitution, are forbidden, it is the more necessary to extend the power of impeachments."[26]

Thus, "high crimes and misdemeanors" was not selected not to allude to any statutory violation but as a flexible concept that could be used by the legislature of the day to justify disciplinary action against an executive who threatened the stability of the body politic whether through malevolent action or character. It gave Congress the authority the Good Parliament seized for itself in the 14th century – the ability to remove an executive officer for conduct that, while not necessarily illegal, threatens the good stewardship of the nation. Bowman puts it succinctly:

"In adopting impeachment provisions that permit removal of a president for 'high crimes and misdemeanors,' the founding generation conferred on congress the same power that Parliament had progressively seized for itself. The written constitution granted successive generations of legislators the power to identify for themselves the essential characteristics of the American constitutional system and to defend that system by removing its chief executive officer if he or she, by any individual act, pattern of behavior or culpable inattention, places it at risk."[27]

Under this lens, Alexander Hamilton's seemingly vague allusion to the "public trust" becomes concrete – it is the ability to uphold the democratic and constitutional norms to the satisfaction of the American people. Much like the American constitution, impeachment is not meant to be statute frozen in a kind of grammatical amber. Rather, it is to be flexible to will to the legislature – to be invoked when the legislature believes the nation's foundations are under threat. Even more importantly, the impeachment process forces the nation to place those foundations under a critical lens and, in the tradition of the constitutional framers, debate what they are and should be.

HOLDING BIG EMITTERS RESPONSIBLE: International Law and Climate Change

The sadness is that these disasters are not occurring in these islands through their own fault. They are happening because of the excesses of larger and more powerful countries, who will not bend from their abuse of the world's atmosphere, even at the risk of eliminating other societies, some older than their own.

– Manasseh Sogavare, Former Prime Minister of the Solomon Islands.[1]

JASMINE TODOROSKA, BSC/LLB III

Over the coming years, many Small Island Developing States ('SIDS') are likely to experience severe disruptions to their society, economy and way of life as a result of the escalating climate crisis. As sea levels rise, low-lying States face an increased risk of inundation, irreversible harm to their marine environment and increased vulnerability to extreme weather events. Nevertheless, SIDS emit less than 1% of global greenhouse gas ('GHG') emissions that contribute to climate change.[2]

In light of this, the island States of Tuvalu, Kiribati and the Maldives announced their intention in 2002 to sue the United States of America and Australia in the International Court of Justice ('ICJ') for failure to take action on climate change.[3] Years later, in 2011, Palau and the Marshall Islands sought an advisory opinion from the ICJ on the legal implications of transboundary harm caused by GHG emissions.[4]

However, these attempts, and countless others by the Alliance of Small Island States ('AOSIS'), have been swiftly snuffed out by more geopolitically powerful States, continuing our current systemic failure to take action on climate change. This raises the question, on what basis could "big emitters" be successfully held responsible under international law? And, would such action encourage or threaten urgently needed cooperation to address climate change?

I. STATE RESPONSIBILITY

The law of State Responsibility, codified in the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001, may provide a strong basis on which to hold big emitters responsible for their excessive emissions. To establish a breach of a primary obligation, international environmental treaties under the United Nations Framework Convention on Climate Change ('UNFCCC'), including the Kyoto Protocol and the 2015 Paris Agreement, could be relied upon. However, given the weak, conditional and often indirect nature of these obligations,[5] the well-established customary "no harm" principle may provide a stronger basis.

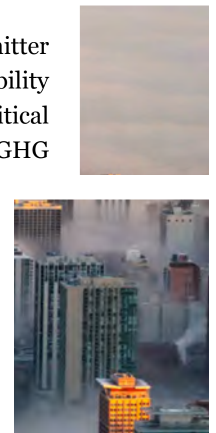
As established in the Trail Smelter Arbitration[6] and confirmed in the *Corfu Channel Case*,[7] every State must act with due diligence to ensure that it does not knowingly allow its territory to be used for acts contrary to the rights of other States. More recently, in the 2010 *Pulp Mills Case*,[8] the ICJ clarified that this obligation involves not only adopting appropriate rules and measures but also upholding a certain level of diligence in exercising administrative control over public and private operators. The "no harm" principle has also been affirmed in the 1972 United Nations Stockholm Declaration on the Human Environment and in the ICJ's 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons.[9]

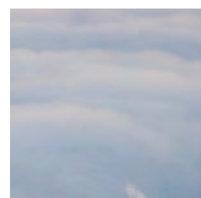
Under the "no harm" principle, a State's behaviour must be contrary to a specified standard of care in order to incur responsibility for the harm caused by GHG emissions. Relevant factors to consider include the foreseeability of harm, a State's opportunity to act and the proportionality of the State's response. In 1990, the Intergovernmental Panel on Climate Change considered it "certain" that anthropogenic emissions were increasing the greenhouse effect.[10] Since this time, the harm caused by unregulated GHG emissions has arguably been foreseeable. Over the past 30 years, States have again arguably had ample opportunity to prevent and mitigate the effects of harmful levels of emissions, and failed to take action. Given the disastrous consequences for SIDS, commentators such as Voigt argue that only significant reductions in GHGs could ever be considered proportionate.[11] As such, there is growing consensus[12] that the failure of big emitters to take action, in light of sufficient opportunity and growing awareness, gives rise to a theoretically strong case for SIDS, based on the "no harm" principle.

If SIDS were successful, they could hypothetically force big emitters to cease their harmful emissions while receiving compensation for environmental damage, which the ICJ recently awarded for the first time in the 2018 *Costa Rica v Nicaragua Border Case*.[13] Crucially, in this case, the ICJ recognised that both direct and indirect ecosystem services are compensable under international law and affirmed that uncertainty as to the extent of damage does not preclude an award.[14] Nevertheless, this case concerned direct environmental damage caused by Nicaragua in Costa Rica's territory. As such, the likelihood of the ICJ awarding compensation for more indirect damage associated with GHG emissions seems tenuous, at least at this stage, despite the legal strength of a claim based on customary international law.

II. CHALLENGES

In reality, any attempt to hold a big emitter responsible under the law of State Responsibility will be fraught with both legal and political challenges. While general attribution of GHG emissions to big emitters may not be difficult, establishing causation in each individual case may prove almost impossible due to the complexity of the climate system.[15] As such, it may be more effective to invoke the obligation as owed to the international community as a whole, erga omnes, rather





than to individual States in order to avoid complex attribution issues. However, while a successful action could potentially require a big emitter to cease its breach of obligation, SIDS may face issues accessing compensation, particularly in a case with multiple claimants. As such, any remedy may be limited to diplomatic protests or sanctions.[16]

Unfortunately, it is unlikely this stage will ever be reached. Given that the ICJ's jurisdiction is based on consent, it is difficult to envisage a case by a SIDS proceeding to the merits stage. As major emitters such as the United States, China and Saudi Arabia have not made optional declarations accepting the compulsory jurisdiction of the ICJ, it seems as though despite the legal strength of SIDS' arguments, they may never be heard.

Further, even if the jurisdiction in the case of one big emitter could be established, issues with indispensable third parties may arise. Following the Monetary Gold and Phosphate Lands principles,[17] the ICJ may refuse to give a decision if, in doing so, it would have to rule on the lawfulness of the conduct of a third State as a pre-requisite to determining the primary State's responsibility. As such, given that current consent to the ICJ's compulsory jurisdiction is not widespread, a dispute may be deemed inadmissible if an indispensable third party cannot be joined.

Finally, even if the ICJ can establish jurisdiction, the lack of binding international enforcement mechanisms will mean that compliance will rest solely on the, generally sparse, goodwill of political leaders.[18] At their core, these issues stem from the relative political and economic weakness of SIDS, especially when compared to big emitters. In theory, the "no harm" principle is effective because it is based upon respect for the sovereign equality of States. In reality, it is difficult to be optimistic about the prospects of geopolitically weak SIDS succeeding against global superpowers. For instance, Palau's attempt to seek an advisory opinion from the ICJ in 2011 resulted in the United States threatening to withdraw the provision of development aid.[19]

On top of this, the massive costs and often lengthy delay of legal proceedings may hinder ongoing efforts by SIDS to mitigate and urgently adapt to the impacts of sea level rise. As such, despite being an attractive, attention-grabbing, and even legally sound basis for holding big emitters responsible, contentious litigation in the ICJ is likely to be silenced by geopolitically powerful States who are, by no coincidence, the world's biggest emitters.

III. ALTERNATIVE OPTIONS UNDER UNCLOS

To avoid issues with litigation before the ICJ, SIDS could attempt to hold big emitters responsible under the United Nations Convention on the Law of the Sea ('UNCLOS').[20] Together, Article 194(2) and Article 235 impose an obligation on States to ensure that activities under their jurisdiction do not cause damage by pollution to other States and their environment, essentially setting out the customary "no harm" principle.[21] Excepting the United States, other big emitters including China, Saudi Arabia, Canada, and Australia all are parties to UNCLOS.

Importantly, UNCLOS has compulsory dispute resolution mechanisms under Article 287. States may choose between one of the following fora: the ICJ, the International Tribunal for the Law of the Sea (ITLOS), an arbitral tribunal, or a special arbitral tribunal. The ITLOS, a specialised judicial body established by the United Nations, is a promising avenue.

Within the ITLOS, permanent members of the Security Council do not have the same control over the election of judges as they currently do in the ICJ. Rather, members are elected via a secret ballot and equitable geographic distribution is required.[22] Further, members must have specific competence with regards to the law of the sea and are encouraged to use relevant scientific and technical experts in adjudicating disputes.[23] Arguably, this places the ITLOS as a more competent forum for settling a dispute about the effects of climate change on SIDS.

Additionally, as the ITLOS focuses specifically on liability under UNCLOS, there may be greater scope for the expeditious handling of any case, which is crucial given the urgency of climate action. SIDS may also request assistance from the ITLOS Trust Fund in order to receive financial assistance to cover the cost of legal fees. In this way, the pursuit of justice in the ITLOS may not be mutually exclusive with implementing domestic mitigation and adaption strategies.

A further benefit of the ITLOS is that it has the competency to order binding provisional measures.[24] Such measures may be sought by SIDS to halt any irreparable harm being caused

to the environment by excessive emissions before the final judgment. Notably, in 2015, Côte d'Ivoire successfully obtained provisional measures against Ghana for the protection of the marine environment.[25] As a result, Ghana was required to suspend oil exploration and exploitation operations in the area under dispute. While a similar ruling with regards to the harm caused by excessive GHG emissions may be plausible, predicting the level of success remains uncertain, given the more indirect effects of GHG emissions.

Despite the benefits of the ITLOS, all States party to the dispute must agree upon the forum for resolving their dispute. Given the track record of big emitters, this may be unlikely. If an agreement is not reached, an arbitration panel is the default mechanism, precluding access to the ITLOS. Further, China's recent refusal to appear before an Annex VII arbitral tribunal in the South China Sea Arbitration[26] indicates that big emitters may be able to ignore their obligations under UNCLOS. However, as the dispute continued to the merits stage, the tribunal managed to deliver a crucial decision that will likely have enduring international impacts, despite China's rejection of the decision.[27] Therefore, relying upon a treaty, such as UNCLOS, under which States have consented to a form of dispute resolution may be more effective than pursuing contentious litigation in the ICJ.

IV. ADVISORY OPINION

Another alternative is for SIDS to collectively push for an advisory opinion from the ICJ. In order to achieve this, a two-thirds majority in the United Nations General Assembly would be required. Whether this would be achieved is uncertain.[28] In comparison to a contentious case, seeking an advisory opinion is less antagonistic and would face fewer procedural issues. Additionally, complexities surrounding causation and apportioning responsibility could be left to the side. Most importantly, an advisory opinion would not be subject to a veto by China, Russia, or the United States.

While an advisory opinion is non-binding and could not provide compensation for SIDS, it may nevertheless be beneficial. Framing climate change as a pertinent issue of international law may enhance climate cooperation by galvanising the international community into action. In addition, an advisory opinion could establish influential international norms of State behaviour.[29]

However, the effectiveness of such an advisory opinion will depend upon the willingness of the ICJ to take a strong stance on climate change. As highlighted by Koivurova, the ICJ may avoid a radical statement for fear of reducing the international community's trust in the institution.[30] The ICJ's hesitance is reflected in the arguably reserved approach taken in Advisory Opinions on the Unilateral Declaration of Independence in respect of Kosovo[31] and the Legality of the Threat or Use of Nuclear Weapons.[32] Despite this, collectively pushing for an advisory opinion through an organisation such as AOSIS remains a promising pathway to begin holding big emitters responsible.

V. FUTURE OUTLOOK

Overall, litigation is not a panacea and cannot replace the urgent need for stronger national and international regulation of GHG emissions. While courts and tribunals are powerful in solving individual controversies and influencing the creation of new norms, they cannot be relied upon, in isolation, to solve complex policy problems such as climate change.[33] Additionally, a wave of uncoordinated legal cases suddenly being brought by individual States may risk undermining the climate change regime, which is based upon cooperation and negotiation in good faith.[34] As such, adjudication may need to be pursued as a complement rather than a substitute for negotiation.[35]

Nevertheless, it may be worth taking the risks of contentious litigation. Media attention and public support may focus attention on the urgency of climate change issues. In turn, this may lead to an increase in the level of financial support and international assistance provided to SIDS who are on the front-line of climate change.[36] In particular, greater pressure on world leaders may strengthen participation in pre-existing compensation regimes under the UNFCCC such as the Warsaw International Mechanism on Loss and Damage. Although SIDS are vulnerable to being silenced in international affairs, they have nevertheless been "instrumental in the generation of path-breaking environmental solutions"[37] and should continue to lead the way in advocating for strong climate change leadership.

Fundamentally, different forms of action on climate change are not mutually exclusive. In tackling this inherently "wicked"[38] problem, diverse forms of climate action and cooperation are urgently needed at various scales. Ultimately, while action in the ICJ may be ineffective in legally forcing big emitters to reduce their emissions, the threat of litigation, and the attention it brings, can be a powerful incentive for governments to change their behaviour.[39] However, in the long-run, negotiation rather than adjudication may be a more sustainable basis for coordinating a widespread response to climate change. Nevertheless, as big emitters continue to stonewall cooperative attempts by SIDS to address the global climate emergency, SIDS may have no choice but to pursue more controversial and potentially divisive courses of action.

A Critical Evaluation of the Patentability of Medical Diagnostics in Times of Crisis

DADAR AHMADI-PIRSHAHID, IDA TAWIAH, CHERYL HOI TING AU, SAMUEL RABIN, JD III

I. INTRODUCTION

9 March 2020. Iran reported 43 coronavirus deaths in the past 24 hours.[1] Italy locked down after the national death toll exceeded 400.[2] The virus had so far claimed 19 lives in the United States.[3] A critical issue in the United States and other countries was an acute shortage of COVID-19 diagnostic tests.[4] It is in this context that the shell company, Labrador Diagnostics LLC, filed a patent infringement suit against BioFire Diagnostics LLC.[5] The injunction sought would, in effect, have halted the production of much-needed COVID-19 diagnostic tests. After public outrage –'the most tone-deaf IP suit in history'[6] – Labrador insisted that they did not know the defendant produced COVID-19 diagnostic tests and that they would offer royalty-free licensing of their patents for use in COVID-19 diagnostic testing.[7] The outcome of this dispute was favourable to the public interest. However, the issue remains that Labrador Diagnostics' offer of royalty-free licensing was made at their discretion. Will the court of public opinion be enough to protect the public interest? Or does this case highlight a need to re-evaluate the exclusive rights, granted by patent systems, to exploit medical diagnostics both in times of crisis and more generally?

II. PATENTABILITY OF MEDICAL DIAGNOSTICS

A patent system offers innovators a statutory right to monopolise exploitation of their innovation. This system aims to mitigate the mischief of innovation 'free riders'. [8] It is argued that without measures against 'free riders', '[m]arket incentives for investment in invention would consequently be deficient'.[9] However, these measures are limited to what is demarcated as patentable subject matter for the purpose of ensuring that the patent system does not inadvertently operate against the public interest, including by stifling innovation.[10] The High Court of Australia, in *NRDC v Commissioner of Patents*, interpreted patentable subject matter broadly to include any 'artificially created state of affairs of economic significance'.[11] This broad statement in the 1950s has not yet resulted in the exclusion of medical diagnostics.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which was implemented into Australian law in 2013,[12] permits the Member States to exclude diagnostic methods from patentable subject matter.[13] Australia has not yet elected to take this step. However, Australia has legislated against the patentability of humans and 'the biological processes for their generation'.[14] Many diagnostic tests today, including those testing for infectious pathogens such as COVID-19, are predominantly innovative in the genetic materials they use. A consequence is that the patentability of many medical diagnostic tests is dependent on the patentability of genetic materials. The High Court of Australia, in the landmark case of *D'Arcy v Myriad Genetics*,[15] deemed genes simply to be manifestations of information. As information is not patentable subject matter, the HCA held that genes were not patentable. However, medical diagnostics based on such genes and such discoveries were upheld as patentable.[16] Justice Beach, in the Federal Court of Australia, has affirmed the patentability of medical diagnostics based on genetic materials in subsequent decisions including, most recently, Sequenom v Ariosa Diagnostics.[17]

The US patent system employs a common law list of prohibitions, expressed most recently in *Mayo v Prometheus*,[18] on patentable subject matter including a prohibition on 'patenting "abstract ideas" or "nature"'.[19] This particular prohibition on patentability was applied by the majority of the Federal Circuit Court in the case of *Ariosa Diagnostics v Sequenom*[20] to hold the medical diagnostic in question as not patentable. This sits in contrast to the decision in the aforementioned *Sequenom v Ariosa Diagnostics*[21] case to hold that same medical diagnostic as patentable in Australia. Judge Linn, in the minority, reluctantly concurred with the decision of the majority in applying the test developed in *Mayo* but commented that there was "no reason, in policy or statute, why this [...] should be deemed patent ineligible".[22] The patent infringement lawsuit brought by Labrador Diagnostics avoided the issue of the exclusion of genetic materials from patentable subject matter. This is because it pertained to the underlying technology of the medical diagnostic sold by BioFire Diagnostics.[23] Commentators have agreed with Judge Linn's sentiment and recognised the need for legislative intervention to overcome the barrier to patentability posed by the decision in *Mayo*.[24]

III. ALTERNATIVE INCENTIVE SYSTEMS

On the other hand, this may represent an opportunity for the United States to explore incentive systems, other than patents, that can promote research into medical technologies without granting patent monopolies. Associate Professor Lisa Ouellette of Stanford University, suggests that existing structures could be used to adequately incentivise innovation of non-patentable subject matter.[25] Ouellette points out that the question of patentable subject matter has been decided by a utilitarian consideration of the benefit a patent would net if granted.[26] She recognises, however, that many useful innovations relating to genes and computer algorithms, both of which have been excluded from patent protection, are in the position that the 'expected cost to the innovator is greater than the private benefit that can be appropriated without state intervention'.[27] Therefore, there is a gap in the incentivisation of 'socially valuable' innovations.[28] Ouellette argues that non-patent incentives such as direct grants and contracts, innovation prizes, regulatory exclusivity, R&D tax incentives, and other forms of intellectual property are currently being utilised, but not to their full potential, to fill this gap.[29] More recently, in the context of COVID-19 diagnostic tests, Oullette argues policymakers must make use of their 'innovation policy toolkit'[30] as a means of incentivising research and development into diagnostic tests and encourage entry into the COVID-19 testing market itself.[31]

Professor Pogge has criticised existing patent systems as neglecting the interest of the global majority and has proposed an international body, the Health Impact Fund ('HIF'), as an alternative.[32] The HIF would be an international organisation that provides financial incentives on a performance basis, that is, for how many people the innovation helped and to what degree it improved their lives.[33] The HIF seeks to address the perceived bias of current patent systems towards developing innovations useful for those wealthy enough to afford them. While the cause seems noble, the reality is far from practical. The World Health Organisation ('WHO'), an existing international organisation with similar goals, has been plagued with political strife, especially in the recent COVID-19 pandemic.[34] Given that the criterion used by the HIF is strictly utilitarian, the HIF will likely find itself navigating dangerous political territory with wide-ranging ramifications.[35] For example, the current struggle for Taiwan to acquire a seat at the WHO, even during a pandemic, is marred by politics.[36] Critical issues would need to be negotiated between States, including whether a 'first to invent' or 'first to file' priority date should be used. Power imbalances in such negotiations could lead to collateral agreements that are ultimately detrimental to less affluent States, as occurred in negotiations of the TRIPS Agreement.[37]

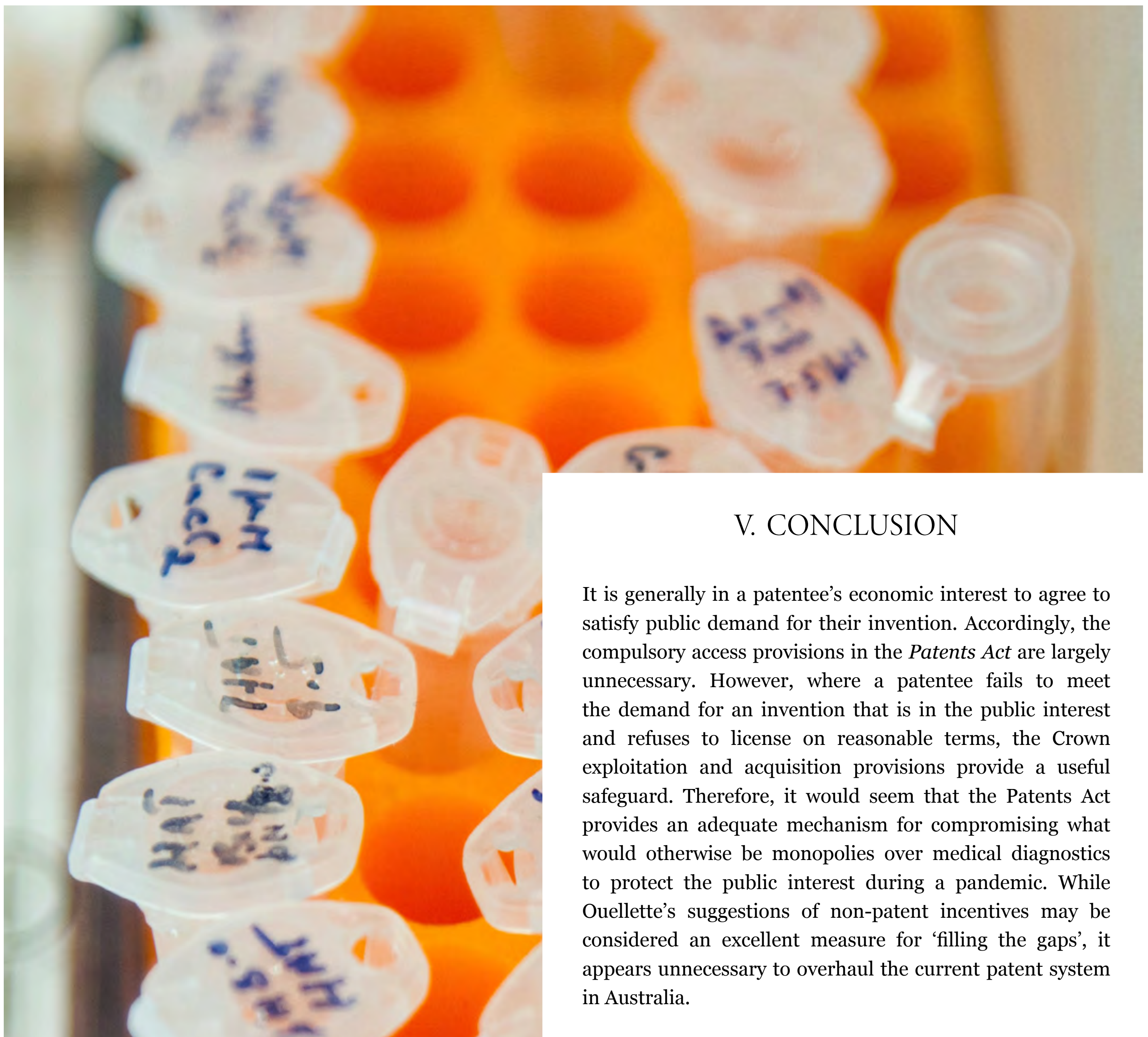
IV. COMPULSORY LICENCING AND CROWN USE

A third and final possibility is a patent system with appropriate limitations to protect the public interest. For better or worse, Australia's patent system generally grants monopolies over medical diagnostics. It could be argued that incentivising pharmaceutical companies to develop innovative medical diagnostics and disclose them in a patent serves the public interest. But what about in times of crisis? Does the system safeguard the public's interest during a pandemic? Arguably, the compulsory access sections of the *Patents Act* ('the Act')[38] provide much-needed protections. The Act provides two central mechanisms for compulsory access to an invention. First, any person may apply to the Federal Court for a compulsory licence to exploit the patented invention. Secondly, the Crown may acquire the patent or exploit the invention for its own use.The Federal Court will grant a compulsory licence when certain conditions are met. These are: [39]

- demand in Australia for the invention is not being met on reasonable terms;
- to meet that demand, authorisation to exploit the invention is essential;
- the applicant has tried for a reasonable period, but without success, to obtain authority from the patentee to exploit the invention;
- the patentee has failed to provide a satisfactory reason for not exploiting their patent to meet Australian demand; and;
- it is in the public interest to authorise the applicant to exploit the invention.

If the applicant is successful, the Court will specify the terms of the licence; that is, how the invention may be exploited.[40] Additionally, the Court facilitates or determines the cost of the licence, which is paid by the applicant to the patentee.[41] This appears to give the public an avenue to protect their interests in times of crisis. However, this process can be very slow and costly. Alphapharm, a pharmaceutical company, has claimed that 'the Australian court system is not an optimal vehicle for the administration of compulsory licensing... Australian courts are very expensive, very slow and lack the necessary powers to mediate quickly and effectively to resolve a patent dispute'.[42] Additionally, the Walter and Eliza Hall Institute of Medical Research noted that the lack of precedent on the current provisions creates uncertainty.[43] Consequently, it is difficult to estimate legal costs and prospects of success. Scott Bouvier, an Australian Intellectual Property lawyer, generally expects a contested compulsory licence application to involve 'fees in the range of $200,000 to $500,000'.[44] The Institute of Patent and Trade Mark Attorneys ('IPTA') and Federation of Intellectual Property Attorneys ('FICPI') contemplate costs potentially exceeding $1 million.[45] In relation to delay, the Act requires that applicants have tried to obtain authority from the patentee for a reasonable time.[46] Moreover, an applicant can only seek the order at the end of the 'prescribed period'.[47] This is three years after the filing of the patent.[48] Consequently, the costs and delay in the compulsory licensing regime restrict the quick exploitation of an invention, especially a recently patented invention.

A viable alternative, which may be quick enough to respond to an emergency, is the Crown Use regime in the *Patents Act*. This regime enables the Commonwealth, a State Government, or a person authorised by the Commonwealth or State to exploit an invention without patent infringement.[49] Under the Crown exploitation provisions, the Crown may use the patent under what is effectively a compulsory licence. This requires, among other criteria, that the invention is exploited for 'Crown purposes'[50] and that the relevant Minister considers that the relevant authority has tried for a reasonable period, but without success, to obtain authorisation to exploit the invention. However, during an emergency, this 'reasonable period' requirement is removed.[51] This regime relieves some of the difficulty under the compulsory licensing mechanism in section 133. For example, it is no longer necessary to demonstrate that Australian demand is unmet, and the process is accelerated during emergencies. Even more potent are the Crown acquisition provisions, which are almost unfettered. By direction from the Governor-General, the Crown may acquire the patent or the invention that is the subject of a patent application.[52] In return, the Crown must pay the patentee an amount determined by the Court or by an agreement between the parties.[53] Notably, it is unnecessary for any emergency to exist. The Crown Use provisions pose difficulties, but those difficulties do not significantly undermine the regime's ability to safeguard the public interest. For example, what purposes are legitimate 'Crown purposes'? The scope of this remains unclear, and consequently, the scope of the Crown's power is unclear. Further, the acquisition provisions should be used carefully because acquisitions significantly affect patent holders' rights. According to the Productivity Commission, 'some inquiry participants cautioned that routine use of the provisions could undermine confidence in the patents system'.[54] Consequently, the provisions should only be invoked in exceptional circumstances, such as public health crises. In 2001, the US and Canadian Governments contemplated invoking analogous powers to exploit a patented treatment for anthrax.[55]



V. CONCLUSION

It is generally in a patentee's economic interest to agree to satisfy public demand for their invention. Accordingly, the compulsory access provisions in the *Patents Act* are largely unnecessary. However, where a patentee fails to meet the demand for an invention that is in the public interest and refuses to license on reasonable terms, the Crown exploitation and acquisition provisions provide a useful safeguard. Therefore, it would seem that the Patents Act provides an adequate mechanism for compromising what would otherwise be monopolies over medical diagnostics to protect the public interest during a pandemic. While Ouellette's suggestions of non-patent incentives may be considered an excellent measure for 'filling the gaps', it appears unnecessary to overhaul the current patent system in Australia.

Unilateral Humanitarian Intervention: Customary or Criminal in the Context of Human Rights Crisis?

APRIL BARTON, BA/LLB IV

I. INTRODUCTION

A crisis is pervasive in public international law. The language and rhetoric of crisis legitimise the quasi-legal and as a result, it features as a cogent part of the global legal vernacular. Unilateral humanitarian intervention ('UHI') is symptomatic of the reciprocity between crisis and internationalism. It is a juncture where the United Nations Security Council, the equivocal nature of custom, and the arbitrary distinctions regarding the rights to collective security and self-defence intersect. The law no longer adheres to strict binaries - combatant and civilian, crisis and peace. In the international legal landscape, where state actors are both the creators and beneficiaries of the law, the ambit of legality is malleable. UHI was particularly pervasive during the 1988 North Atlantic Treaty Organisation's ('NATO') intervention in Kosovo. Was this humanitarian intervention legal, legitimate? Do human rights crises now mandate a violation of territorial sovereignty? It is within the context of UHI that traditional indicia of legalities become frustrated. A crisis compels us to revisit the complex jurisprudential basis for UHI and question its future application.

This article analyses the role of customary international law ('CIL') as an ambiguous instrument of law-making in facilitating UHI. In this context, the article defines UHI as state intervention exercised outside the authority of the United Nations in order to secure human rights in another country.[1] This definition supports a tangible legal alternative to the United Nations for human rights preservation. The general proposition is that nations do not obtain authority to intervene in matters within the domestic jurisdiction of foreign territories.[2] However, state practice has tended to negate this international stance, with states having recourse to UHI to defend their presence in varying conflicts. As such, CIL provides a potential legal justification for the normative operation of UHI. The recent conflicts of Kosovo, Syria and Iraq have led many to seek to locate the legal premise that substantiates foreign intervention.[3] In international law, states exercise self-determination by defining the legal parameters that bind them. Accordingly, the law against UHI reflects the moral-political conclusion that individual states should not be trusted as their own independent legal arbiter.[4] The inherent subjectivity of UHI blurs the distinction between pursuing genuine humanitarian need and consolidating national interests.

II. IS UNILATERAL HUMANITARIAN INTERVENTION EQUIVALENT TO CUSTOMARY INTERNATIONAL LAW?

CIL has broadened the conventional notions of consent in international law-making. At international law, there are four prescribed sources including; treaty, custom, general principles and judicial decisions or notable publicists.[5] Treaties are a primary source of law within a consensual-based international legal order. However, these instruments are often ambiguous, and at times, ineffective construal has led to an increase in reliance on custom. Contrary to treaties, custom challenges the requirement for positivist consent between state parties entering into a binding international agreement. An alternative avenue of international liability arises where a states' obligation is manifested through practice rather than ratification. CIL fundamentally questions international allegiance to consent in the presence of cognisable state practice. In the case of *Nicaragua v United States of America* ('*Nicaragua*'),[6] despite the presence of a multilateral treaty reservation, the Court relied on General Assembly resolutions to determine the ambit of international liability. The United States involvement in Nicaraguan paramilitary activities for 'humanitarian assistance' breached its obligations under CIL.[7] The judgment emphasised the persuasive role of custom in adjudicating international legal disputes between nations – legitimising it as an equally as significant instrument of international law.

A. *Elements of Customary International Law*

The doctrine of custom comprises of two-elements: state practice and opinio juris.[8] The process of establishing a custom proves self-generative. A state can either practice in a manner which seeks to produce law, or purely announce that it does not seek to be bound.[9] It is this process which grants arbitrary discretion to states who obtain the capacity to determine both the existence, parameters and legality of international law. Custom provides a nuanced and less rigid legal interpretation of consent. Subsequently, CIL is being harnessed in the modern legal landscape to create and substantiate international law. The difficulty lies in the fact that the law has developed arbitrary rhetorical conceptualisations of war and peace. In the context of UHI, states attempt to vocalise what constitutes 'humanitarianism' in the pursuit of legality. The practice of humanitarian interference becomes an ethical vocabulary, less about the use of force and more about a justification to do so. As custom becomes an instant law-maker, legality as a measure of legitimacy must be re-considered.

(a) *State Practice*

The first element of CIL is state practice, recognised as conduct that is "widespread, representative and consistent."[10] The vulnerability of state practice lies in the distinction between articulation and action. States often acknowledge that a customary rule is in operation, yet proceed to act on the contrary. This example is particularly cogent in the prohibitions against torture. Despite the ratification of states to the UN Convention against Torture, many continue to commit the act in violation of international mandate. In Nicaragua,[11] the International Court of Justice ('ICJ') held that it was unnecessary for a state to act in "rigorous conformity with the rule" of state practice.[12] In doing so, the Court affirmed their willingness to sacrifice strict compliance of international mandates. State consent has become symptomatic of their ability to create international law whilst simultaneously determine the extent of its application. To posit that state practice must be consistent and representative, yet not oblige extensive conformity, is inherently paradoxical. In the absence of consistent unanimity, it is difficult to reconcile whose voice matters in determining the consent of the state.

State practice substantiates the legal foundation for UHI in legitimising international interference. Subsequently, UHI has become a tool employed in varying conflicts throughout the twenty-first century. An erudite example is NATO's intervention in Kosovo in 1998. The intervention was legally premised on the notion of UHI to prevent crimes against humanity. The events in Kosovo threatened international peace and security, prompting the UN Security Council to act pursuant to a 'collective' mandate. Agreement by the permanent members appeared improbable, and as such it remained preferable to avoid frustration by veto.[13] Thus, NATO acted irrespective of the absence of legal authorisation. The decision to operate outside the scope of international law has led many to fear the indeterminate peripheries of UHI. The intervention in Kosovo witnessed states act without UN Security Council sanction and yet remain unaccountable. In the context of human rights crisis, humanitarian intervention may be pardoned. However, as advocates shift the status of UHI from 'legitimate' to 'legal,' this transcends our acquiescence and compels the international community to recognise its inherent political nature. The legalisation of UHI would provide a 'pretext for abusive intervention'[14] and nourish state-centrism over the international landscape. It is this statist-orientation which reaffirms the authority of the state to afford itself jurisdiction on the premise of humanitarianism.

(b) *Opinio Juris*

Consent becomes increasingly frustrated by the subjectivity of opinio juris. This element of CIL denotes the belief of a state that it is bound to a legal obligation. As a result of its anthropomorphic nature, the concept is vulnerable to varying legal interpretations and political objectives. Opinio juris endows the state with an independent consciousness. The notion of a national consensus in state psychology, in turn, proves a determinant of custom. It is the subjective concept of a state's 'belief' which engenders further ambivalence within the landscape of consent.[15] The practical indeterminacy of opinio juris as evidence of consent, leave civilians inherently vulnerable to political incentives. Accordingly, opinio juris is considered an unreliable determinant of a legal obligation, blurring the distinction between binding and non-binding law. Further, CIL impregnates a false unification between political actors and civilians. As a result, both politicians and populace find refuge under the broad terminology of the 'state'. This fictitious collective identity fundamentally fails to contemplate the fact that states often act contrary to the interests or beliefs of its people. The legal foundations of UHI become contingent upon broad and unconstrained state discretion. This framework has attracted academic criticism regarding the genuine ability for a state to balance national interests against genuine humanitarian need.

The equivocal nature of CIL allures and entices states to practice UHI. Despite the inability for CIL to cultivate clear and consistent precedent, it remains a popular instrument for legal debate and

discourse. This provides foundation for the argument that if UHI is exercised frequently, then why does it fail to be formally legitimised in law?[16] It seems instinctual that the law should respond to the realistic practices of states operating within a globalised and cross-jurisdictional landscape. As the UN has repeatedly failed to adequately respond to humanitarian crisis, it implicitly promotes the notion that states should seek to take independent action in upholding international legal standards. Advocates of UHI find refuge in the ambivalent genealogy of custom, using the law to act in congruence with the perpetually shifting dynamics of the international legal sector. It is within this framework that UHI cultivates discursive support. The international discourse appears less preoccupied with state sovereignty and progressively dictated by the notion of universal

human rights. It is in accordance with this premise that UHI can justify international interference as a globalised effort to combat human rights injustices. In doing so, it elucidates the apparent difficulty of the UN in holding states accountable to these benchmarks.

In this sense, CIL provides an apparatus that can respond to the realistic pace of international legal and political movement. It obtains the authority to legitimise laws that are deemed a 'contemplation of the legal experience of civilised nations' and are 'obvious maxims of jurisprudence.'[17] However, prima facie, there is difficulty in defining the periphery of what is 'obvious' in a context frustrated by varying political mandates. Nowhere does this become more apparent than in the context of UHI. International law has become the taxonomy in which modern war speaks. As a result, 'combat' has become 'self-defence,' and 'war' has become 'intervention'. The purported 'legal experience' that is shared terrain between these civilised states, negates the presence of unique domestic and foreign policy. The mere notion of a 'civilised nation' proves progressively intangible and incapable of visualisation. In the context of Kosovo, collateral damage resulted in superfluous injury and disproportionate suffering for the citizenry. Despite humanitarian aid being used as the reasoning for the intervention, the consequences of military action became pertinent. Consequential human rights violations led advocates to demand feasible compliance with the basic requisites of humanitarian responsibility.[18] Many states assert that their military action falls comfortably within the legal parameters of UHI. However, the limits of these parameters are equivocal and arbitrary. As such, the humanist vernacular of international law frequently mobilises justification for war.

III. 'COLLECTIVE SECURITY': A LEGAL PHENOMENON OR FICTION?

Prescribed in Article 2(4) of the UN Charter, the prohibition on the use of force aims to prevent armed conflict between states. In a post-WWII context, where the objectives and boundaries of war were palpable, the prohibition provided a clear denouncement of engagement in force. However, in our broader political culture, the term 'war' perpetually cultivates novel semantics. Consequently, the justification of military intervention becomes increasingly difficult to contemplate. The 'war on drugs' and 'war on terror' extend the rhetoric scope of conflict. This justifies militaristic action to eliminate enemies that are atypically non-state actors and incapable of identification. It is the discursive danger of declaring 'war' that provides the legal basis for the use of cross-jurisdictional intervention. It has now become difficult to envisage usages of force that could not be justified within the scope of the Charter.[19] As a result, humanitarian elitism has become a strategic military asset in defining what constitutes legally recognised interference.

In order to understand the development of UHI, an examination of war etymology is crucial. Advocates for UHI rely on the exceptions to the prohibition of force, specifically collective security and self-defence. Collective security denotes the laws governing the powers of the Security Council. The UN Charter grants the Security Council a broad mandate to determine the definitional threshold of a breach or threat to peace, and the appropriate international response pursuant to their jurisdictional powers.[20] The legal definitions of 'peace' and 'security' are equivocal and widely contested. These ambiguities accentuate the difficulties in determining the justifications of military intervention. One of the most prominent critiques of UHI is the functional impracticability of pursuing human rights prevention through a necessary and proportionate use of force. [21] States are likely to unreasonably protect their own interests, which engenders legitimate scepticism as to whether the unauthorised military intervention could be determined unilaterally.[22] If a legitimate model of UHI existed, it is idealistic to suggest that it would regulate both international and domestic interests. Historically, it is too often that political partisanship is prioritised over international justice.

Subsequently, international law is both reinforced and undermined by its equivocality. International law rarely speaks with a single voice and often its legitimacy is defined by its beneficiary.[23] The UN can determine when force is a necessary response to restore the global order. It is a consensus within the international legal field that the measures adopted should avoid the use of force. To penalise breaches of civil maintenance, states have the power to sever diplomatic relations or interrupt economic relations with human rights violators.[24] In the circumstances that these non-forceful measures be deemed inadequate, UHI may be considered permissible and necessary in the pursuit of collective security.[25] However, the notion that force is justified in order to restore peace seems oxymoronic. International humanitarian law accommodates for this type of military force by restricting the parameters according to proportionality, in relation to military objective, and necessity concerning consequential damage and loss of life.[26] Two examples that exemplify the inherent difficulties in balancing the competing interests of harm to civilians and humanitarian motives are the US involvement in Afghanistan and Iraq. Each case illustrates collective security as the international legal axiom in legitimising military intervention. This has become evident in opponents of conflict, who deem what is being done is 'illegal.' It is as though when adopting the elitism of legal dialect, the vague territory of international law during a crisis can be understood.

The second, and equally as important exception to use of force is the doctrine of self-defence.[27] The UN Charter prescribes that if an armed attack occurs there is an 'inherent right of individual or collective self-defence,' and permits a state to use force in restoring international peace and security.[28] The issue of self-defence is also frustrated by legal definitions, where what constitutes an 'armed attack' has led to considerable legal controversy. Notably, the UN has provided no legal definition and subsequently left the interpretation of CIL to construe the statutory scope of its operation. In Nicaragua, the ICJ held that it was necessary to distinguish between the gravest forms of force. In doing so, it held the threshold for self-defence was 'instant, overwhelming and leaving no choice of means or moment for

deliberation.'[29] The Oil Platforms[30] case established that any unreasonable or excessive acts of self-defence are impermissible. However, contemporary state practice suggests that a relatively small-scale military attack can trigger Article 51, broadening the scope of force for justified means. [31] The vast indeterminacy of what constitutes an attack is of increasing concern for the transnational realms of cyber, aerial, virtual and artificial intelligence. These uniquely expose individuals to novel forms of victimisation and vulnerability to states abuse and misuse of force.

In the context of UHI, the use of pre-emptive and preventative force as self-defence accentuates the role of state-centrism. In defining the conditions of lawful intercession, a conflation of the concepts of anticipatory self-defence and humanitarian intervention has occurred.[32] A conjugal relationship between these two concepts assumes that UHI serves the purpose of those who may suffer human rights injustice, rather than those who are currently suffering. This distinction suggests that states admittedly refrain from exercising UHI unless it serves their own interests or protection. During the Obama administration, the US Advisor to the Department of State, Harold Koh, defended UHI as a need to 'fashion better law' which operates as a defensive mechanism in response to conflict.[33] Koh's assertion elucidates the issues of defining UHI as a right to force, where the potential humanitarian benefit proves only ancillary to a national mandate. If UHI is predicated on defence, then it is a response to the future needs of their own populace, rather than to those who are at most grave risk of humanitarian crises. Subsequently, UHI proves a mechanism to strengthen the superior states and facilitate the subjugation of the most disadvantaged citizens.

IV. CONCLUSION

Human rights crises are universal. To conceptualise crisis as the basis for international law accentuates the collective predisposition that the law is the natural remedy to injustice. At its genesis, the law is the interpretation of lexicon. In the international landscape, these interpretative nuances become particularly cogent in the context of UHI. The universal understandings of justice become subject to cross-border disputes and multi-jurisdictional meaning. UHI itself is a complex etymological construction. The notion of intervention has now adopted a human rights vocabulary. This foundational basis accentuates the extent to which legal taxonomy can justify the use of force. Individuals should be reluctant to unconditionally accept the validity of international law in sanctioning the use of force. Whilst adequately responding to human rights concerns, international actors should not have recourse to political interests in dictating what defines the humanitarian pursuit.

In international law, the legalisation and legitimisation of UHI substantiate state-centric dominance over humanitarian conflict. It is within the boundaries of CIL and broad treaty interpretation, that states can pursue UHI within the framework of universal aid and human rights justice. Thus, whilst UHI advocates adopt humanist legal vernacular to legitimise their use of force beyond their jurisdictional scope, it effectively broadens state discretion. As a result of this erosion, UHI in international law remains undefined, arbitrary and an intangible legal basis for human rights crisis intervention.

Charitable Advocacy Is More Important than Ever

SAMUEL CHU, BSC/LLB IV*

I. INTRODUCTION

Australian charities have the right to engage in issue-based advocacy for charitable purposes.[1] A unique creation of Australian common law and statute, this right has allowed Australian charities to continue to stand up for positive change and defend the vulnerable and downtrodden. In recent years, both governments and politicians alike have attempted to silence the voice of Australian charities in the political space. However, charities' right to engage in issue-based advocacy must be defended. In a time of crisis, where Australians are suffering from the economic and social consequences of the COVID-19 pandemic, both Federal and State Governments need to stop impeding on issue-based advocacy and ultimately, respect charities' important voice in Australian society.

II. ISSUE-BASED ADVOCACY: THE LAW

A. *The context of 'charity' in Australian law*

Prior to the introduction of the *Charities Act 2013* (Cth) ('Charities Act'), the definition of charity was provided by the common law, which followed the four heads of charity as provided in Pemsel[2] – namely, education, religion, relief of poverty, and "other purposes". Further, it was accepted at common law that charitable purposes needed to be of the public benefit. A charitable purpose was demonstrated to be of the public benefit when it was shown that the general community or a sufficient section of the general community benefited.[3]

Section 5 of the Charities Act provides the statutory definition of 'charity' in Commonwealth legislation. In order to satisfy this definition, an organisation must meet the following criteria: it must have either charitable purposes or incidental purposes, its purposes cannot be considered as 'disqualifying purposes' under the Charities Act,[4] and its purposes must be for the public benefit. Section 12 of the Charities Act provides for the 12 categories of charitable purposes under Commonwealth legislation, which is a reformulation of the Pemsel heads of charity in Australia, with additional purposes added beyond the four Pemsel heads of charity. The new purposes added to the Charities Act, including 'advancing social and public welfare', 'advancing the natural environment' and 'advancing health', have been added to provide a more rounded picture of the scope of charity in Australia.

Organisations seeking charity status under Commonwealth legislation must register under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('ACNC Act').[5] To register as a charity under the ACNC Act, organisations must satisfy the definition of 'charity' in section 5 of the Charities Act.[6] Charities may also seek to register charity 'subtypes'. The fourteen charity subtypes in the ACNC Act include the Charities Act's 12 charitable purposes and two special categories of organisations recognised under Federal taxation law (public benevolent institution and health promotion charity).[7]

B. *Issue-based advocacy in the United Kingdom and New Zealand*

Charities have traditionally not been allowed to engage in issue-based advocacy. In the United Kingdom, *Bowman v Secular Society*[8] highlighted that charities had not been allowed to engage in issue-based advocacy because of the inability to determine the requisite public benefit that it provides. As summed up neatly by Parker LJ:[9]

> *"... but a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift."*

The principle espoused in Bowman remains the current position in the United Kingdom – the United Kingdom's statutory definition of charity, as set out in section 3 of the *Charities Act 2011* (UK), does not include issue-based advocacy as a charitable purpose.[10] Closer to home, New Zealand has not fully adopted a liberal position on issue-based advocacy. Whilst in *Re Greenpeace of New Zealand*, the Supreme Court of New Zealand acknowledged there should be no blanket ban on charities engaging in 'political purposes',[11] subsequent cases have raised questions regarding how public benefit in political advocacy by charities is to be determined in New Zealand. One prominent example of this is *Re Family First New Zealand*, where a Christian advocacy organisation was deregistered (and subsequently denied registration by the High Court of New Zealand) because its purpose of promoting the family unit could not be shown by the High Court to have the required public benefit.[12]

C. *Issue-based advocacy in Australia*

Unlike the United Kingdom and New Zealand, Australia has taken a much more liberal and permissive approach to issue-based advocacy by charities. In *Aid/Watch Incorporated v Federal Commissioner of Taxation* ('*Aid/Watch*'),[13] the majority of the High Court noted that:

> *"... the generation by lawful means of public debate, in the sense described earlier in these reasons, concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in Pemsel."*[14]

The High Court took this position because of the unique nature of Australia's democratic process. The majority acknowledged that the implied freedom of political communication in the Australian Constitution provides charities with the right to engage in communication regarding "matters of government

and politics",[15] which is sufficient to provide the requisite public benefit to the community necessary for issue-based advocacy to be a charitable purpose. Subsequent to the decision in *Aid/Watch*, section 12(1)(l) of the Charities Act provides that "the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country" is a charitable purpose, if this advocacy is in furtherance of another purpose identified as a 'charitable purpose' in section 12 of the Charities Act.[16]

III. ISSUE-BASED ADVOCACY: IN PRACTICE

A. *Threats to charities' right to engage in issue-based advocacy*

In recent years, the right of charities to engage in issue-based advocacy, as provided for by *Aid/Watch* and section 12(1)(l) of the Charities Act, has been under sustained threat from both Federal and State Governments in Australia. Legislative measures and attitudes from regulators and government agencies have fostered an increasing public perception that governments are out to "silence the voice of charities".[17]

(a) *Political donations reform by the Commonwealth*

At the federal level, the Liberal Government introduced the *Electoral Legislation Amendment* (*Electoral Funding and Disclosure Reform) Bill 2018* ('Federal Bill') to combat foreign donations in Australian politics.[18] However, a large number of Australian charities opposed the Federal Bill, because it proposed amendments to the *Commonwealth Electoral Act 1918* (Cth) that would have required charities to register as political campaigners if their electoral expenditure exceeded $100,000 over any of the past four financial years. [19] This reporting requirement would have increased compliance burdens for charities by forcing them to prepare annual returns (disclosing their political expenditure) and meet cumbersome administrative and reporting requirements. In practice, these reforms would have impeded their advocacy for charitable purposes.[20]

Opposition MPs and the charity sector engaged in significant lobbying with the Federal Government to ensure the reforms did not apply to charities registered with the Australian Charities and Not-for-profits Commission ('ACNC'). [21] This lobbying was successful – the Federal Bill, as passed by both Houses, only required organisations to register as political campaigners if their electoral expenditure exceeded $500,000 over any of the past four financial years.[22] After the passage of the Federal Bill, Dr Andrew Leigh MP and Don Farrell stated that "...if [the Liberal Government] had gotten their way, Australia's charities and not-for-profits would have been reeling from yet another Coalition attack on their right to play an active part in our democracy".[23]

(b) *Political donations reform by the States*

The Queensland Government enacted a bill of a similar nature to the Federal Bill. In 2019, the Government proposed the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019* ('Queensland Bill'), which, as initially drafted, provided for two significant reforms that would harm charities. Third parties, including charities, would be required to register under the *Electoral Act 1992* (Qld) if their political expenditure exceeded $1,000.[24] Individuals would also be forbidden from donating to third parties if their donations exceeded $4,000 over four years.[25]

These reforms were met with constructive criticism. Charities expressed concerns about the restricting effect of these proposals on their advocacy, and the Economics and Governance Committee of the Queensland Parliament recommended that the Queensland Bill be amended to prevent charities and not-for-profits from being stifled by onerous donation disclosure requirements.[26] The resulting amendments made to the Queensland Bill to ensure its passage in June 2020 were positive: the donation cap for individuals was scrapped, and amendments were made to the Queensland Bill to lift the political expenditure cap for third parties from $1,000 to $6,000.[27]

The NSW Government's recent passage of controversial political donations reforms in the *Electoral Funding Act 2018* (NSW) ('Electoral Funding Act') were invalidated in *Unions NSW v New South Wales*,[28] after being deemed by the High Court to have breached the Commonwealth Constitution's implied freedom of political communication. Section 29(10) of the Electoral Funding Act restricts the amount that registered third parties, including charities, can spend on an election to $500,000.[29] In contrast, a political party that fields candidates in all 93 Legislative Assembly districts (for example, most major political parties, including Labor and the Liberal/National Coalition) is allowed to spend up to $11,429,700 on the same election.[30] Kiefel CJ, Bell and Keane JJ indicated that the cap on third parties' electoral expenditure was not sufficiently "justified", especially in comparison to the much larger cap available to political parties.[31]

The charity sector supported the invalidation of section 29(10) of the *Electoral Funding Act*. Industry leaders suggested Unions NSW was a win for charities against governments who may be out to silence them financially because of their belief that charities "are inappropriately entering into the political space when they advocate on an issue". David Crosbie, the CEO of the Community Council of Australia, was right to suggest that "… electors should be the main players in any democratic process", and that electors' support for charitable advocacy "can only be a positive for the democratic process".[32]

(c) *Recent events at the ACNC*

In 2017, much of the Australian charity sector expressed concern at the appointment of Dr Gary Johns, a noted critic of charities and their right to advocate, as Commissioner of the ACNC. Prior to his appointment as Commissioner, Dr Johns had publicly criticised charities that engaged in issue-based advocacy in furtherance of their charitable purposes. Dr Johns suggested that the then-Abbott Government needed to abolish the Charities Act "in a way that makes it clear to the High Court that advocacy is not a charitable purpose", and has criticised environmental charities for campaigning against fossil fuels and suggested that these organisations should not benefit from presumptions of public benefit.[33]

In performing his functions as Commissioner, Dr Johns is required under the ACNC Act to have regard to "the unique nature and diversity of not-for-profit entities and the distinctive role that they play in Australia".[34] It is unclear whether Dr Johns factored into account the unique nature and diversity of the not-for-profit sector (including with respect to charities that engage in advocacy) in publicly and openly criticising many Australian charities' advocacy. The concern over Dr Johns' leadership of the ACNC does not appear to have abated over time, even after three years of acting as Commissioner.[35] These actions have arguably cast a shadow over advocacy by charities in Australia, with charities fearful of criticism or scrutiny from the ACNC.

B. *Issue-based advocacy by charities should be protected*

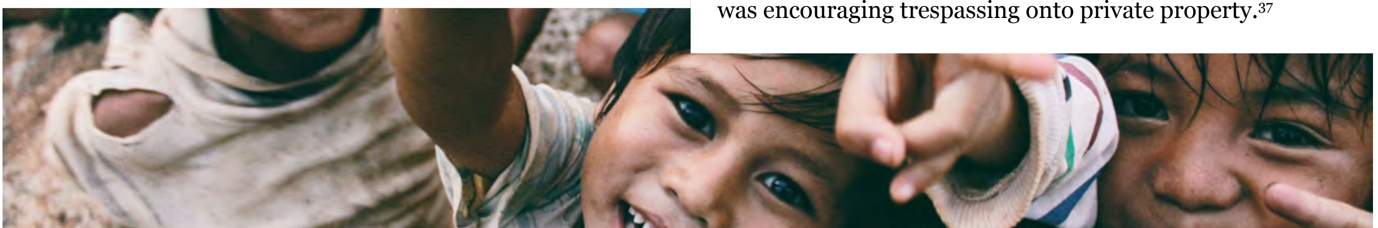
(a) *Two issues*

We should respond to the above attempts by governments to limit charities' right to engage in issue-based advocacy by looking at two opposing perspectives. On the one hand, attempts to limit issue-based advocacy may be borne out of a desire to clarify the boundaries between lawful issue-based advocacy by charities on political issues and unlawful partisan political advocacy by charities. In order to safeguard and strengthen charities' right to advocate, attempts to clarify this distinction should be encouraged. On the other hand, attempts to limit issue-based advocacy may be borne out of a desire to silence civil society, including charities that seek to advance charitable purposes that may run counter to a government's political agenda. This perspective should be opposed.

(b) *Clarification of the scope of advocacy*

Some attempts to limit charities' advocacy may arise from an inherent desire to clarify what charities can lawfully do in advocating in the public space for their causes. Whilst the right to issue-based advocacy by charities was settled in *Aid/Watch* and was codified into a statutory charitable purpose in the Charities Act (with the caveat that charities cannot engage in disqualifying purposes), the paucity of further discussion on this point and the introduction of a statutory caveat have introduced some ambiguity. As a result, Federal and State Governments may seek to crack down on charities' advocacy due to a belief that some charities skirt the boundaries between charitable and disqualifying purposes in their activities.

This belief is arguably a valid point. Governments have every right to be concerned when charities engage in activities that are unlawful or contrary to public policy, or openly promote or oppose political parties. To provide one hypothetical example, if a charity actively opposed or promoted a political party bypassing motions in public to "stand[s] against the Morrison Liberal government", [36] this could be a disqualifying purpose (if shown to be a sustained long-term purpose of the organisation). Governments have notably acted in some instances – in November 2019, the ACNC deregistered Aussie Farms, an animal activist organisation, after a large number of serious complaints from politicians and farmers. These complaints were made because Aussie Farms activists were targeting dozens of farms – the leader of the National Party, Michael McCormack, even suggested that the organisation was encouraging trespassing onto private property.[37]



The ACNC Review Panel (the three-person panel of charity sector leaders tasked with reviewing the ACNC Act in 2018, five years after its implementation) has acknowledged the "ambiguity around the threshold between issues-based advocacy linked to a charitable purpose and activities undertaken to achieve a political purpose that constitutes a disqualifying purpose".[38] The ACNC Review Panel's two recommendations that test case funding should be provided and the Commissioner of the ACNC be resourced to clarify the scope of issue-based advocacy are worth supporting.[39] Any legal test cases should expand the case law in this area because there is limited Australian case law around the Charities Act and *Aid/Watch*.

(c) *Clarifying the scope of advocacy must strengthen charities' right to advocate*

Any attempts to clarify the scope of issue-based advocacy (as discussed above) should not be used to silence charities' right to advocate, but should free charities from constraints, ensuring that they are comfortable with the boundaries of their right to advocate. Many examples of charities' advocacy illustrate how vital charitable advocacy is for Australian society. The loss of this advocacy would be devastating if silenced over time by governments through donations reform or other regulatory changes.

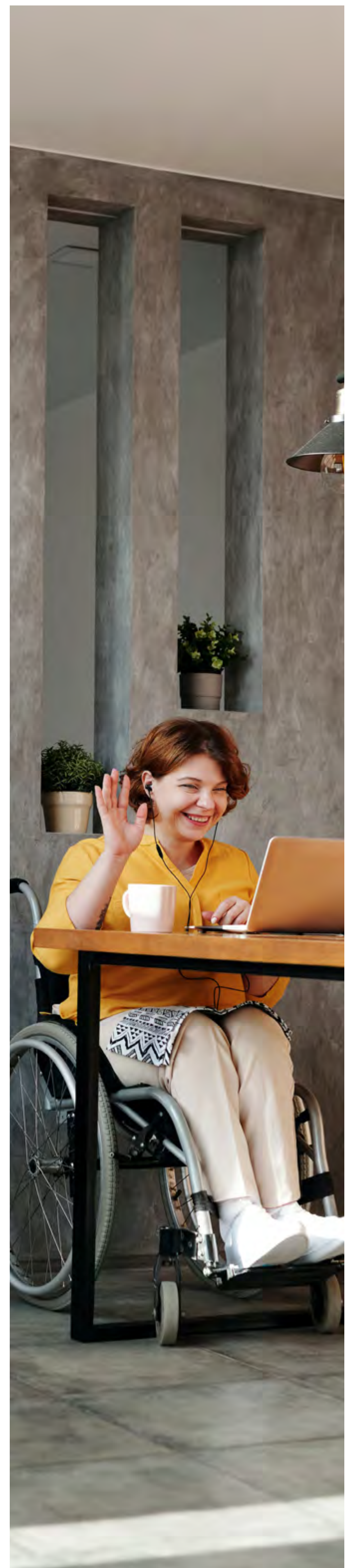
Advocacy by disability rights groups led to the establishment of the National Disability Insurance Scheme.[40] As the Covid-19 pandemic engulfs the world, university students' associations (such as the University of Melbourne Student Union) have stepped up to advocate for more significant government support of university students, including especially-disadvantaged international students. [41] Further, the Australian Council of Social Services has advocated for the Federal Government to take steps to raise the quality of living for lower-income Australians during the Covid-19 pandemic.[42]

Micah Australia, a Christian charity led by Rev Dr Tim Costello that bills itself as "a movement of Australian Christians raising a powerful voice for justice and a world free from poverty",[43] has advocated over time for Christian justice by promoting increased Australian involvement in foreign aid and through an annual 'Voices for Justice' summit, where Christian activists meet with federal politicians to raise a Christian perspective on social issues.[44] Environmental organisations like the Climate Council of Australia and the Australian Youth Climate Coalition have continued to advocate for solutions to mitigate the effects of climate change globally.[45]

Legal test cases should be encouraged, as they would provide "greater clarity and certainty"[46] to the charity sector regarding the scope of its advocacy. However, these cases should not be used to silence charities and completely eradicate their right to engage in issue-based advocacy. Charities are at the front line of disaster and crisis, and should be permitted to engage in advocacy by utilising their positions of experience and expertise in the public arena.

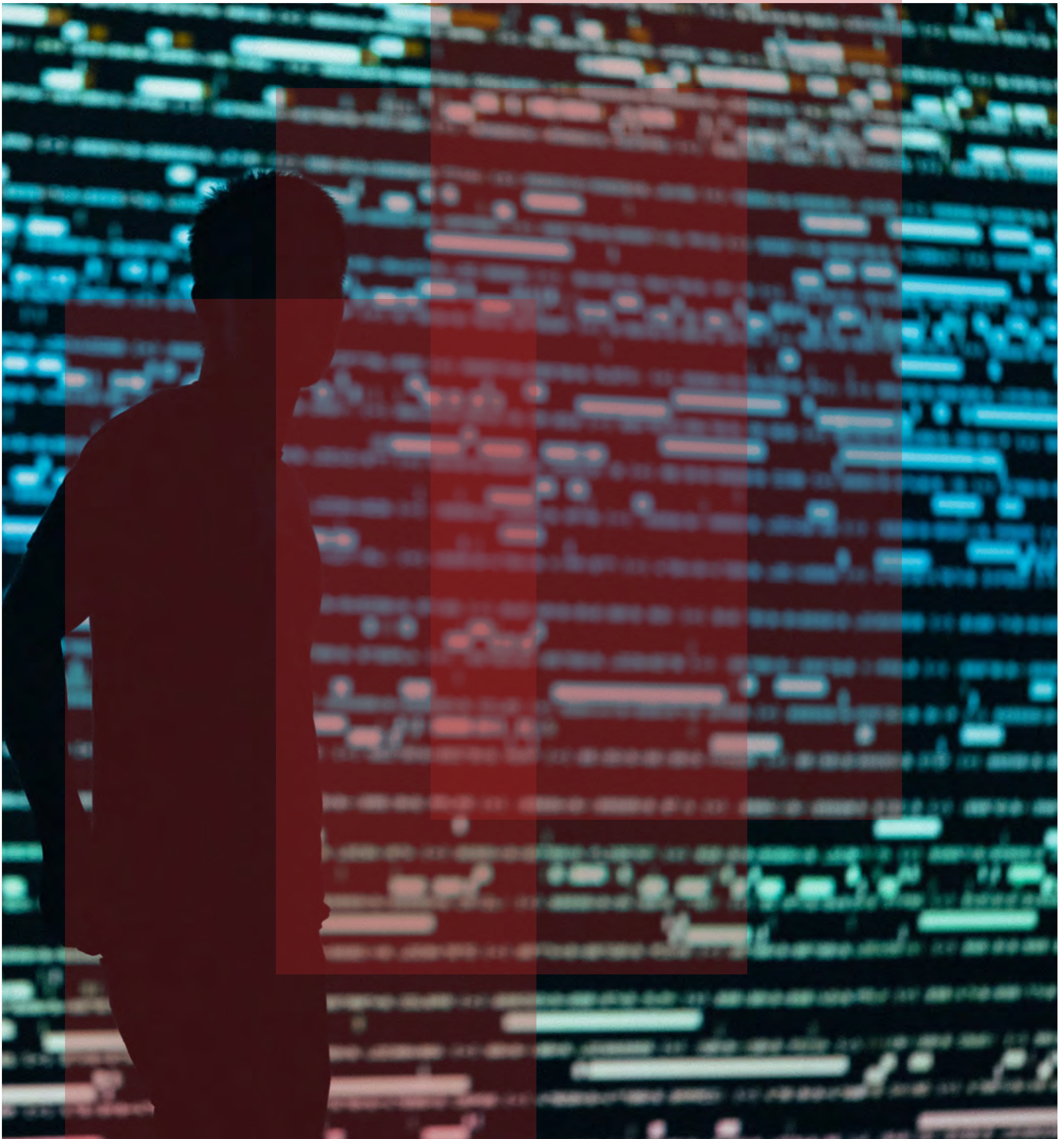
V. CONCLUSION

Australian charities must be allowed to continue to engage in issue-based advocacy. This right, as provided by Australian courts and Commonwealth legislation, allows Australian charities to advocate from their positions of expertise in times of both acute and sustained crisis, in furtherance of important causes. Federal and State Governments should recognise this right and ultimately ensure that the critical voice of the charity and not-for-profit sector in civil society is protected. Any attempts to limit or clarify this right should only be motivated by attempts to clarify the scope of charities' right to engage in issue-based advocacy. This should only serve to empower charities to be comfortable that their advocacy is lawful and are in furtherance of their charitable purposes, allowing them to increase their contributions to civil society.



State of Exception? A Look Into Australia's Increasingly Unexceptional National Security Laws

JASMINE CRITTENDEN, JD I



I. INTRODUCTION

In his book the State of Exception, Italian philosopher Giorgio Agamben argues that, since World War One, democratic governments have invoked crises more and more often, for increasingly diverse reasons, and longer and longer periods. These crises may be officially declared through constitutional emergency powers and emergency acts. Alternatively, they may be politically invoked, then used as a platform for the enactment of exceptional laws. Either way, the result is an expansion of executive powers and significant encroachments upon citizens' rights and freedoms, which, if unchecked, may place the state in an uncertain political and legal position, somewhere between democracy and absolutism.[1]

Where Agamben traces the history of the state of exception in Europe and the United States since the French Revolution, this essay will examine its manifestation in Australia since 9/11. It will argue that the Federal government, without legally declaring a crisis, has repeatedly invoked the crisis of the threat of terrorism and used it as justification for the enactment of national security laws. These laws, touted as tough but temporary measures necessary to the nation's defence, have encroached upon hundreds of citizens' rights and freedoms. So far, neither democratic nor legal checks and balances have been successful in preventing their intensification.

19 years on, Australia's state of exception has become more permanent than temporary, as sunset clauses have been renewed over and over again, and wave after wave of new legislation has come into effect. At the same time, the threat of terrorism has manifested less as a crisis and more as a long-term problem. As such, it is one of the many risks to health and life with which Australia, as a democratic nation, must wrestle, as it weighs up the importance of safety and security with the desire to restrain executive power and protect citizens' rights and freedoms.

II. AGAMBEN'S STATE OF EXCEPTION

The state of exception has been invoked by more and more democratic governments, more and more often, for increasingly diverse reasons, and for longer and longer periods, since World War One.[2] In its original modern incarnation, in a 1791 decree of the French Constituent Assembly, the state of exception gave the military commander exclusive powers to maintain internal order during a war.[3] Since then, however, governments have used it to deal with crises of many kinds. These include natural disasters, as in Italy during the earthquakes of 1908; civil unrest, as in Britain during the union strikes of 1920; economic emergencies, as in Germany in 1923, in France in 1925, 1935 and 1937;[4] and public health crises, as in many nations during the coronavirus pandemic of 2020. Between 1978 and 1986, the number of nations in a state of emergency grew from 30 to 70.[5]

Contained in more than 147 democratic constitutions[6] and many international human rights treaties,[7] triggering emergency powers are a legal response to a crisis. Their justification is that they enable a democratic government to act quickly to protect the nation by seizing extra executive powers and suspending citizens' rights and freedoms. In some constitutions, this occurs according to strict criteria, such as what constitutes a crisis, how it may be invoked, how long it may last and what form emergency powers may take. For example, the Constitution of India, which empowers the President to declare an emergency on the cabinet's advice,[8] limits a qualifying emergency to a physical threat to territory and states that elections may be delayed for up to a year only.[9] It also grants the executive powers to restrict the civil liberties usually protected under article 19, which include freedom of speech, expression, movement and occupation, as well as the right to assemble peacefully and form associations.[10] In other constitutions, emergency powers are more vaguely outlined. For example, the Constitution of the Netherlands gives Parliament the power to determine what constitutes an emergency and declare how it will affect both the distribution of political power and civil liberties.[11]

Over the past century, democratic governments have also expanded their emergency powers beyond the constitution and into legislation, through emergency acts, emergency clauses and national security laws. For example, since 9/11 and its ensuing declaration of the war on terror, the United States has been in a continuous state of crisis, invoked by multiple legal channels. These include the President's declaration, under the National Emergencies Act 1976,[12] of more than 26 ongoing emergencies,[13] and the President's exercise, under the American Constitution, of his powers as Commander-in-Chief.[14] In addition, the USA Patriot Act has narrowed the 4th, 5th and 6th amendments of the Bill of Rights.[15]

For Agamben, the ultimate manifestation of this state of exception is the Guantanamo detainee, created in 2001 by a Presidential military order, which authorised the indefinite detention and trial by military commission of noncitizens suspected of involvement in terrorist activities.[16] Neither a prisoner of war as defined by the Geneva Convention nor a person accused under American law, the detainee is a 'legally unnameable and unclassifiable being', who, on the one hand, is utterly bound by law, but, on the other, unable to access any legal rights.[17] He inhabits 'a no man's land between public law and political fact, and between the juridical order and life'.[18]

III. THE STATE OF EXCEPTION IN AUSTRALIA

Having allied with the United States in its war on terror, the Australian Government has also created a state of exception in response to the crisis of the threat of terrorism. However, this crisis has not been officially declared, nor invoked through the Constitution of Australia or other emergency legislation. Instead, the state of exception has been created, incrementally, by the introduction of national security legislation that is exceptional, in terms of its expansion of executive powers and significant encroachments upon citizens' rights and freedoms. More than 82 such laws have been made since 9/11,[19] constituting an average of one law every seven weeks.[20]

These laws have expanded the executive's powers by expanding the powers of various ministries, law enforcement and intelligence agencies. For example, the Australian Security Intelligence Organisation ('ASIO') has gained powers to question, for up to 24 hours,[21] and detain, for up to a week,[22] any individual, in order to collect intelligence believed important to a terrorism offence.[23] The individual need not be a suspect, and the nature of the intelligence is widely defined, meaning it may extend to 'information about a family member, or a journalist about a source.'[24] While in ASIO's keep, the individual loses the right to silence and, in certain circumstances, the right to contact a lawyer of choice.[25] Should ASIO permit a lawyer, neither that lawyer nor the individual may ask questions, including to find out the reason for the warrant's issue.[26] Plus, if ASIO deems the lawyer disruptive, the lawyer may be removed, and legal professional privilege is restricted, with the only communication allowed between lawyer and subject being that which ASIO can monitor.[27]

Meanwhile, the Australian Federal Police ('AFP') has gained powers to detain individuals preventatively for up to 48 hours, if that detention might help prevent a terrorist attack that could occur within the following 14 days.[28] The AFP also has powers to request control orders, which restrict an individual's movements, where the AFP can demonstrate that these orders are likely to help prevent a terrorist attack.[29] In neither case must the individual be charged with, nor convicted of, an offence, and, although the individual's lawyer may see the court's reasons for issuing the order, they may not see the evidence.[30] Hence, temporarily, both ASIO's detainee and an individual under AFP's control orders, are stripped of many of their legal rights, and, in this, resemble the state of exception experienced by Agamben's Guantanamo detainee, albeit partially and temporarily.

A slew of other national security laws have encroached upon other rights and freedoms. These rights and freedoms include freedom of speech and freedom of the press, both necessary to transparent government and the facilitation of political opposition, without which democracy cannot exist, and recognised as fundamental rights by the Universal Declaration of Human Rights.[31] Anti-terror laws have made a crime of free speech, where that speech advocates terrorism, even it 'does not intend any other person to commit a terrorist act or terrorism offence'.[32] Freedom of the press has taken multiple legislative hits, curbing journalists' ability to handle information relevant to government activities, as well as their ability to protect the confidentiality of their sources. For example, new Journalist Information Warrants allow more than 22 government agencies to access journalists' metadata without journalists' knowledge,[33] while multiple laws prevent journalists from reporting on information that relates to special intelligence agencies and operations. In many cases, exemptions are not provided for reporting in the public interest.[34]

These encroachments extend, too, to freedom of association and freedom of movement. For example, it is now an offence, punishable by up to ten years' imprisonment, to be a member of any organisation that advocates terrorism, even if the individual charged disagrees with the organisation's advocacy.[35] It is also a crime for any Australian merely to set foot in an area determined by the Australian government to be a 'declared area', where that individual does not have a 'valid excuse'.[36]

IV. CHECKS AND BALANCES?

The number and reach of Australia's national security laws indicate that, so far, checks and balances have not succeeded in ensuring the protection of citizens' rights and freedom. In the short-term, checks and balances may be effective in decreasing the severity of particular laws, at the time of their passing. For example, in its initial incarnation, the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth) ('ASIO Amendment Act'), which gave ASIO many of the extraordinary powers outlined above, would have enabled the detention of children as young as ten and prevented detainees from contacting friends or family members. However, following parliamentary debate and examination by many parliamentary committees, the Act was amended.[37]

In the long-term, though, these checks and balances are not so effective. For example, in order to pass the ASIO Amendment Act, the opposition insisted on a three-year sunset clause, aimed to prevent the Act from becoming permanent.[38] However, three years later, the Act was simply re-enacted, with a ten-year clause, despite the recommendation of the Parliamentary Joint Committee on ASIO, ASIS and DSD that it should be limited to five years.[39] At the time of writing, a bill is under consideration which would expand ASIO's powers even further, enabling the agency to gain questioning warrants for the purpose of seeking intelligence, relating not only to terrorism but also espionage, politically motivated violence and acts of foreign interference, and for children as young as 14.[40]

Part of the problem is that, in Australia, potential legal protections of the many rights and freedoms impacted by national security legislation are scattered across multiple acts. There is no explicit protection of particular rights and freedoms at the national level, in either the Constitution of Australia or a bill of rights or a dedicated human rights act. Australia is one of the only liberal democracies in the world lacking such overarching legal protection.[41]

V. NOT SO EXCEPTIONAL?

When, in 2005, Prime Minister John Howard introduced some of the earliest anti-terror laws, he described them as 'unusual but necessary measures… needed to cope with an unusual and threatening situation'.[42] 15 years on, as Parliament considers yet another round of national security laws, it is becoming less and less fitting to describe them as 'unusual'. Any Australian aged 19 years or under has never known anything else. The threat of terrorism, despite having been invoked, politically, as a temporary crisis, is a long-term problem, and the war on terror is one with an impossible goal. This calls for a new approach to legislation, which balances national security with the protection of fundamental rights and freedoms.

Climate Change Related Environmental Displacement in International Law: The Conceptual, Legal and Logistical
John McCrorie, JD II

1 Relevant literature often uses these terms relating to displaced persons in confusing ways; for the sake of clarity, this definition of 'displaced persons has been adopted by this article. For a discussion of this point, see: International Organisation for Migration, *Migration and Climate Change* (International Organisation for Migration Research Series No 31, 2008) 13–15; Camillo Boano, Roger Zetter and Tim Morris, *Environmentally displaced people: understanding the linkages between environmental change, livelihoods and forced migration* (Forced Migration Policy Brief 1, November 2008) 26; Jane McAdam, *Climate Change, Forced Migration and International Law* (Oxford University Press, 2012) 6.
2 International Panel on Climate Change, *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation* (Special Report, 2012) 7, 49, 80, 114; Sarah Opitz-Stapleton et al, *Climate change, migration and displacement: the need for a risk-informed and coherent approach* (Overseas Development Institute Report, 2017) 7–9, 17.
3 Most relevantly, the terminology relating to environmental and climate change related displacement is unhelpfully disjointed in relevant literature. Again, for a discussion of this point, see: *Migration and Climate Change* (n 1) 13–15; Boano, Zetter and Morris (n 1) 26; McAdam (n 1) 6.
4 United Nations Educational, Scientific and Cultural Organisation, 'Migration and inclusive societies', *Glossary: Displaced Person/ Displacement'* (Website, 2017) <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/glossary/displaced-person-displacement>; Denis Ushakov, *Urbanization and Migration as Factors Affecting Global Economic Development* (IGI Global, 2014) 218; International Migration Organisation, *International Migration Law: Glossary on Migration: 'Displaced Person'* (Glossary, 2019) 55.
5 International Labour Organisation, *The access of refugees and other forcibly displaced persons to the labour market* (Background paper and draft ILO guiding principles, 5–7 July 2016) 1; Courtland Robinson, *Risks and Rights: The Causes, Consequences, and Challenges of Development-Induced Displacement* (Occasional Paper for the Brookings Institute, May 2003) 1–2.
6 Courtland Robinson (n 5) 1–2.
7 *International Migration Law: Glossary on Migration: 'Displaced Person'* (n 4) 55.
8 The Government Office for Science in the United Kingdom, *Migration and Global Environmental Change: Future Challenges and Opportunities* (Final Project Report, 2011) 35; Brendan Gogarty, 'Climate-Change Displacement: Current Legal Solutions to Future Global Problems' (2011) 21(1) *Journal of Law, Information and Science* 167, 169–171.
9 For a list of protections offered, see: Jane McAdam and Fiona Chong, *Refugees: Why Seeking Asylum is Legal and Australia's Policies are Not* (UNSW Press, 2014) 17; *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954).
10 For example, for a person to qualify for protection under the *Refugee Convention*, they must have fled or been displaced across State boundaries on the basis of one of the five grounds identified in A1(2). Therefore, a person who has been displaced internally on a ground not identified in A1(2) would be unable to access protections under the *Refugee Convention*. See, *Convention Relating to the Status of Refugees* Art 1(2).
11 International Organisation for Migration, *Environment and Climate Change: Assessing the Evidence* (Report, 2009) 19; International Organisation for Migration, *Migration, Environment and Climate Change: evidence for policy*: *'environmentally displaced persons'* (Glossary, 2014) 13.
12 Such a point will be discussed at length in part two, however, for a general discussion on the lack of legal protections see generally: McAdam (n 1).
13 See generally: International Panel on Climate Change, *Climate Change 2014 Synthesis Report: Summary for policy makers* (Synthesis Report, 2014).
14 Ibid 7–10, 37; International Panel on Climate Change, *Climate Change 2007: The Physical Science Basis* (Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Chang, 2007) 8-9. For a report specifically focusing on Australia, see generally: National Centre for Atmospheric Research, *Severe Weather in a Changing Climate* (Report, November 2019).
15 *Migration and Climate Change* (n 1) 11.
16 McAdam (n 1) 3–4.
17 *Migration and Climate Change* (n 1) 11–12.
18 This is not to imply that no other factors are relevant to the dispute, only that these three in particular are relevant to this article.
19 McAdam (n 1) 3.
20 *Migration and Climate Change* (n 1) 11–12; see also: International Panel on Climate Change, *Climate Change 2007: Impacts, Adaptation and Vulnerability: Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007) 365.
21 McAdam (n 1) 25.
22 Ibid 24.
23 *Climate Change 2007: The Physical Science Basis* (n 14) 8–9.
24 *Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaption* (n 2) 127.
25 Though, as noted by the IPCC in 2012, 'it may be possible to make an attribution statement about a specific weather event by attributing the changed probability of its occurrence to a particular cause'. See: Ibid.
26 For a discussion of causation in international refugee law, see: James C Hathaway, 'The Causal Nexus in International Refugee Law' 2002 32(2) *Michigan Journal of International Law* 207, 208–209.
27 McAdam (n 1) 49.
28 *Environment and Climate Change: Assessing the Evidence* (n 11) 19; *Migration, Environment and Climate Change: evidence for policy*: *'environmentally displaced persons'* (n 11) 13.
29 For example, in 2019 there were 2,000 disasters that displaced approximately 24.9 million persons. Most of these displacements were caused by tropical storms and monsoons in South Asia, East Asia and the Pacific. See, Migration Data Portal, 'Environmental Migration' (Website, 10 June 2020) <https://migrationdataportal.org/themes/environmental_migration>.
30 Though, this would not resolve all issue relating to causation. Under the definition used by the IMO, environmental pressure must amount to a 'major cause' of displacement, meaning a displaced person would need to establish a significant degree of causation between an identifiable environmental pressure and subsequent movement.
31 Samuel B Woldemariam, Amy Maguire and Jason von Meding, 'Forced Human Displacement, the Third World and International Law: a TWAIL perspective' 2019 20(1) *Melbourne Journal of International Law* 248, 261.
32 Such as refugees, stateless persons and those eligible for complementary protection. For further discussion of this point, see McAdam (n 1) 1.
33 United Nations High Commissioner for Refugees, *High Commissioner's Dialogue on Protection Challenges: Breakout Session 1: Gaps in the International Protection Framework and its Implementation* (Report by the Co-Chairs, 8–9 December 2010) 3.
34 *Convention Relating to the Status of Refugees*; *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).
35 For a list of protections offered see: McAdam and Chong (n 9) 17; *Convention Relating to the Status of Refugees*.
36 Ibid Arts 31, 32.
37 Othering & Belonging Institute, *Climate Refugees: the Climate Crisis and Rights Denied* (Research Report, December 2019) 11; Intergovernmental Panel on Climate Change, *Special Report on the Ocean and Cryosphere in a Changing Climate* (Special Report, 25 September 2019) 323–410.
38 *Convention Relating to the Status of Refugees*.
39 This requirement is expressed in the definition of 'refugee' under the *Refugee Convention*. It should be noted that domestic interpretations of 'persecution' vary between jurisdictions. While some common themes exist between these definitions, an explanation provided by Australian courts in *Minister for Immigration, Multicultural and Indigenous Affairs v Kord* stated it involves 'the conduct of the persecutor and the effect that conduct has on the person being persecuted'. See, *Minister for Immigration, Multicultural and Indigenous Affairs v Kord* (2002) 125 FCR 68; Hugo Storey, 'What Constitutes Persecution? Towards a Working Definition' (2014) 26(2) *International Journal of Refugee Law* 272, 272–285; *Convention Relating to the Status of Refugees* Art 1(2).
40 McAdam (n 1) 41–42.
41 Jessica B Cooper, 'Environmental Refugees: Meeting the

Requirements of the Refugee Definition' (1998) 6 *New York University Environmental Law Journal* 480, 502; See generally, Christopher M Kozoll, 'Poisoning the Well: Persecution, the Environment, and Refugee Status' (2004) 15 *Colorado Journal of International Environmental Law and Policy* 271.

42 Furthermore, while environmental pressures can cause the non-realisation of rights (e.g. not being able to access food or water in a locality), it must be further established that an element of discrimination is evident before non-realisation can amount to a violation of a right on the basis of persecution. For further discussion, see McAdam (n 1) 43–44.

43 While it may be arguable that those affected by climate change in this manner could be classified as a particular 'social group', this has not received legal recognition. *Convention Relating to the Status of Refugees* Art 1A(2).

44 Consequently, the *Refugee Convention* does not contemplate or recognise environmental harms as persecution. However, there are some limited circumstances that may serve as grounds for arguing persecution. For example, it has been suggested that the deliberate withholding of aid to victims of natural disasters on the basis of one of the five *Convention* grounds may amount to persecution. For a discussion of these point and further examples, see McAdam (n 1) 46–47; *Convention Relating to the Status of Refugees* Art 1(2).

45 McAdam (n 1) 2.

46 Ibid 5.

47 Ibid 16.

48 The inability of 'climate refugees' to access State protection has been established through a range of cases from Australia and New Zealand. For Australian cases, see: *1004726* [2010] 845 RRTA; *0907346* [2009] 1168 RRTA; *N00/34089* [2000] 1052 RRTA. For New Zealand cases, see; *800859* [2015] NZIPT; *800517-520* [2014] NZIPT; *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* [2014] NZAR 688.

49 McAdam (n 1) 52.

50 United Nations Human Rights Committee, *General Comment No 15, The position of aliens under the Covenant,*
UN Doc CCPR/C/74/CRP.4/Rev (11 April 1986) para 5.

51 Jane McAdam identifies this in similar terms. See, McAdam (n 1) 53.

52 Ibid 52–82.

53 *Universal Declaration of Human Rights* (adopted 10 December 1948) UNGA res 217A (III); *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; *Convention on the Rights of the Child* (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3.

54 United Nations Commission on Human Rights, *Human Rights and Extreme Poverty,* UN Doc E/CN.4/RES/2005/16 (14 April 2005) para 1(b).

55 The United Nations Human Rights Committee has stated this principle in broad terms, observing that Article 2 of the *International Covenant on Civil and Political Rights* regarding State compliance 'entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm', especially in circumstances where Articles 6 or 7 may be violated. See, United Nations Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 12; *International Covenant on Civil and Political Rights.*

56 Judge Weeamantry in this case noted that the environment is 'a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] … for numerous human rights such as the right to health and the right to life itself'. See, *Case Concerning the Gabčikovo-Nagymaros Project* (Hungary v Slovakia) (Judgement) [1997] ICJ Rep 7, 91 (Separate Opinion of Judge Weeramantry) section VII.

57 In other words, this means that the effects of climate change in depriving persons access to necessities such as food, water and shelter will not be regarded as falling within the scope of the 'right to life'. This is important because – if it is not relevant to the right to life – then a State is under no obligation to not refoul a person by sending them back to circumstances where they will not be able to access minimum essentials due to environmental pressures. For further discussion on this point see, McAdam (n 1) 59.

58 Ibid 54.

59 International Committee of the Red Cross, *What is International Humanitarian Law?* (Advisory Service on International Humanitarian Law Report, July 2004) 1–2.

60 Article 49 of the *Fourth Geneva Convention* and Article 17 *Additional Protocol II* prohibits the deportation or displacement or persons and civilians from their territory. However, these prohibitions can be overridden by imperatives relating to military operations and the safety of populations. See, James Cantor 'Does IHL Prohibit the Forced Displacement of Civilians during War' (2012) 24(4) *International Journal of Refugee Law* 840, 841; *Geneva Convention relative to the Protection of Civilian Persons in Times of War,* opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) Art 49; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the of Victims of Non-International Armed Conflicts,* opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) Art 17.

61 Article 55 of the *Protocol I* prohibits the use of 'methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'. See, James Cantor 'Does IHL Prohibit the Forced Displacement of Civilians during War' (2012) 24(4) 840, 841; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978), Art 55.

62 If deliberate environmental damage were of such an extent that it displaced a population, the act which caused the damage would likely be captured by the environmentally focused prohibitions in international humanitarian law. Further legal instruments that would reinforce this point would include Article I(1) of the *Environmental Modification Convention* and the seventh preambular paragraph of the *Chemical Weapons Convention*; *The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, opened for signature 18 May 1977, 1108 UNTS 151 (entered into force 5 October 1976); *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, opened for signature 13 January 1993, 1975 UNTS 45 (entered into force 29 April 1997).

63 Aurelie Lopez, 'The protection of environmentally-displaced persons in international law' 37(2) *Environmental Law* 165, 367.

64 Under Article 7(1)(d) of the *Rome Statute*, the '[d]eportation or forcible transfer of population' amounts to a crime against humanity when 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack'. Furthermore, Articles 8(2)(a)(vii) and (b)(viii) renders the '[u]nlawful deportation or transfer or unlawful confinement' and the 'transfer … by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory' a war crime. *The Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) Art's 7(1)(d), 8(2)(a)(vii), 8(2)(b)(viii).

65 Under, Article 8(2)(b)(iv) renders the 'long-term and severe damage to the natural environment which would clearly be excessive' relative to the 'overall military advantage' a war crime. The displacement of a population – or damage to the environment – must nevertheless be part of 'a large-scale commission of such' activities. Similar to Article 55 of *Protocol I*, such a prohibition does not afford a direct protection to environmentally displaced persons, but it can be understood as encouraging a reduction of environmental destruction which would prevent instances of environmental displacement. *Rome Statute*, Art 8(2)(b)(iv); *Additional Protocol Relating to the Protection of Victims of International Armed Conflicts*, Art 55.

66 *Rome Statute.*

67 Refer again to the provisions referenced above. See, Francois Gemenne and Pauline Brucker, 'From the Guiding Principles on Internal Displacement to the Nansen Initiative: What the Governance of Environmental Migration Can Learn from the Governance of Internal Displacement' (2015) 27(2) *International Journal of Refugee Law* 245, 262.

68 Daniel Bodansky, Jutta Brunnee and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017) 11.

69 Ibid 10. *United Nations Framework Convention on Climate Change*, opened for signature 19 June 1993, 1171 UNTS 107 (entered into force 21 March 1994); *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005).

70 Inter-Agency Standing Committee, *Climate Change, Migration*

and Displacement: Who will be affected? (Working paper submitted by the informal group on Migration/ Displacement and Climate Change of the IASC, 31 October 2008) 1.
71 United Nations Commission on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Human Rights, Mass Exoduses and Displaced Persons —Addendum: Guiding Principles on Internal Displacement*, 54th sess, Provisional Agenda Item 9(d), UN Doc E/CN.4/1998/53/Add.2 (11 February 1998) Principles 5–9.
72 *Guiding Principles on Internal Displacement* Principles 10–23.
73 Ibid Principles 24–27.
74 Ibid Principles 28–30. To further understand how the *Guiding Principles on Internal Displacement* are relevant to the environmentally displaced, see Internal Displacement Monitoring Centre, 'Guiding Principles on Internal Displacement' (website, 2019) <https://www.internal-displacement.org/internal-displacement/guiding-principles-on-internal-displacement>.
75 McAdam (n 1) 5.
76 *Organisation of African Unity: Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force 20 June 1974) ('Kampala Convention'). See also, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, opened for signature 23 October 2009, 52 ILM 400 (entered into force 6 December 2012).
77 *Kampala Convention* Art 1(2).
78 Allehone Mulugeta Abebe, *The Kampala Convention and Environmentally Induced Displacement in Africa* (Report of the OM Intersessional Workshop on Climate Change, Environmental Degradation and Migration, 2011) 2.
79 These provisions have been amended or appealed in recent years. For more of a discussion on this point, see Thea Philip, 'Climate Change Displacement and Migration: an Analysis of the Current International Legal Regime's Deficiency, Proposed Solutions and a way Forward for Australia' (2018) 19(2) *Melbourne Journal of International Law* 648; *Aliens Act* 2005 (Sweden) Ch 4 s 2; *Aliens Act* 2004 (Finland) s 88A(1).
80 Other potentially relevant instruments would include the *Global Compact for Safe, Orderly and Regular Migration* and the *Global Compact on Refugees*. See, *Global Compact for Safe, Orderly and Regular Migration*, GA Res 73/195, UN GAOR, 73rd sess, Agenda Items 14 and 119, UN Doc A/RES/73/195 (11 January 2019, adopted 19 December 2018); United Nations High Commissioner for Refugees, Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees, UN GAOR, 73rd sess, Supp No 12, UN Doc A/73/12 (Part II) (2 August 2018).
81 Kaldor Centre, 'What are the Global Compacts?' (Website, 23 January 2019) <https://www.kaldorcentre.unsw.edu.au/publication/2018-global-compacts-refugees-and-migration>.
82 Though it should not be inferred from this that these instruments are not relevant in a domestic setting. For example, in New Zealand advice was given by Crown Law to the National Cabinet regarding the legal relevancy of the *Global Compact* on Migration, stating that '[t]he Compact is not directly enforceable in domestic legal proceedings. Courts may be willing, however, to refer to the Compact and to take the Compact into account as an aid in interpreting immigration legislation or policy, especially if this is not clear'. See, Crown Law and Minister of Foreign Affairs and Trade, 'Global Compact for Safe, Orderly and Regular Migration' (Letter, 17 December 2018); *Global Compact*. For a discussion of the 'soft law' status of these instruments see also, Woldemariam, Maguire and von Meding (n 31) 251.
83 This could include an amendment to the actual text of the *Refugee Convention* to make its language broader or it could include the judicial reinterpretation of terms such as 'persecution' to broaden the scope of the definition of refugee. For example, Brooke Harvard has suggested that the definition of a refugee could be expanded through consideration of concepts located in international human rights law to increase the scope of 'persecution' to include human rights abuses – noting that 'Such an expanded definition of persecution would embody those persons forced to migrate as a result of root environmental causes such as natural disasters, development or environmental degradation, thus offering international protections for [environmentally displaced persons]'. See Brooke Harvard, 'Seeking Protection: Recognition of Environmentally Displaced Persons under International Human Rights Law' (2007) 18(1) *Villanova Environmental Law Journal* 65, 79.
84 McAdam (n 1) 52–78.
85 For example, Laura Westra argues that 'eco-criminals' (i.e. those contributing to anthropogenic climate change) are engaged in activities of such a widespread nature that they could amount to crimes against humanity and therefore b captures by international criminal law. Laura Westra, *Environmental Justice and the Rights of Ecological Refugees* (Earthscan, 2009) 105–174.
86 A suggestion of this nature has been reflected in the Cancun Agreements of 2010 that invited all parties to undertake 'measures to enhance understanding, coordination and cooperation related to national, regional and international climate change induced displacement, migration and planned relocation'. For further discussion on this point, see United Nations High Commissioner for Refugees, *Summary of Deliberations on Climate Change and Displacement* (Report, April 2011) 3; *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention,* Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1 (15 March 2011) para 14(f).
87 Suggestions relating to this solution have included the creation of a novel, international legal instrument that specifically addresses climate change related displacement (i.e. 'hard law'). The creation of such a treaty has been criticised, however, on the basis of its predicted ineffectiveness (i.e. some migratory law authors believe international consensus forming would be prohibitively difficult). Consequently, the alternate suggestion of creating 'soft law' instruments has been advocated for (e.g. instruments such as the *Guiding Principles on Internal Displacement*). For further discussion on these points, see: Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, UN Doc PPLA/2011/03 (May 2011) 55–56; Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UN Doc PPLA/2012/01 (February 2012) 71; *Guiding Principles on Internal Displacement.*
88 While an exhaustive model of such treaties and resettlement agreements will not be presented by this article, it is suggested that the following principles would offer direction: (i) identifying at-risk populations and establishing which states require assistance and which states can provide assistance, (ii) recognising that proactive approaches to resettlement will be more effective and desirable to both assisted and assisting states, (iii) providing preferential access to at-risk populations for existing and novel migration pathways, (iv) adopting repatriation programs that encourage safe returns to countries of origin, (v) acknowledging that state responsibilities will be moderated by factors such as size, wealth and number of displaced persons already resettled.
89 *Kampala Convention*.
90 See the first section that discussed the conceptual difficulties in establishing a causal connection between anthropogenic climate change and specific instances of displacement.
91 Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches*, UN Doc PPLA/2012/01 (February 2012) 71.
92 The difficulties in forming an international consensus over the content of binding international law has been recognised as a major barrier to the protection of vulnerable populations; environmentally displaced persons are no exception to this. For further discussion on this point, see: ibid. Furthermore, for examples of why 'regional sensitivity' may be important consider, for example, the differing climatic pressures in (i) the Pacific Island states of Tuvalu and Kiribati in requiring assistance in managing rising sea-levels, (ii) South Asian states such as Bangladesh that will require assistance with coastal flooding, and (iii) states in central-northern Africa such as Chad that will require support in managing continuing desertification. For a further discussion on these points, see, *Special Report on the Ocean and Cryosphere in a Changing Climate* (n 37) 323–410; Mathew Hauer et al, 'Sea-level rise and human migration' (2020) 1 *Nature Reviews Earth & Environment* 28, 28-39; United Nations Economic and Social Council, *African Review Report on Drought and Desertification*, UN Doc E/ECA/ACSD/5/3, 5th Comm (25 October 2007).
93 Inspiration for pre-emptive schemes of this nature could be derived from the migration pathways established by Australia and New Zealand for citizens of Pacific Island States. Between 2006 to 2014, Australia operated a scheme that enabled 90 students from Kiribati to train as nurses at an Australian university and concurrently increased their chances of a permanent visa. Furthermore, New Zealand has operated a program (the Pacific Access Category) which has provided residency annually to citizens of Fiji, Tonga, Tuvalu and Kiribati – those island States identified

as being 'at risk'. For a further discussion of this point, see Jane McAdam, 'Should I stay or should I go' (2017) 32 *Law Society of NSW Journal* 36, 39.

94 For example, during the 1970s-90s, the 'Comprehensive Plan of Action for Indo-China Refugees' created durable solutions for relocating approximately 700,000 Vietnamese, Cambodian and Laos residents – with major state parties (including United States, Canada, Australia and a selection of European states) actively participating. Therefore, there is precedent for widespread resettlement arrangements. This being said, a greater number of people are predicted to be displaced by the effects of climate change, and it is likely that a large number of States will experience displacement events simultaneously. For further discussion on these points, see Volker Turk and Madeline Garlick, 'From Burdens and Responsibilities to Opportunities: The Comprehensive Refugee Response Framework and a Global Compact on Refugees' 28 (2016) *International Journal of Refugee Law* 656, 666– 668; Nicholas Stern, The Economics of Climate Change: the Stern Review (Cambridge University Press, 2007) 56.

95 Examples of such preventive and mitigatory include pre-emptively moving of 'at-risk' populations and developing shelters in response to natural disasters such as cyclone shelters. Bangladesh has taken measures such as these. See generally, Chandan Roy and Rita Kovodanyi, 'The current cyclone early warning system in Bangladesh: Providers' and receivers' views', (2015) 12 *International Journal of Disaster Risk Reduction* 185.

96 For example, the Australian Department of Home Affairs describes identity as a 'key part of the immigration process' and that the provision of 'false' or 'bogus' documents can be fatal to a request to migrate or seek protection. Also consider the *Migration Amendment (Protection and Other Measures) Bill* 2014 which created grounds to refuse a protection application where an applicant fails to establish their identity. See, Department of Home Affairs, 'Meeting our requirements' (website, 11 November 2018) <https://immi.homeaffairs.gov.au/supporting/Pages/Identity-requirements.aspx>; Department of Home Affairs, 'Identity requirements for protection visa applicants' (website, 21 March 2019) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/protection-866/identity-requirements>; *Migration Amendment (Protection and Other Measures) Bill* 2014 (Cth).

97 Kristian Hollins, 'Comparative international approaches to establishing identity in undocumented asylum seekers' (Migration and Border Policy Working Paper No 8, April 2018) 2.

98 For example, s 106 of the Canadian *Immigration and Refugee Protection Act* makes the lack of identity documents a mandatory consideration for the Refugee Protection Division. See generally, ibid; Walter Kälin and Nina Schrepfer, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc PPLA/2012/01 (December, 2011) 38; *Immigration and Refugee Protection Act*, SC 2001, s 106.

99 See generally, Hollins (n 97) iv.

100 Such a feature of the immigration process can disproportionately affect particular groups of people. For example, the minority group in Afghanistan known as the Hazara are often unable to access reliable identity documents, with the most prevalent document (the taskera certificate) lacking a standard format and modern security features. See, Attorney-General's Department, *National Identity Proofing Guidelines* (Report, 2016) 7; Hollins, (n 97) 2–5.

101 International Organisation for Standardisation, *Information Technology: 'biometrics'* (Glossary, 2017).

102 International Organisation for Migration, *IOM and Biometrics* (Report, November 2018) 3.

103 This 'reactive' feature is common to some of the major biometric collection programs that relate to refugees. For example, the Biometric Identity Management System operated by the United Nations High Commissioner for Refugees uses biometric technology in relation to forcibly displaced persons across the globe. Such a system is used reactively, however, meaning the displacing events occurs before the entry of biometric data. See: United Nations High Commissioner for Refugees, *Biometric Identity Management System: Enhancing Registration and Data Management* (Report, 2020) 1.

Identity Crisis: The Public Listing of Law Firms

Wendy Hu, BCom/LLB IV

1 James R. DeBuse, 'Opening at $25 1/2 is Big Firm U.S.A.: Why America May Eventually Have a Publicly Traded Law Firm, and Why Law Firms Can Succeed Without Going Public' (2008) 34(1) *The Journal of Corporation Law* 320.

2 Chief Justice Murray Gleeson, 'Are the Professions Worth Keeping?' (Speech, Greek-Australian International Legal & Medical Conference, 31 May 1999)

3 Milton Regan, 'Law Firms, Ethics, and Equity Capital: A Conversation' (Report, Georgetown University Law Center, The Center for the Study of the Legal Profession, 2007) 3 ('A Conversation').

4 Gleeson (n 2).

5 Thomas R. Andrews, 'Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?' (1989) 40(3) *Hastings Law Journal* 602.

6 *Legal Profession Act 2004* (NSW) (repealed).

7 Christine Parker, 'Law Firms Incorporated: How Incorporation Could and Should Make Law Firms More Ethically Responsible' (2004) 23(2) *University of Queensland Law Journal* 347.

8 John Littrich and Katrina Murray, Lawyers in Australia (The Federation Press, 4th ed, 2019) 249-294.

9 Ibid.

10 Justin D. Petzold, 'Firm Offers: Are Publicly Traded Law Firms Abroad Indicative of the Future of the United States Legal Sector?' [2009] (1) *Wisconsin Law Review* 79-88.

11 Edward S. Adams and John H. Matheson, 'Law Firms on the Big Board?: A Proposal for Nonlawyer Investment in Law Firms' (1998) 86(1) *California Law Review* 39.

12 Arthur T. Farrell, 'Public Interest Meets Public Ownership: Pro Bono and the Publicly Traded Law Firm' (2008) 21(3) *Georgetown Journal of Legal Ethics* 732.

13 Christine Parker, 'An Opportunity for the Ethical Maturation of the Law Firm: The Ethical Implications of Incorporated and Listed Law Firms' in Kieran Tranter (ed), Reaffirming Legal Ethics (Routledge, 2010) 102.

14 Ibid.

15 Ibid.

16 Milton Regan, 'Taking Stock' *The American Lawyer* (New York, 1 August 2007) 1 ('Taking Stock').

17 The 2020 American Lawyer 200 Elites: RPL, Profits and Value (Web Page, 18 May 2020) <https://www.law.com/americanlawyer/2020/05/18/the-2020-am-law-200-elites-rpl-profits-and-value/?slreturn=20200719072917>.

18 Brendan Wright, 'Incorporated Law Firms: The Practical and Ethical Considerations' [2007] (2) *Auckland University Law Review* 14.

19 Adams and Matheson (n 11) 16.

20 Paul A. Grout, 'The Clementi Report: Potential Risks of External Ownership and Regulatory Responses' (Working Paper No 5/135, The Centre for Market and Public Organisation, University of Bristol, July 2005) 14.

21 Steven Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics—An Australian Viewpoint' [2001] (34) *Vanderbilt Journal of Transnational Law* 1208.

22 Cindy Alberts Carson, 'Under New Mismanagement: The Problem of Non-Lawyer Equity Partnership in Law Firms' (1994) 7(3) *Georgetown Journal of Legal Ethics* 619.

23 Mark (n 21) 1208.

24 Grout (n 20) 15.

25 Adams and Matheson (n 11) 35.

26 Ibid.

27 Regan, *Taking Stock* (n 16) 1.

28 *Legal Profession Act 2004* (NSW), s 47E(3).

29 Christine Parker, Tahlia Gordon and Steven Mark, 'Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW' (2010) 37(3) *Journal of Law and Society* 467.

30 Ibid.

31 A.C. Grayling, The History of Philosophy (Penguin Books, 1st ed, 2019) 444-457.

32 NSW Law Society, 'Legal Practice: Corporations Submission Goes to Attorney General: Minimal Restrictions Best, Argues Law Society' (2017) 36(5) *Law Society Journal of NSW* 70.

33 Jeff Shaw, 'Incorporation of legal practices under the Corporations Law' (1999) 37(1) *Law Society Journal* 68.

34 Benedict Sheet, 'From Law Firm to Stock Exchange Listed Law Practice: An Examination of Institutional and Regulatory Reform' (2013) 20(1) *International Journal of the Legal Profession* 10.

35 Ibid 9.

36 Carson (n 22) 604.

37 Ibid 633-4.

38 *Civil Procedure Act 2005* (NSW), s 56.

39 Grout (n 20) 4

40 Carson (n 22) 634.

41 Trevor Hoey, 'Legal Eagles Ready to Soar' *finfeed* (Melbourne, 15 January 2019).
42 'HWL Ebsworth Prepares for 1 billion Plus Float Hires Bankers', Australian Financial Review (Web Page, 24 August 2020) <https://www.afr.com/street-talk/hwl-ebsworth-prepares-for-1-billion-plus-float-hires-bankers-20200823-p550e6>.
43 Chief Justice James Spigelman, 'Address at the Law Term Dinner for the Law Society of NSW' (Speech, Law Society of NSW, 29 January 2001).

Competition Law In Crises: A Comparative Study In Authorising Your Toilet Paper

Jeremy D Chan, LLB VI

1 * Economist, Australian Competition and Consumer Commission. The views expressed in this paper are those of the author. They do not purport to reflect the opinions or views of the Australian Competition and Consumer Commission. The author is grateful to Richard York (Principal Economist, ACCC) for inspiring this piece. The author appreciates comments from Justin Handisurya and Jeffrey Khoo. The author also thanks the editors, in particular Annie Chen, who provided thoughtful feedback and advice on this piece.
2 Pallavi Singhal and Tim Barlass, 'Toilet paper and pasta: here's what Sydneysiders are 'panic buying', *Sydney Morning Herald* (online, 3 March 2020) <https://www.smh.com.au/national/toilet-paper-and-pasta-here-s-what-sydneysiders-are-panic-buying-20200303-p546j9.html>.
3 Coles Group Limited, Application for interim and final authorisation under s 88(1) of the *Competition and Consumer Act 2010* (Cth) to the Australian Competition and Consumer Commission, (20 March 2020).
4 Ibid 6 [3.2].
5 See, e.g., Frances Mao, 'Coronavirus panic: Why are people stockpiling toilet paper?', *BBC News* (online, 4 March 2020) <https://www.bbc.com/news/world-australia-51731422>.
6 See, e.g., Kevin Nguyen, 'Coronavirus toilet paper row at Western Sydney Woolworths leads to two women charged', *ABC News* (online, 8 March 2020) <https://www.abc.net.au/news/2020-03-08/coronavirus-toilet-paper-fight-at-woolworths-leads-to-charges/12037046>.
7 Coles Group Limited, Application for interim and final authorisation under s 88(1) of the *Competition and Consumer Act 2010* (Cth) to the Australian Competition and Consumer Commission, (20 March 2020) 6 [3.2].
8 Coles Group Limited, Application for interim and final authorisation under s 88(1) of the *Competition and Consumer Act 2010* (Cth) to the Australian Competition and Consumer Commission, (20 March 2020).
9 Examples of well-known cartel cases include: *Air New Zealand Ltd v ACCC* (2017) 262 CLR 207 (price-fixing between airlines for international air freight services); *CDPP v Kawasaki Kisen Kaisah Ltd* [2019] FCA 1170 (price-fixing, bid-rigging, and market sharing arrangements between international sea freight companies); and *ACCC v Australian Abalone Pty Ltd* [2007] FCA 1834 (abalone fisherman, concerned about low returns, agreed to only sell their catch through a single marketing company that would maximise their returns).
10 John M Connor and Robert H Lande, 'Cartel Overcharges and Optimal Cartel Fines' in Wayne D Collins (ed), *Issues in Competition Law and Policy* (American Bar Association, 2008) 2203.
11 *Competition and Consumer Act 2010* (Cth) s 2; *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374, 429 (Gaudron, Gummow and Hayne JJ).
12 *Competition and Consumer Act 2010* (Cth) ss 45AF and 45AG.
13 Otherwise known as 'price-gouging: Australian Competition and Consumer Commission, 'ACCC response to COVID-19 pandemic' (Media Release 51/20, 27 March 2020). See, e.g., Summer Woolley, 'Single toilet paper roll sells for $1000 as coronavirus panic-buying reaches new level', *7 News* (online, 4 March 2020) <https://7news.com.au/lifestyle/health-wellbeing/single-toilet-paper-roll-sells-for-1000-as-coronavirus-panic-buying-reaches-new-level-c-729542>.
14 *Competition and Consumer Act 2010* (Cth) s 88(1).
15 In urgent situations, the ACCC can also grant interim authorisation while it considers the application further: *Competition and Consumer Act 2010* (Cth) s 91(2).
16 Arlen Duke, *Corones' Competition Law in Australia* (Thomson Reuters (Professional) Australia, 7th ed, 2019) 3 [1.20].
17 *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) 25 FLR 169, 187 ('*Re QCMA*').
18 Ibid.
19 According to orthodox economics, a cartel results in higher prices or lower quality products for consumers because of a reduction in competition. To illustrate, consider the case where the only two retailers in a market were to begin coordinating prices. This means the two retailers become an effective monopoly. As consumers have no outside options to which they could switch their retail purchases, the monopoly is free from any competitive constraints that might limit the prices they set or the quality of the products they provide.
20 See John M Connor and Robert H Lande, 'Cartel Overcharges and Optimal Cartel Fines' in Wayne D Collins (ed), *Issues in Competition Law and Policy* (American Bar Association, 2008) 2203.
21 *Competition and Consumer Act 2010* (Cth) s 2; *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374, 429 (Gaudron, Gummow and Hayne JJ).
22 In *ACCC v Air New Zealand Ltd* (2014) 319 ALR 388, 486 [463], Perram J concluded that an understanding can be tacit and may arise without communication so long as there is a meeting of the minds. However, cases where courts have inferred a horizontal understanding without explicit communication between competitors have involved 'hub and spoke' arrangements, that is, where the competitors use a third-party intermediary to collude: see, e.g., *News Ltd v Australian Rugby Football League* (1996) 64 FCR 410, 581 (The Court). It has further been settled that communication is insufficient to amount to a meeting of the minds. There must be some assumption of obligation: see *ACCC v CC (NSW)* (1999) 92 FCR 375, 394 [76] (Lindgren J).
23 This involves establishing a 'cartel provision', as defined in s 45AD. This can include price-fixing behaviour (s 45AD(2)), supply-restriction, market-dividing, or bid-rigging behaviour (s 45AD(3)). As held by the High Court of Australia, this invites attention to the substance of what has been, or is to be agreed, arranged or understood, rather than to its particular form: *Visy Paper Pty Ltd v ACCC* (2003) 216 CLR 1, 6 [7] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
24 *Competition and Consumer Act 2010* (Cth) s 45AD(4).
25 *Competition and Consumer Act 2010* (Cth) ss 45AF(2), 45AG(2).
26 *Competition and Consumer Act 2010* (Cth) s 76(1B).
27 *Competition and Consumer Act 2010* (Cth) ss 45AF and 45AG.
28 *Competition and Consumer Act 2010* (Cth) ss 45AF(3), 45AG(3), 76.
29 *Air New Zealand Ltd v ACCC* (2017) 262 CLR 207, 228 [35] (Kiefel CJ, Bell and Keane JJ), 231 [44]–[45] (Nettle J), 266 [181] (Gordon J).
30 Arlen Duke, *Corones' Competition Law in Australia* (Thomson Reuters (Professional) Australia, 7th ed, 2019) 810 [15.10].
31 Jill Walker, 'Developments in Competition Law' (Presentation Paper, RBB Economics Australian Conference, Sydney, 8 June 2011) 24–5.
32 Pallavi Singhal and Tim Barlass, 'Toilet paper and pasta: here's what Sydneysiders are 'panic buying', *Sydney Morning Herald* (online, 3 March 2020) <https://www.smh.com.au/national/toilet-paper-and-pasta-here-s-what-sydneysiders-are-panic-buying-20200303-p546j9.html>.
33 See, e.g., Summer Woolley, 'Single toilet paper roll sells for $1000 as coronavirus panic-buying reaches new level', *7 News* (online, 4 March 2020) <https://7news.com.au/lifestyle/health-wellbeing/single-toilet-paper-roll-sells-for-1000-as-coronavirus-panic-buying-reaches-new-level-c-729542>.
34 Pallavi Singhal and Tim Barlass, 'Toilet paper and pasta: here's what Sydneysiders are 'panic buying', *Sydney Morning Herald* (online, 3 March 2020) <https://www.smh.com.au/national/toilet-paper-and-pasta-here-s-what-sydneysiders-are-panic-buying-20200303-p546j9.html>.
35 Noor El-Terk, 'Toilet paper, canned food: What explains coronavirus panic buying', *Al Jazeera* (online, 14 March 2020) <https://www.aljazeera.com/news/2020/03/toilet-paper-canned-food-explains-coronavirus-panic-buying-200313083341035.html>.
36 See, e.g., Summer Woolley, 'Single toilet paper roll sells for $1000 as coronavirus panic-buying reaches new level', *7 News* (online, 4 March 2020) <https://7news.com.au/lifestyle/health-wellbeing/single-toilet-paper-roll-sells-for-1000-as-coronavirus-panic-buying-reaches-new-level-c-729542>.
37 To illustrate this point further, suppose that, due to an economic crisis, supply of a certain good suddenly falls while demand for that good suddenly increases. Even if there is healthy competition between firms, orthodox economic theory suggests that in the short-term the price of that good will increase (for the market to clear) or there will be a supply shortage in the market. This means that the supply shortage or the incentive to set higher prices is *not* necessarily caused

by reduced competition. Instead, it is caused by the initial sudden change in supply and demand in the market.
38 *Competition and Consumer Act 2010* (Cth) s 90.
39 *Competition and Consumer Act 2010* (Cth) s 88(1).
40 *Competition and Consumer Act 2010* (Cth) s 88(2).
41 *Competition and Consumer Act 2010* (Cth) ss 88(3), 91. See, e.g., *Australian Banking Association, AA1000441* (Determination, 21 November 2019).
42 *Competition and Consumer Act 2010* (Cth) s 88(6).
43 See, e.g., *Pacific National NSW Pty Ltd, QR Ltd and Port Waratah Coal Services Ltd, A91068-A91070* (Interim Authorisation Decision, 13 December 2007).
44 See Australian Competition and Consumer Commission, *Authorisation Register* (Web Page, 2020) <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register>.
45 Coles Group Limited, Application for interim and final authorisation under s 88(1) of the *Competition and Consumer Act 2010* (Cth) to the Australian Competition and Consumer Commission, (20 March 2020) 3 [1.1].
46 Coles Group Limited, Application for interim and final authorisation under s 88(1) of the *Competition and Consumer Act 2010* (Cth) to the Australian Competition and Consumer Commission, (20 March 2020) 5–6 [3.1].
47 *Coles Group Limited, AA1000477* (Interim Authorisation Decision, 23 March 2020) 1 [5].
48 *Coles Group Limited, AA1000477* (Interim Authorisation Decision, 23 March 2020) 1 [6].
49 Sue Mitchell, 'ACCC allows supermarkets to work together on grocery supplies', *Australian Financial Review* (online, 24 March 2020) <https://www.afr.com/companies/retail/accc-allows-supermarkets-to-work-together-on-grocery-supplies-20200324-p54d9s>.
50 Australian Competition and Consumer Commission, 'Coles Group on behalf of itself and participating supermarkets', *Authorisations register* (Web Page, 2020) <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/coles-group-on-behalf-of-itself-and-participating-supermarkets>.
51 James Ross, 'Don't panic (again): here's why Melbourne's supermarket shortages will quickly pass', *The Conversation* (online, 9 July 2020) <https://theconversation.com/dont-panic-again-heres-why-melbournes-supermarket-shortages-will-quickly-pass-142288>.
52 See, e.g., Todd C Frankel, 'The toilet paper shortage is real. But it should be brief', *The Washington Post* (online, 14 March 2020) <https://www.washingtonpost.com/business/2020/03/13/toilet-paper-shortage/>; Michael Corkery and Sapna Maheshwari, 'Is There Really a Toilet Paper Shortage?', *The New York Times* (online, 13 March 2020) <https://www.nytimes.com/2020/03/13/business/toilet-paper-shortage.html>; Noor El-Terk, 'Toilet paper, canned food: What explains coronavirus panic buying', *Al Jazeera* (online, 14 March 2020) <https://www.aljazeera.com/news/2020/03/toilet-paper-canned-food-explains-coronavirus-panic-buying-200313083341035.html>.
53 Jen Wieczner, 'The case of the missing toilet paper: How the coronavirus exposed U.S. supply chain flaws', *Fortune 500* (online, 18 May 2020) <https://fortune.com/2020/05/18/toilet-paper-sales-surge-shortage-coronavirus-pandemic-supply-chain-cpg-panic-buying/>; Andrew Moore, 'How the Coronavirus Created a Toilet Paper Shortage', *NC State University* (online, 19 May 2020) <https://cnr.ncsu.edu/news/2020/05/coronavirus-toilet-paper-shortage/>.
54 Jen Wieczner, 'The case of the missing toilet paper: How the coronavirus exposed U.S. supply chain flaws', *Fortune 500* (online, 18 May 2020) <https://fortune.com/2020/05/18/toilet-paper-sales-surge-shortage-coronavirus-pandemic-supply-chain-cpg-panic-buying/>.
55 Jen Wieczner, 'The case of the missing toilet paper: How the coronavirus exposed U.S. supply chain flaws', *Fortune 500* (online, 18 May 2020) <https://fortune.com/2020/05/18/toilet-paper-sales-surge-shortage-coronavirus-pandemic-supply-chain-cpg-panic-buying/>; Andrew Moore, 'How the Coronavirus Created a Toilet Paper Shortage', *NC State University* (online, 19 May 2020) <https://cnr.ncsu.edu/news/2020/05/coronavirus-toilet-paper-shortage/>.

Cost of Business Process Corruption and Tort Litigation Against the New South Wales Police Force

Oliver Creagh, JD II

1 Juris Doctor II, University of Sydney. I would like to thank my editor Zachary O'Meara for his invaluable and insightful cracking of the proverbial whip; without it, the piece would not be complete. I'd also like to thank Elle Triantafillou for her informal insight and guidance into police accountability in New South Wales.
2 James Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 1, 49-50 [3.3].
3 Patrick Saidi, *Complaint to the Inspector of the Law Enforcement Conduct Commission pursuant to the provisions of Part 9 of the Law Enforcement Conduct Commission Act* (Report, 18 June 2019) 78.
4 See James Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 2, 523 [9.1].
5 Law Enforcement Conduct Commission, *Operation Gennaker* (Report, 8 May 2020) 43.
6 Ibid 18.
7 Ibid 42.
8 Law Enforcement Conduct Commission, *Operation Brugge* (Report, 8 May 2020) 42.
9 Ibid 10.
10 Law Enforcement Conduct Commission, *Operation Gennaker* (Report, 8 May 2020) 4; Law Enforcement Conduct Commission, *Operation Brugge* (Report, 8 May 2020) 1.
11 Michael Grewcock and Vicki Sentas, *Rethinking Strip Searches by NSW Police* (Report, August 2019) 28.
12 Law Enforcement Conduct Commission, *Operation Gennaker* (Report, 8 May 2020) 41; Law Enforcement Conduct Commission, *Operation Brugge* (Report, 8 May 2020) 42.
13 See Michael McGowan, 'Strip search inquiry cut short after NSW government sacks commissioner', *The Guardian* (online, 6 February 2020) < https://www.theguardian.com/australia-news/2020/feb/06/strip-search-inquiry-cut-short-after-nsw-government-sacks-commissioner>.
14 See generally Patrick Saidi, *Complaint to the Inspector of the Law Enforcement Conduct Commission pursuant to the provisions of Part 9 of the Law Enforcement Conduct Commission Act* (Report, 18 June 2019).
15 See Michael McGowan, 'Law firms look to launch landmark strip-search class action against NSW police', *The Guardian* (online, 27 May 2020) < https://www.theguardian.com/australia-news/2020/may/27/law-firms-look-to-launch-landmark-strip-search-class-action-against-nsw-police>.
16 Janet Chan and David Dixon, 'The politics of police reform: Ten years after the Royal Commission into the New South Wales Police Service' (2007) 7(4) *Criminology and Criminal Justice* 443, 444.
17 See David Dixon, 'Corruption and Reform: An Introduction' in David Dixon (ed), *A Culture of Corruption: Changing an Australian Police Service* (Hawkins Press, 1999) 1.
18 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 May 1994, 2287.
19 See, e.g., Law Enforcement Conduct Commission, *Operation Asinara* (Report, 21 October 2019), where a sergeant allegedly tipped-off their drug dealer about an impending search warrant.
20 James Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 2, 223 [2.10].
21 James Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 3, A38, A41.
22 Ibid A38, A40.
23 James Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 1, 25 [2.1].
24 This included theft and extortion, protection of the drug trade/gambling industry, fraudulent practices and substance abuse.
25 James Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 1, 36 [2.34]-[2.35].
26 See ibid 26 [2.3]. Wood noted that process corruption is typically directed at members of the community least likely or able to complain, and justified to procure convictions or "exercise control over sections of the community".
27 Ibid 83-84 [4.5], 104 [4.77].
28 Ibid 104 [4.77].
29 Such as, for example, excessive and *ultra vires* physical assaults. See ibid 104-108 [4.77-4.91].
30 This included general maladministration of the criminal justice system, inclusive of perjury, planting of evidence, posing as a solicitor and gilding the evidence to produce a better case. See ibid 84 [4.5]. It should be noted that this narrower conceptualisation of 'process corruption' is often referenced in academic literature- see, e.g., David Brown, '*The Royal Commission into the NSW Police Service: Process Corruption and the Limits of Judicial Reflexivity*' (1998) 9(3) *Current Issues in Criminal Justice* 228.
31 See James Wood, *Royal Commission into the New South Wales*

Police Service (Final Report, May 1997) vol 1, 26-27 [2.6]-[2.11].
32 Ibid 26-27 [2.6]-[2.11]. As Wood notes, the prior Knapp and Luther Commissions (into the New York and NSW Police Services respectively) also dismissed this theory of corruption.
33 David Dixon, 'Corruption and Reform: An Introduction' in David Dixon (ed), *A Culture of Corruption: Changing an Australian Police Service* (Hawkins Press, 1999) 3.
34 The actual number of claims against the NSWPF and total costs is difficult to determine. Many claims are presumably subject to confidential settlement, and the NSWPF does not report precise figures of money paid in compensation. Attempts to obtain true figures by former LECC Commissioner for Oversight Patrick Saidi and parliamentarians have been repeatedly frustrated by the Force. See Patrick Saidi, *Complaint to the Inspector of the Law Enforcement Conduct Commission pursuant to the provisions of Part 9 of the Law Enforcement Conduct Commission Act* (Report, 18 June 2019), 17.
35 Ibid 17. One wonders there is an extension of police culture known as a the code of silence chastised by Wood- see James Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 1, 33 [2.23].
36 Michael McGowan, 'NSW police treated millions in damages for misconduct as 'cost of doing business', *The Guardian* (online, 13 February 2020) <https://www.theguardian.com/australia-news/2020/feb/13/nsw-police-treated-millions-in-damages-for-misconduct-as-cost-of-doing-business>.
37 See generally Law Enforcement Conduct Commission, *Operation Sandbridge* (Report, 8 May 2020).
38 See Law Enforcement Conduct Commission, *Operation Gennaker* (Report, 8 May 2020) 42.
39 See Law Enforcement Conduct Commission, *Operation Brugge* (Report, 8 May 2020) 42.
40 Law Enforcement Conduct Commission, *Operation Mainz* (Report, 8 May 2020) 42.
41 See, e.g., Law Enforcement Conduct Commission, *Operation Gennaker* (Report, 8 May 2020) 23 [3.97].
42 See generally Law Enforcement Conduct Commission, *Review of NSW. Police Force Standard Operating Procedures for strip searches in custody* (Report, 13 February 2020) 2.
43 See, e.g., Law Enforcement Conduct Commission, *Strike Force Blackford- Report* (Report, 21 July 2020) 3.
44 See, e.g., *Adams v Kennedy* (2000) 49 NSWLR 78; *Commonwealth v Graves* (1996) 41 NSWLR 111; *Coyle v New South Wales* [2006] NSWCA 95.
45 Corrie Goodhand and Peter O'Brien, *Intentional Tort Litigation in Australia (*The Federation Press, 2015) 4.
46 *Williams v Milotin* (1957) 97 CLR 465, 470.
47 See, e.g., *Coyle v New South Wales* [2006] NSWCA 95.
48 See, e.g., *New South Wales v Ibbett* (2006) 231 ALR 485.
49 See, e.g., *Houda v New South Wales* [2005] NSWSC 1053.
50 See, e.g., *New South Wales v Robinson* (2019) 374 ALR 687, [63], [116] (Bell, Gageler, Gordon and Edelman JJ).
51 And if appropriate defences of justification or statutory defences are not made out. For justification, see *New South Wales v Koumdjiev* 63 NSWLR 353, [61]-[63]. For defences generally, including for claimants in custody, see Corrie Goodhand and Peter O'Brien, *Intentional Tort Litigation in Australia (*The Federation Press, 2015) 68-72, 77-85.
52 *Halliday v Nevill* (1984) 57 ALR 331, 336 (Brennan J); *Coco v R* (1994) 120 ALR 415,418 (Mason CJ, Brennan, Gaudron and McHugh JJ); also *Plenty v Dillon* (1991) 98 ALR 353. These cases discuss authority and excuse for trespass to property. The principles are the same for person- see, e.g., *Houda v New South Wales* [2005] NSWSC 1053.
53 This is typically expressed through awarding exemplary damages. See, eg, *New South Wales v Ibbet*t (2006) 231 ALR 485, [38]-[39]. For intermediary courts, see, e.g., *Henry v Thompson* [1989] 2 Qd R 412. In New South Wales, exemplary damages still available for the intentional torts- see *Civil Liability Act 2002* (NSW() s 3B, s 21. Notably, the availability of exemplary damages may depend on the pleadings. See *Williamson v State of New South Wales* [2012] HCA 57. In *Williamson,* the State of NSW unsuccessfully attempted to recategorise costs from an intentional torts claim as those of a "personal injury damages", and therefore capped under the *Legal Profession Act 2004* (NSW). It would be unsurprising if similar attempts are made with intentional torts under the *Civil Liability Act*.
54 *New South Wales v Koumdjiev* [2005] NSWCA 247, [61]-[63]. See also *Quirk v New South Wales* [2011] NSWSC 341, [120]. In *Quirk,* three Constables forcibly removed a Mr Quirk- who allegedly had committed a non-violent AVO breach- from his car while he sat rigidly and attempted to call his solicitor. Mr. Quirk's subsequent arrest was found to be unlawful [148]. Grove AJ considered that, even if the arrest been lawful, the attempt to "lever" Mr. Quirk out of the car constituted was excessive, and thus tortious interference.
55 *Law Enforcement (Powers and Responsibilities) Act NSW* (2002).
56 See, e.g., *Coco v R* (1994) 120 ALR 415.
57 (2019) 374 ALR 687.
58 Ibid [116] (Bell, Gageler, Gordon and Edelman JJ).
59 Ibid [63] (Bell, Gageler, Gordon and Edelman JJ).
60 Ibid [63], [93]-[94] (Bell, Gageler, Gordon and Edelman JJ).
61 Ibid [2] (Kiefel CJ, Keane and Nettle JJ).
62 Ibid [114]-[115] (Bell, Gageler, Gordon and Edelman JJ).
63 Ibid [63] (Bell, Gageler, Gordon and Edelman JJ).
64 How high this bar actually is will be tested again in 2020, with *Roy v O'Neill*, a case currently before the High Court of Australia (see High Court of Australia, Case No D2/2020). For an excellent summary of the issues at play, see Julian Murphy, 'Police Door Knocking in Comparative and Constitutional Perspective: *Roy v O'Neill*' (2020) 42(3) *Sydney Law Review* 1 (forthcoming).
65 *A v New South Wales* (2007) 233 ALR 584, [38].
66 Ibid [1]. A fifth limb of requiring the plaintiff to prove damage was not confirmed by the High Court in *A* nor in *Beckett v New South Wales* (2013) 297 ALR 206. Lower courts have maintained this as a requirement for the tort; see, e.g., *New South Wales v Landini* [2010] NSWCA 157, [20] (Macfarlan JA), confirmed in *New South Wales v Zreika* [2012] NSWCA 37, [59]. (Sackville AJA). It is difficult to conceive a malicious prosecution where damage has not occurred, leading to a suggestion that damage in malicious prosecution actions is 'presumed'. See *Clavel v Savage* [2013] NSWSC 775, [41] (Rotham J).
67 *A v New South Wales* (2007) 233 ALR 584, [1]. A fifth limb of requiring the plaintiff to prove damage was not confirmed by the High Court in *A* nor in *Beckett v New South Wales* (2013) 297 ALR 206. Lower courts have maintained this as a requirement for the tort; see, e.g., *New South Wales v Landini* [2010] NSWCA 157, [20] (Macfarlan JA), confirmed in *New South Wales v Zreika* [2012] NSWCA 37, [59]. (Sackville AJA). It is difficult to conceive a malicious prosecution where damage has not occurred, leading to a suggestion that damage in malicious prosecution actions is 'presumed'. See *Clavel v Savage* [2013] NSWSC 775, [41] (Rotham J).
68 *A v New South Wales* (2007) 233 ALR 584, [1]. In *A*, the appellant was arrested and charged with two offences of homosexual intercourse contrary to the *Crimes Act 1900* (NSW). The officer admitted to feeling pressure from superiors to lay charges and commence prosecution.
69 Ordinary civil proceedings (*Clavel v Savage* [2013] NSWSC 775, [44] (Rothman J)), administrative proceedings like those of the AAT (*Chapel Road v ASIC* [2007] NSWSC 975, [32] (Howie J)) or police disciplinary proceedings *Noye v Robbins* [2007] WASC 98, [228]-[229] (Heenan J) are generally beyond the ambit of the tort. Non-criminal proceedings where the damage to reputation and standing of the accused exceeds that which can be remedied by the judicial process itself- i.e. through the judgement of the Court in favour of the plaintiff- may give rise to an action for malicious prosecution. This may include disciplinary proceedings against a solicitor (see *Little v Law Institute (No 3)* [1990] VR 257), bankruptcy proceedings (*Quartz Hill Consolidated Mining Co v Eyre* (1983) 11 QBD 674).
70 *Clavel v Savage* [2013] NSWSC 775, [45] (Rotham J).
71 See generally *Bayliss v Cassidy* [1998] QSC 186.
72 *Young v New South Wales; Young v Young (No 2)* [2013] NSWSC 330, [141] (Adamson J).
73 See, e.g., *Beckett v New South Wales* (2013) 297 ALR 206.
74 See, e.g., *Young v New South Wales; Young v Young (No 2)* [2013] NSWSC 30.
75 This may occur in a variety of ways that demonstrates 'an absence of any judicial determination his guilt', including 'not guilty' verdicts, the magistrate not committing for trial, or the Attorney-General entering a *nolle prosequi*. See *Beckett v New South Wales* (2013) 297 ALR 206, [6].
76 *A v New South Wales* (2007) 233 ALR 584, [80]; "...unless the prosecutor is shown either not to have honestly [subjectively] formed the view that there was a proper case for prosecution, or to have [objectively] formed that view on an insufficient basis, the element of absence of reasonable and probable cause is not established".
77 Ibid [91].
78 Ibid.
79 *Wood v State of New South Wales* [2019] NSWCA 313, [49].
80 See, e.g., *Wood v State of New South Wales* [2018] NSWSC 1247, [196]-[197], [1152].

81 *A v New South Wales* (2007) 233 ALR 584, [93].
82 [2019] NSWCA 313.
83 Ibid [61]-[63].
84 *Wood v State of New South Wales* [2018] NSWSC 1247, [1337].
85 Ibid [1338].
86 Given that threats and harassment by the NSW Police Force are well documented (see, e.g., James Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 1, 107, [4.87], 136 [4.191], 147 [4.220]) this author was surprised that Wilkinson Downton liability is not more of an 'emerging suitor' for actions against the police. One example of the tort is in *Carter v Walker* (2010) 32 VR 1, which dismissed proceedings in the officer's favour. Analysis of this case has suggested poor pleadings, poor facts which leant stronger to a claim for battery, and a narrow interpretation of the tort resulted in a lack of liability being found. See Peter Handford, 'Battery, Traumatised Secondary Victims and *Wilkinson Downton'* (2012) 20 *Tort Law Review* 3.
87 For an excellent summary of the tort, refer to Mark Aronson, 'Misfeasance in a Public Office: a very peculiar tort' (2011) 35(1) *Melbourne University Law Review* 1.
88 *Sanders v Snell* (1998) 157 ALR 491, [37].
89 *Pyreness Shire Council v Day* (1998) 151 ALR 147, [124] (Gummow J).
90 *Nyoni v Shire of Kellerberrin and Ors* (2017) 346 ALR 631, [83] (North and Rares JJ)
91 *Pyreness Shire Council v Day* (1998) 151 ALR 147, [124] (Gummow J).
92 *Farrington v Thomson* [1959] VR 286, 295 (Smith J). The tort thus requires the plaintiff to suffer legally recognised damage- see *Nyoni v Shire of Kellerberrin and Ors* (2017) 348 ALR 731, [97] (North and Rares JJ).
93 *Northern Territory of Australia v Mengel* (1995) 129 ALR 1, 37 (Deane J).
94 See ibid. Malice will be satisfied if the act is done knowingly (with an actual intention cause injury) or reckless indifference or deliberate blindness.
95 Ibid 25 (Brennan J). Nor will negligent or unintentional acts/ omissions by officers will suffice- see *Nyoni v Shire of Kellerberrin and Ors* (2017) 348 ALR 731, [97] (North and Rares JJ).
96 See *Garrett v Attorney-General* [1997] 2 NZLR 332.
97 See *Ashby v White* (1703) 92 ER 126.
98 [2020] NSWCA 127.
99 Ibid [9].
100 Ibid [56] (Payne JA).
101 Ibid [57] (Payne JA), [71] (White JA).
102 Ibid [76], [127] (White JA).
103 Ibid [135]-[141] (Simpson AJA), citing *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, 370 (Deane J).
104 *Ea v Diaconu* [2020] NSWCA 127, [135]-[145] (White JA).
105 Ibid [57] (Payne JA), [129] (White JA), [147] (Simpson AJA).
106 See, e.g., *New South Wales v Tyszyk* [2008] NSWCA 107, [128] (Giles JA), citing *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 59 (Lord Kinkel); *New South Wales v Spearpoint* [9]-[10] (Ipp JJA).
107 See, e.g., *Tame v New South Wales* (2002) 211 CLR 317; *Stuart and Another v Kirkland-Veenstra* (2009) 237 CLR 215.
108 Some commentators suggest this reluctance is the result of an unfortunate hangover from the Crown's traditional immunity for suit. See Anthony Gray, 'Liability of police in negligence: A comparative analysis' (2012) 24 Tort Law Review 34, 34-35, citing Richard Mullender, 'Negligence, Public Bodies and Ruthlessness' (2009) 72(6) *Modern Law Review* 961, 961-962 and Claire McIvor 'Getting Defensive About Police Negligence: The *Hill* principle, the *Human Rights Act 1998* and the House of Lords' (2010) 69(1) *Cambridge Law Review* 133, 133.
109 See, e.g., *Chief Constable of the Hertfordshire Police v Van Colle* [2008] UKHL 50. *Van Colle* surrounded a claim in negligence from a victim of chronic domestic abuse. The abuser was well known to the police, and abuse was frequently reported. In 2003, the abuser attacked the victim with a claw hammer, fracturing his skull in three places, causing brain damage and ongoing psychological injury. Applying the *Hill* policy approach, the majority of the Court found that a duty of care was not owed. Lord Bingham gave a compelling dissent, noting (at [57]) that "very potent" considerations were required to override the ultimate public policy of the law; to remedy wrongs.
110 [1988] 2 All ER 238.
111 Ibid 240.
112 Ibid 243.
113 *New South Wales v Tyszyk* [2008] NSWCA 107, [118] (Giles JA), citing *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 63 (Lord Kinkel).
114 See generally *Smith v State of Victoria* (2018) 56 VR 332; *New South Wales v Spearpoint* [2009] NSWCA 233.
115 See, e.g., *Sullivan v Moody* (2001) 183 ALR 404, [57], where the High Court suggested that "conduct of a police investigation involves a variety of decisions on matters of policy and discretion" that may be beyond judicial scrutiny. See also *New South Wales v Tyszyk* [2008] NSWCA 107, [113]-[133], in which Giles JA (with Mason P agreeing) considered the *Hill* factors but ultimately declined to treat them as broadly applicable to interactions with police, save for the investigation process. This approach was cited favourably in *New South Wales v Spearpoint* [2009] NSWCA 233, [9]-[10] (Ipp JJA, Allsop ACJ and Beazley JA agreeing).
116 See, e.g., *Slaveski v State of Victoria* [2010] VSC 441, [332]-[333] (Kyrou J).
117 Commentators such as Gray note that the rejection of the stronger policy components in the *Caparo* test have de-emphasised pure policy towards duty of care in Australian Court. Despite this, Gray argues that reasons given for denying a duty of care can sometimes sound an awful lot like policy reasons. See Anthony Gray, 'Liability of police in negligence: A comparative analysis' (2012) 24 Tort Law Review 34, 49, citing *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540. Civil juries appear to be less forgiving- see *Zalewski v Turcarolo* [1995] 2 VR 562, 578–579.
118 *New South Wales v Tyszyk* [2008] NSWCA 107, [124] (Giles JA); see also *New South Wales v Spearpoint* [2009] NSWCA 233, [11] (Ipp JJA), citing *Van Colle v Chief Constable of the Hertfordshire* [2009] 1 AC 225 (Lord Bingham, in dissent).
119 A third category- wherein by officers carelessly facilitate injury in an unrelated execution of their duty- will not be dealt with in this essay. See, e.g., *New South Wales v Tyszyk* [2008] NSWCA 107. In *Tyszyk,* the respondent was a furniture removalist who was struck by a piece of downpipe that fell from a building. At the time, two officers had been called to the scene to examine the downpipe. The CCA ultimately allowed the appealing, primarily due to the officer's failing to have breached any duty of care owed to the respondent.
120 *Tame v New South Wales* (2002) 211 CLR 317. No duty of care was found.
121 *Sullivan v Moody; Thompson v Connor* (2001) 183 ALR 404. In *Sullivan*, claims were brought against medical practitioners and social workers involved in a child abuse investigation conducted under the *Community Welfare Act 1972* (SA). Though police were not parties to the action, the same logic applies. No duty of care was found.
122 *Ogden v Bells Hotel Pty Ltd* [2009] VSC 219.
123 *Cran v New South Wales* (2004) 62 NSWLR 95.
124 But see *Ogden v Bells Hotel Pty Ltd* [2009] VSC 219.
125 These may be termed "inconsistent", "conflicting" or "irreconcilable" obligations. See *Smith v State of Victoria* (2018) 56 VR 332, [150].
126 *Sullivan v Moody* (2001) 183 ALR 404, [55]
127 Ibid [30], citing *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 739. Importantly, contradictory obligations may arise from common law duties and powers of an officer, as well as statutory. See *New South Wales v Tyszyk* [2008] NSWCA 109, [73]-[115].
128 *Tame v New South Wales* (2002) 211 CLR 317.
129 *Tame v State of New South Wales* (2002) 191 ALR 449, [57] (Gaudron J),
130 Ibid [26] (Gleeson CJ), [231] (Gummow and Kirby JJ)
131 Ibid [299] (Hayne J).
132 Ibid [26] (Gleeson CJ).
133 This category may be taken to include instances where the third party includes oneself, such as in the case of mental illness. See, e.g., *Kirkham v Chief Constable of Greater Manchester Police* [1990] 2 QB 283.
134 *Stuart v Kirkland-Veenstra* (2009) 82 ALJR 623. No duty of care was found.
135 See generally *Smith v State of Victoria* (2018) 56 VR 332; *New South Wales v Spearpoint* [2009] NSWCA 233. The Court indicated findings of duty of care were open on the facts.
136 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 263-269 (Gleeson CJ) 270 (Gaudron J), 288 (Hayne J). See also *Smith v Leurs* (1945) 70 CLR 256, 261-262 (Dixon J).
137 *Stuart v Kirkland-Veenstra* (2009) 82 ALJR 623, [88], (Gummow, Hayne and Heydon JJ), [120] (Crennan and Kiefel JJ), citing *Smith v Leurs* 1945) 70 CLR 25.
138 See also *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR

1 37, [101] (McHugh J).
139 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 267 [30] (Gleeson CJ), 270 [43] (Gaudron J), 294 [117] (Hayne J).
140 See, e.g., *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.
141 For an interesting English example, see, e.g., *An Informer v A Chief Constable* [2012] EWCA Civ 197, where a police informer successfully sued for economic loss after negligently being arrested by the police force he was informing for.
142 *Smith v State of Victoria* (2018) 56 VR 332, [151]-[153], [173].
143 See generally Ibid.
144 [2009] NSWCA 233.
145 Ibid [1], [16], [31]; *Smith v State of Victoria* (2018) 56 VR 332, [153]-[154] (Dixon J**)**.
146 See *Smith v State of Victoria* (2018) 56 VR 332 [129]-[143] (Dixon J). See also commentary on "control" in Anthony Gray, 'Liability of police in negligence: A comparative analysis' (2012) 24 Tort Law Review 34, 48-49. Both *Spearpoint* and *Smith* appear to have settled out of court, so these points were not litigated further.
147 James Wood, *Royal Commission into the New South Wales Police Service* (Final Report, May 1997) vol 2, 523 [9.1].
148 David Dixon, 'Issues in the Legal Regulation of Policing' in David Dixon (ed), *A Culture of Corruption: Changing an Australian Police Service* (Hawkins Press, 1999) 52.
149 The State of NSW assumes vicarious liability for all of its officers (*Law Reform (Vicarious Liability) Act 1983* (NSW) s 6, s 8. This is not the case at common law- see *Enever v R* (1906) 3 CLR 969.).
150 Patrick Saidi, *Complaint to the Inspector of the Law Enforcement Conduct Commission pursuant to the provisions of Part 9 of the Law Enforcement Conduct Commission Act* (Report, 18 June 2019) 17.
151 See Law Enforcement Conduct Commission, *Strike Force Blackford- Report* (Report, 21 July 2020) 8, 14-16. The LECC notes that internal police investigations of apparently unlawful strip searches resulted in recommendations of "Not Sustained" findings against all officers involved. The LECC notes that a report collating systemic and organisational issues from Strike Force Blackford has been prepared by the NSWPF, but was not provided to the LECC.
152 Patrick Saidi, *Complaint to the Inspector of the Law Enforcement Conduct Commission pursuant to the provisions of Part 9 of the Law Enforcement Conduct Commission Act* (Report, 18 June 2019) 78.
153 See also David Dixon, 'Corruption and Reform: An Introduction' in David Dixon (ed), *A Culture of Corruption: Changing an Australian Police Service* (Hawkins Press, 1999) 3.
154 See *Police Regulation 2015* (NSW) cl 141(1) ('Oath or affirmation of office for recognised law enforcement officers').

A Crisis of Conscience Resolved – Revitalising the Jury in Modern Australia

Matthew Joyce, BA/LLB III

1 E.P Thompson, 'The State versus its Enemies' in E.P.Thompson (ed), *Writing by Candlelight* (The Merlin Press, 1980) 99, 108.
2 Lord Devlin, *Trial by Jury* (The Hamlyn Trust, 1956) 164.
3 Bureau of Crime Statistics and Research, 'NSW Criminal Courts Statistics' (2020).
4 *Jury Act 1901* (NSW) pt VII.
5 *Defamation Act 2005* (NSW) s 21.
6 Bret Walker in Forward to Ian Barker, *Sorely Tried: Democracy and Trial by Jury in New South Wales* (Dreamweaver Publishing, 2003), 12.
7 *Jury Act* 1977 (NSW) s 68B.
8 But see *Crimes (Appeal and Review) Act 2001* (NSW) pt 8 div 2.
9 *Ad quæstionem facti non respondent judices; ad quæstionem juris non respondent joratores;* See W.S. Holdsworth, *A History of English Law* (Methuen, 1903) Volume 1, 135.
10 (1997) 139 CLR 28.
11 See John Baker, The Oxford History of the Laws of England (Oxford University Press, 2003), Volume 6, 373.
12 Ibid.
13 Lord Devlin, *Trial by Jury* (n 2), 77.
14 (1670) Vaughan 135; 124 ER 1006. To this day, a plaque in the Old Bailey 'Commemorates the courage and endurance of the jury… who refused to give a verdict against [the accused] although they were locked up without food for two nights and were fined for their final verdict of not guilty. The case of these jurymen was reviewed on a writ of habeas corpus, and Chief Justice Vaughan delivered the opinion of the Court which established the right of juries to give their verdict according to their conviction'.
15 *R v Lilburne* (1649) 4 How St Tr 1269 at 1379-1380. Upon his acquittal, the Law Report states that 'a loud and unanimous shout [for joy], as is believed was never heard in Guildhall, lasted for about half an hour…which made the Judges for fear turn pale, and hang down their heads'.
16 Devlin, *Trial by Jury* (n 2) 92-4;
17 *R v Shipley* (1784) 4 Doug 73; 99 ER 774. But see Kevin Crosby, 'R v Shipley (1784)' in Philip Handler, Henry Mares and Ian Williams (ed), *Landmark Cases in English Law* (Bloomsbury, 2017) 103.
18 *Libel Act 1792*, 32 Geo. 3, c. 60, s 1.
19 Glanville Williams, *The Proof of Guilt* (The Hamlyn Trust, 1955), 198.
20 Ibid.
21 Ibid, 198-199; Freedman*, The Jury on Trial* (1981) 34 Current Legal Problems 65, 92.
22 [1985] Crim LR 318.
23 Edward Griew, 'Summing Up the Law' [1989] *Criminal Law Review* 768, 777.
24 *R v Shipley* (1784) 21 How St Tr 847, 950-55; 4 Doug 73; 99 ER 774, 824.
25 Unreported (1991). See Nick Cohen, 'A Jailbreak out of an Ealing Comedy', *New Statesman* (Online, 9 October 2000) <https://www.newstatesman.com/node/193728>
26 Ibid.
27 Lord Hailsham, 'Elective Dictatorship' (Richard Dimbleby Lecture, British Broadcasting Corporation, 14 October 1976).
28 Lord Devlin, *Trial by Jury* (n 2) 160-2.
29 Ibid.
30 Bar Council of New South Wales, *Your Right to a Jury Trial* (12 August 1965), 26.
31 Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (Stationary Office, 2001), [5-95]- [5-108]; Williams, *The Proof of Guilt* (n 19) 195-200.
32 See, e.g., *R v Crisologo* (1997) 99 A Crim R 178; Lord Justice Auld, *Review of the Criminal Courts* (n 31), *[*5-100].
33 MDA Freeman, 'Why Not a Jury Nullification Statute Here Too?', (1981) 131 *New Law Journal* 304.
34 Ibid; Stanley Milgram, *Obedience to Authority* (Harper and Row, 1974).
35 Harry Kalven and Hans Zeisel, *The American Jury* (Little, Brown and Company, 1966), 291.
36 Ibid.
37 Lord Justice Auld, *Review of the Criminal Courts* (n 31), [5-95]-[5-108].
38 William Forsyth, *History of Trial by Jury* (J.W.Parker, 1852), 220-221; *R v Shipley* (1784) 4 Doug 73; 99 ER 774, 824.
39 *People v Croswell*, 3 Johns. Cas. 337, 345 (Alexander Hamilton) (during argument).
40 *R v Wang* [2005] 1 WLR 661, 671-2.f
41 *Yager* 36.
42 Ibid 46.
43 Ibid 38-9, 52-3.
44 Ibid 38-9.
45 Ibid 51-3.
46 *United Brotherhood of Carpenters and joiners of America v United States* 330 US 395 (1946); *L v The Queen* [2006] NZSC 18; *Krieger v The Queen* (2006) 272 DLR (4th) 410. See, generally, Peter Giles and Andrew Dahdal, 'Directions to Convict' (2007) 31 Criminal Law Journal 295.
47 [2005] 1 WLR 661
48 Ibid 672, quoting Lord Devlin, *Trial by Jury* (n 2) 160-2.
49 Griew, *Summing Up the Law* (n 23), 777.
50 That *Bushell's Case* would not now be heard before a jury should surely cause questioning.
51 *Coroners Act 2009* (NSW) s 48. See also E.P.Thompson, 'The People of Britain v the Judges, Ex Parte Peach' in E.P.Thompson (ed), *Writing by Candlelight* (The Merlin Press, 1980) 187.
52 *Crimes Legislation (Unsworn Evidence) Amendment Act* 1994 (NSW).
53 *Justice Legislation Amendment (Committals and Guilty Pleas) Act* 2017 (NSW).
54 See generally Ian Barker, 'A geriatric barrister's yearning for the good old days' [2009] NSW Bar Association News 12.
55 Lord Devlin, *The Judge* (Oxford University Press, 1979), 175.
56 William Blackstone, *Blackstone's Commentaries on the Laws of England in Four Volumes*, Vol 4, 349-350.

States of Exception and Radical Hope: Agamben and Lear on COVID-19

Noah Corbett, LLB VI

1 Nomi Claire Lazar, *States of Emergency in Liberal Democracies* (Cambridge University Press, 2009) 1-2.
2 *Commissioner of Police (NSW) v Supple* [2020] NSWSC 727, [41] (‘*Supple*’)
3 Giorgio Agamben, *State of Exception*, tr Kevin Attell (University of Chicago Press, 2005) 31.
4 Lazar (n 1); Agamben (n 3); Ellen Kennedy, ‘Review: Emergency and Exception’ (2011) 39(4) *Political Theory* 534; Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, tr. Maurizia Boscagli (University of Minnesota Press, 1991); Ross J. Corbett, ‘Suspension of Law during Crisis’ (2012) 127(4) *Political Science Quarterly* 627.
5 Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, tr George Schwab (University of Chicago Press, 2005) 5–6.
6 Agamben (n 3) 2.
7 *Biosecurity (Human Coronavirus with Pandemic Potential) Declaration 2020* (Cth) (‘*Biosecurity Declaration*’).
8 Renju Jose and Colin Packam, ‘State of Emergency: Australia steps up efforts to curtail coronavirus’, *Reuters*, (online, 16 March 2020) <https://www.reuters.com/article/health-coronavirus-australia/state-of-emergency-australia-steps-up-efforts-to-curtail-coronavirus-idUSL4N2B80Z0>.
9 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020* (NSW) (‘*COVID-19 Restrictions*’); *Supple*.
10 Giorgio Agamben, ‘The Invention of an Epidemic’ (online, 2020) *European Journal of Psychoanalysis* <https://www.journal-psychoanalysis.eu/coronavirus-and-philosophers/>; Giorgio Agamben, ‘Clarifications’ (2020), tr Adam Kotsko (web page, 17 March 2020) <https://itself.blog/2020/03/17/giorgio-agamben-clarifications/>.
11 Jonathan Lear, *Radical Hope: Ethics in the face of Cultural Devastation* (Harvard University Press 2008) 103.
12 Schmitt (n 5) 5–6; Agamben (n 3) 31.
13 Agamben (n 3) 23.
14 Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt* (Verso, 2000), 1–3.
15 Agamben (n 3) 2.
16 Ibid.
17 Ibid.
18 Ibid 31.
19 Ibid 23.
20 Ibid 2–3.
21 Agamben (n 3) 31; Paul Hegarty, ‘Giorgio Agamben (1942-)’, in Jon Simons (ed), *From Agamben to Zizek: Contemporary Critical Theorists* (Edinburgh University Press, 2010) 14, 24.
22 Agamben (n 3) 37–38.
23 Ibid 36–37.
24 Ibid 38–39.
25 Ibid 38; Hannah Arendt, ‘Eichmann in Jerusalem’, *The New Yorker* (New York, 9 February 1963).
26 Agamben (n 3) 11.
27 Ibid 3.
28 Ibid 3–4.
29 Ibid 4.
30 Ibid 11; Greg Barns, ‘New ASIO law one more step towards a totalitarian state’ *The Sydney Morning Herald* (online, 13 May 2020) <https://www.smh.com.au/national/new-asio-law-one-more-step-towards-a-totalitarian-state-20200513-p54smi.html>.
31 Agamben (n 3) 2.
32 Agamben, ‘The Invention of an Epidemic’ (n 10); Agamben ‘Clarifications’ (n 10).
33 Agamben, ‘The Invention of an Epidemic’ (n 10).
34 Agamben ‘Clarifications’ (n 10).
35 John Hopkins University, ‘COVID-19 Dashboard’ (web page, 9 August 2020) <https://coronavirus.jhu.edu/map.html>.
36 Brigitte Nehrlich, ‘Metaphors in the time of Coronavirus’, *Making Science Public* (web page, 17 March 2020) <https://blogs.nottingham.ac.uk/makingsciencepublic/2020/03/17/metaphors-in-the-time-of-coronavirus>.
37 Josh Taylor, ‘Australia’s civil liberties under coronavirus: advocates warn laws must be temporary’, *The Guardian (online, Thursday 26 March 2020) <https://www.theguardian.com/world/2020/mar/26/australias-civil-liberties-under-coronavirus-advocates-warn-laws-must-be-temporary>.*
38 *Biosecurity Declaration.*
39 *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension) Instrument 2020* (Cth).
40 *Biosecurity Act 2015* (Cth), sub-s 477(1) (‘*Biosecurity Act*’).
41 *Biosecurity Act*, sub-s 478(1).
42 *Biosecurity Act*, sub-ss 477(5), 478(4).
43 Josh Taylor (n 37).
44 Jose and Packam (n 8).
45 *COVID-19 Restrictions* sub-s 10(1).
46 *COVID-19 Restrictions* sub-ss 11(1)(b)–(c); Government of NSW ‘COVID Safe Businesses’ *NSW Government* (web page, last updated 7 August 2020) <https://www.nsw.gov.au/covid-19/covid-safe-businesses>.
47 *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109.
48 Ibid [7].
49 *Commissioner of Police v Bassi* [2020] NSWSC 710.
50 Ibid [24].
51 Ibid [31].
52 *Supple*, [41].
53 Ibid [42].
54 Public Health Association of Australia, ‘Black Lives Matter protests should proceed – safely’ (media release, 12 June 2020); NATSILS, Human Rights Law Centre, RACS, Amnesty, Grata Fund, NSW Council for Civil Liberties and Community Legal Centres NSW, ‘Joint Statement: Australians’ Right to Protest’ *NSW Council for Civil Liberties* (web page, 18 June 2020) <https://www.nswccl.org.au/joint_statement_the_right_to_protest#:~:text=%E2%80%9CThe%20public’s%20right%20to%20protest,not%20to%20cause%20avoidable%20harm.>.
55 *Commissioner of Police v Bassi* [2020] NSWSC 710, para 31; *Supple*, [42].
56 Jordan Hayne, ‘Black Lives Matter protests ‘completely unacceptable’, Scott Morrison says in call for demonstrators to be charged’, *ABC News (online, 11 June 2020) <https://www.abc.net.au/news/2020-06-11/black-lives-matter-protests-morrison-calls-for-charges/12342762>.*
57 *Commissioner of Police (NSW) v Gibson [2020] NSWSC 953, [84].*
58 *Padraic Gibson (on behalf of the Dungay family) v Commissioner of Police (NSW Police Force) [2020] NSWCA 160.*
59 Jesse Dorsett and Emma Elsworthy, ‘Six protesters arrested at Sydney Black Lives Matter march’ *ABC News (online, 28 July 2020) <https://www.abc.net.au/news/2020-07-28/sydney-black-lives-matter-protesters-detained/12498034>; Laura Chung, ‘Sydney Black Lives Matter protest organiser detained, protesters ordered to move on’ The Sydney Morning Herald (online, 28 July 2020) <https://www.smh.com.au/national/nsw/sydney-black-lives-matter-protest-organiser-detained-protesters-ordered-to-move-on-20200728-p55g20.html>.*
60 Dorsett and Elsworthy (n 58).
61 Chung (n 58).
62 Zsuzsanna Végh, ‘No more red lines left to cross: The Hungarian government’s emergency measures’, *European Council on Foreign Relations,* (online, 2 April 2020*) <https://www.ecfr.eu/article/commentary_no_more_red_lines_left_to_cross_the_hungarian_governments_emerge#:~:text=No%20more%20red%20lines%20left%20to%20cross%3A%20The%20Hungarian%20government’s%20emergency%20measures,-Commentary&text=The%20Hungarian%20government%20now%20has,the%20interests%20of%20crisis%20management.&text=And%20none%20more%20so%20than%20Hungarian%20Prime%20Minister%20Viktor%20Orb%C3%A1n>.*
63 Ibid; Lydia Gall, ‘Hungary’s Orban Uses Pandemic to Seize Unlimited Power Emergency Draft Law A Clear Threat to Democratic Freedoms’, *Human Rights Watch (web page, 23 March 2020) <https://www.hrw.org/news/2020/03/23/hungarys-orban-uses-pandemic-seize-unlimited-power>; Benjamin Novak and Patrick Kingsley, ‘Hungary’s Leader Grabbed Powers to Fight the Virus. Some Fear Other Motives.’ The New York Times (online, 5 April 2020) <https://www.nytimes.com/2020/04/05/world/europe/victor-orban-coronavirus.html>.*
64 Benjamin Novak, ‘Hungary Moves to End Rule by Decree, but Orban’s Powers May Stay’, *The New York Times*, (online, 16 June 2020) <https://www.nytimes.com/2020/06/16/world/europe/hungary-coronavirus-orban.html>.
65 Agamben (n 3) 3.
66 Ibid 59-60.

67 Ibid 59.
68 Ibid 56, 59.
69 Ibid 59.
70 Ibid 59-60.
71 Walter Benjamin, *Selected Writings: Volume 1, 1913-1926, tr Edmund Jephcott, Howard Eiland and Michael W.Jennings (eds) Jennings (Harvard University Press, 2003), 246, 252.*
72 Agamben (n 3) 62.
73 Ibid 63.
74 Ibid 64.
75 Ibid.
76 Ibid.
77 Ibid 88; Benjamin Morgan, 'Undoing Legal Violence: Walter Benjamin's and Giorgio Agamben's Aesthetics of Pure Means', (March 2007) 34(1) *Journal of Law and Society* 46, 47.
78 Agamben (n 3) 63-64; Morgan (n 76) 46-48.
79 Walter Benjamin, *Selected Writings: Vol 4, 1938-1940, tr Edmund Jephcott, Howard Eiland and Michael W. Jennings (eds) (Harvard University Press, 2003) 392.*
80 Ibid.
81 Ibid.
82 Elaine Godfrey, 'The Enormous Scale of this Movement', *The Atlantic*, (online, 7 June 2020) <https://www.theatlantic.com/politics/archive/2020/06/protest-dc-george-floyd-police-reform/612748/>.
83 *Raul Bassi v Commissioner of Police (NSW)* [2020] NSWCA 109.
84 Steven Trask, 'Justice won't wait': Protesters vow to defy Supreme Court at Sydney Black Lives Matter rally', *SBS News* (online, 5 June 2020) <https://www.sbs.com.au/news/justice-won-t-wait-protesters-vow-to-defy-supreme-court-at-sydney-black-lives-matter-rally>.
85 Lear (n 11) 6-7.
86 Ibid, 6, 55-57.
87 Ibid 50.
88 Ibid 56.
89 Ibid 6.
90 Ibid 103.
91 Ibid 103-104.
92 Ibid 135-136.
93 Ibid 117.

COVID-19 Emergency Measures as a Double-Edged Shovel: To Revive or Rebury the 'Socially Dead'?

Sheree Kuan, BA/LLB III

1 Orlando Patterson, *Slavery and social death: a comparative study* (Harvard University Press, 1982) 38.
2 'Explainer: Prisons and COVID-19', *Human Rights Law Centre* (Web Page, March 2020) <https://www.hrlc.org.au/prisons-and-covid19>.
3 Australian Institute of Health and Welfare, *The health of Australia's prisoners 2018* (Report No PHE 246, 30 May 2019) 7.
4 Craig Longman, 'Could the 'Great Writ' lie to release prisoners at risk from COVID-19?' (2020) 66 *Law Society of NSW Journal* 74, 74.
5 US Department of Justice, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(g)* (Program Statement No 5050.50, 17 January 2019) 1.
6 See, e.g., *Hasim v Attorney-General of the Commonwealth* [2013] FCA 1433 [19]. Medium neutral citation?
7 *Abdul v The Queen* [2020] WASCA 34 [52].
8 Dianne Heriot, 'Justice beyond law: clemency and the Royal Prerogative of Mercy', *FlagPost* (Blog Post, 19 September 2012) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2012/September/Justice_beyond_law_clemency_and_the_Royal_Prerogative_of_Mercy>.
9 *Eastman v A-G (ACT)* (2007) 210 FLR 440, 458 [78].
10 *COVID-19 Legislation Amendment (Emergency Measures) Act* 2020 (NSW) s 276.
11 Tony Butler et al, *Report on COVID-19 and the impact on New South Wales prisoners* (Report, April 2020) 7.
12 Ibid.
13 Diane Nazaroff and Heidi Harrington-Johnson, *Extraordinary measures' to release NSW prisoners is all about safety* (March 2020) <https://newsroom.unsw.edu.au/news/business-law/%E2%80%98extraordinary-measures%E2%80%99-release-nsw-prisoners-all-about-safety>.
14 Craig Longman, 'Could the 'Great Writ' lie to release prisoners at risk from COVID-19?' (2020) 66 *Law Society of NSW Journal* 74, 74.
15 Lesley Russell, 'Why prisons in Victoria are locked up and locked down' *The Conversation* (online, 23 July 2020) < https://theconversation.com/why-prisons-in-victoria-are-locked-up-and-locked-down-143178>.
16 *Human Rights Law Centre* (n 2).
17 Peter Wagner, 'Large scale releases and public safety', *Prison Policy Initiative* (Blog Post, 9 April 2020) <https://www.prisonpolicy.org/blog/2020/04/09/large-scale-releases/>.
18 Ibid.
19 Stephane Shepherd and Benjamin Spivak, 'Re-considering the immediate release of prisoners during COVID-19 community restrictions' (2020) 213(2) *The Medical Journal of Australia* 1.
20 Ibid 3.
21 *RC v R; R v RC* [2020] NSWCCA 76 [252], [255].
22 Ibid.
23 *Rowson v Department of Justice and Community Safety* [2020] VSC 236 [98].
24 *R v Despotovski* [2020] NSWDC 110 [35]-[39].
25 *Scott v R* [2020] NSWCCA 81 [166].
26 *McKinnon v R* [2020] NSWCCA 106 [32].
27 'Corrective Services', *NSW Department of Communities and Justice* (Web Page, June 2020) <https://www.coronavirus.dcj.nsw.gov.au/services/corrective-services>.
28 Hannah Sparks and Louise Thrower, 'Inmate disturbance at Goulburn Correctional Centre'. *Goulburn Post* (online, 14 April 2020) <https://www.goulburnpost.com.au/story/6718319/gas-deployed-on-goulburn-correctional-centre-inmates-on-holy-thursday/>.
29 Marzia Lazzerini and Giovanni Putoto, 'COVID-19 in Italy: momentous decisions and many uncertainties' (2020) *Lancet Glob Health* 1, 1.
30 Craig Longman, 'Could the 'Great Writ' lie to release prisoners at risk from COVID-19?' (2020) 66 *Law Society of NSW Journal* 74, 74.
31 For further discussion into the traditional forms of the writ, see *Secretary of State for Home Affairs v O'Brien* [1923] AC 603, 609 (Lord Birkenhead).
32 Ibid.
33 *R v Deputy Governor of Parkhurst Prison; ex parte Hague* [1992] 1 AC 58, [166].

Toeing the borderline – the impact of Brexit on Ireland's borderlands

Aoife Hogan, JD I

1 Seamus Heaney, 'Feeling into Words', in *Preoccupations: Selected Prose 1968-1978* (Faber and Faber, 1980) 41.
2 Ibid.
3 Seamus Heaney, 'A Herbal', in *Human Chain* (Faber and Faber, 2010) 43.
4 Seamus Heaney, 'Digging', in *Death of a Naturalist* (Faber and Faber, 1966) 3.
5 Ronan McGreevy, 'Marking the Norman Invasion of Ireland: 850 years and counting…', *Irish Times* (Dublin, 1 May 2019) 1.
6 Peter Leary, *Unapproved Routes: Histories of the Irish Border, 1922 – 1972* (Oxford University Press), 2016) 4.
7 Ibid.
8 Leary (n 6) 3.
9 Ibid.
10 Heaney (n 4) 3.
11 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 476 - 477.
12 Northern Ireland Assembly, 'Assembly Business', *Northern Ireland Assembly* (Web Page, 2020) <http://www.niassembly.gov.uk/assembly-business/>.
13 Signed by the Ulster Unionist Party, the Social Democratic and Labour Party, Sinn Féin, the Alliance Party, the Progressive Unionist Party, the Northern Ireland Women's Coalition, the Ulster Democratic Party and Labour.
14 *Belfast Agreement 1998* (UK), 'Annex: Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland', 'Constitutional Issues'.
15 *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583.
16 *Belfast Agreement 1998* (UK) (n 17) cl 1(ii).
17 James Dingley, 'Constructive Ambiguity and the Peace Process in Northern Ireland' (2005) 13(1) *Low Intensity Conflict & Law Enforcement* 1.
18 Brendan O'Leary, 'The Nature of the British-Irish Agreement' (1999) 233(1) *New Left Review* 68.

19 Anthony M Collins, 'EU Law in Ireland Post Brexit' (2018) 21 *Trinity College Law Review* 8.
20 Dagmar Schiek, 'Brexit on the island of Ireland: beyond unique circumstances' (2018) 69(3) *Northern Ireland Legal Quarterly* 369.
21 Simon Bulmer and Lucia Quaglia, 'The Politics and Economics of Brexit' (2018) 25 *Journal of European Public Policy* 98.
22 Schiek (n 20) 368.
23 Fintan O'Toole, 'English nationalists have placed a bomb under peace process', *Irish Times* (Dublin, 25 June 2016) 1.
24 Heaney, Seamus, 'Clearances I', *The Haw Lantern* (London: Faber and Faber, 1987), p.
27.
25 UK Electoral Commission, 'Results and turnout at the EU referendum', *The Electoral Commission (Website*, 25 September 2019) <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/elections-and-referendums/past-elections-and-referendums/eu-referendum/results-and-turnout-eu-referendum>.
26 European Commission, *Revised Protocol on Ireland and Northern Ireland included in the Withdrawal Agreement* TF50 (2019).
27 European Commission, *Revised Protocol on Ireland and Northern Ireland included in the Withdrawal Agreement* TF50 (2019) art 5.
28 Ibid.
29 Ibid.
30 Stephen Weatherill, 'The Protocol on Ireland/Northern Ireland: protecting the EU's internal market at the expense of the UK's' (2020) 45(2) *European Law Review* 222, 229.
31 Weatherill (n 30) 229.
32 L Alan Winters, 'EU tariffs could cover 75% of imports of goods into Northern Ireland', *UKTPO* (Blog Post, 9 December 2019) 1 < https://blogs.sussex.ac.uk/uktpo/2019/12/09/eu-tariffs-could-cover-75-of-imports-of-goods-into-northern-ireland/>.
33 Weatherill (n 30) 230.
34 Weatherill (n 30) 231.
35 John Curtis, *Withdrawal Agreement Bill: The Protocol on Ireland/Northern Ireland* (House of Commons Briefing Paper No. CBP 8720, 23 October 2019) 11.
36 Peter Foster and George Parker, 'Government to spend £200m on helping GB goods flow to N Ireland', *Financial Times* (London, 7 August 2020) 3.
37 David Young and David Hughes, 'Michael Gove denies £355m Brexit support for north's firms is admission of Irish sea border', *Irish News* (Dublin, 7 August 2020) 2.
38 Heaney (n 3) 43.
39 Ibid.
40 *In the Matter of an Application By Raymond McCord for Judicial Review* [2020] NICA 23 (27 April 2020), Stephens LJ (Treacy LJ and Colton J agreeing).
41 *Robinson v Secretary of State for Northern Ireland and Others* [2002] UKHL 32 [30].
42 Leary (n 6) 1.

Shall any man be above Justice? A History of Impeachment and its Place in the American Constitution
Alexander Bird, JD II

1 Architect of the Capitol, 'Senate Chamber' (Web Page) <https://www.aoc.gov/explore-capitol-campus/buildings-grounds/capitol-building/senate-wing/senate-chamber>.
2 Articles of Impeachment Against Donald John Trump, HR Res 755, 116th Congress (2019).
3 *United States Constitution art II § 4.*
4 James Madison, 'Notes of Debates in the Federal Convention of 1787', *Tuesday, September 8, 1787 (Web Page) <https://avalon.law.yale.edu/18th_century/debates_908.asp>.*
5 Alexander Hamilton et al, *The Federalist Papers, ed Michael A. Genovese (Palgrave Macmillan, 2009) 178.*
6 Frank O. Bowman III, *High Crimes and Misdemeanors: A History of Impeachment for the Age of Trump (Cambridge University Press, 2019) 26.*
7 Ibid, 24.
8 Ibid, 25.
9 W.S. Holdsworth, *A History of English Law (Little, Brown, 1931) 380.*
10 Bowman (n 6) 32.
11 King James I, *The True Law of Free Monarchies and Basilkon Doron, ed. Daniel Fischlin and Mark Fortier (Centre for Reformation and Renaissance Studies; 1st edition (1996) 69.*
12 Bowman (n 6) 32.
13 Ibid.
14 The National Archives, 'Civil War', *Why Did People Want the King Back in 1646? (Web Page)* < https://www.nationalarchives.gov.uk/education/civilwar/g4/key/>.
15 J.R. Jones, *The Revolution of 1688 in England (Norton & Co, 1973) 11.*
16 Bowman (n 6) 40.
17 Barbara Aronstein Black, 'Massachusetts and the Judges: Judicial Independence in Perspective' (1985) 3(1) *Law and History Review 101, 108-110.*
18 Bowman (n 6) 83.
19 Lawrence M. Friedman, *A History of American Law (Simon & Schuster, 3*rd ed, 2005) 67.
20 Bowman (n 6) 96.
21 Ibid.
22 Ibid.
23 Thomas Jefferson, 'A Summary View of the Rights of British North America' in Merrill Jensen (ed), *Tracts of the American Revolution, 1763-1776 (Hackett Publishing Company, 2003) 256, 270.*
24 *United States Constitution art I § 9.*
25 Bowman (n 6) 110.
26 Ibid.
27 Ibid, 111.

Holding Big Emitters Responsible: International Law and Climate Change
Jasmine Todoroska, BSc/LLB III

1 UN News, 'Island States threatened by rising seas call at UN for urgent action on climate change' (2 October 2015) < https://news.un.org/en/story/2015/10/511232-island-states-threatened-rising-seas-call-un-urgent-action-climate-change>.
2 UNDP, 'Small Island nations at the frontline of climate action', *United Nations Development Programme* (18 September 2017) <https://www.undp.org/content/undp/en/home/news-centre/news/2017/09/18/small-island-nations-at-the-frontline-of-climate-action-.html>.
3 Rebecca Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' (2005) 14(1) *Washington International Law Journal* 103, 104.
4 Aaron Korman and Giselle Barcia, 'Rethinking Climate Change: Towards an International Court of Justice Advisory Opinion' (2012) 37 *Yale Journal of International Law* 35, 36.
5 Laura Horn, 'Is Litigation an Effective Weapon for Pacific Island Nations in the War against Climate Change' (2009) 12 *Asia Pacific Journal of Environmental Law* 169, 177.
6 Trail Smelter Case (United States v. Canada) [1938 and 1941] 3 R.I.A.A. 1905, 1963.
7 Corfu Channel Case (United Kingdom v. Albania) (Merits) [1949] ICJ Rep 4, 22.
8 Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment) [2010] ICJ Rep 14, 79.
9 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 241.
10 Roda Verheyen and Peter Roderick, 'Beyond Adaption: The legal duty to pay compensation for climate change damage' (Discussion Paper, World Wide Fund for Nature, November 2008), 19.
11 Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic Journal of International Law* 1, 13.
12 Voigt, above n 11, 9 – 10; Roda Verheyen and Peter Roderick, above n 10, 21; André Nollkaemper and Michael Faure, 'International Liability as an Instrument to Prevent and Compensate for Climate Change' (2007) 43 *Stanford Journal of International Law* 123, 145.
13 Certain Activities Carried Out By Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Compensation) [2018] ICJ Rep 15, 30.
14 Jason Rudall, *Compensation for Environmental Damage under International Law* (Routledge, 2020), 1.
15 Roda Verheyen and Peter Roderick, above n 10, 22 – 23.
16 Laura Horn, above n 5, 180.
17 Monetary Gold Case (Italy v France, UK and US) (Preliminary Question) [1954] ICJ Rep 19, 32; *Certain Phosphate Lands in Nauru (Nauru v Australia)* [1992] ICJ Rep 240, 261.
18 Benoit Mayer, 'State Responsibility and Climate Change Governance: A Light through the Storm' (2014) 13 *Chinese Journal of International Law* 1, 19.

19 Stuart Beck and Elizabeth Burleson, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations' (2014) 3(1) *Transnational Environmental Law* 17, 26.
20 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force Nov. 16, 1994).
21 Laura Horn, above n 5, 182.
22 UNCLOS annex VI art 2.
23 UNCLOS art 289.
24 UNCLOS art 290.
25 Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana v Côte d'Ivoire) (Provisional Measures) [2015] ITLOS Rep 146, 152.
26 South China Sea Arbitration (The Republic of the Philippines v The People's Republic of China) (Permanent Court of Arbitration, Case No 2013 – 19, 12 July 2016).
27 Leonardo Bernard, 'The Legal Impact of the South China Sea Arbitration Award on Indonesia', *Australian Institute of International Affairs* (21 November 2019) <http://www.internationalaffairs.org.au/australianoutlook/the-legal-impact-of-the-south-china-sea-arbitration-award-on-indonesia/.
28 Rebecca Jacobs, above n 3, 115.
29 Stuart Beck and Elizabeth Burleson, above n 19, 27.
30 Timo Koivurova, 'International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects', (2007) 22(2) *Journal of Environmental Law and Litigation* 267, 296.
31 Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo (Advisory Opinion) [2010] ICJ Rep 403.
32 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.
33 Laura Horn, above n 5, 194.
34 Roda Verheyen and Peter Roderick, above n 10, 5.
35 Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections', (2017) 49 *Arizona State Law Journal* 1, 5.
36 Laura Horn, above n 5, 202.
37 Stuart Beck and Elizabeth Burleson, above n 19, 20.
38 Richard Lazarus, 'Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future' (2009) 94 *Cornell Law Review* 1153.
39 Laura Horn, above n 5, 202.

Uncertain Prognosis: A Critical Evaluation Of The Patentability Of Medical Diagnostics In Times Of Crisis

Dadar Ahmadi-Pirshahid, Ida Tawiah, Cheryl Hoi Ting Au, Samuel Rabin, JD III

1 Tse Yin Lee, 'Coronavirus: Iran reports leap in death toll', *BBC World News* (News Article, 9 March 2020) <https://www.bbc.com/news/world-middle-east-51801968>
2 Martin Bull, 'Italy's 'darkest hour': how coronavirus became a very political problem.', *The Conversation*, (News Article, 10 March 2020) <https://theconversation.com/italys-darkest-hour-how-coronavirus-became- a-very-political-problem-133178>
3 Adam Rogers, 'Trump's Coronavirus Press Event was even worse than it looked', *WIRED* (News Article, 7 March 2020) < https://www.wired.com/story/trumps-coronavirus-press-event-was-even-worse-than-it-looked/>
4 Ibid.
5 Labrador Diagnostics LLC, 'LABRADOR DIAGNOSTICS LLC'S COMPLAINT FOR PATENT INFRINGEMENT', Submission in *Labrador Diagnostics LLC v BioFire Diagnostics LLC and Biomeriuex*, 311-2873445, 9 March 2020.
6 @marklemley, (Twitter, 17 March 2020, 3.52 am) <https://twitter.com/marklemley/status/1239610528533827586> cited by Nicole Westman, 'A SoftBank-owned company used Theranos patents to sue over COVID-19 tests', *The Verge* (News Article, 18 March 2020) < https://www.theverge.com/2020/3/18/21185006/softbank-theranos-coronavirus-covid-lawsuit-patent-testing>
7 Christina J Moser, 'Invoking Equity in the Time of Covid-19', *Lexology* (Blog Post, 31 March 2020) <https://www.lexology.com/library/detail.aspx?g=335d78c3-c5ec-43e9-b51e-28a0c6d554d3>
8 Intellectual Property Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (Final Report, September 2000) (Ergas Report), 136 cited in David Price, Colin Bodkin and Fady Aoun, *Intellectual property: Commentary & Materials* (Thomson Reuters, 6th ed, 2017), 349-351.
9 Ibid.
10 Productivity Commission of Australia, *Intellectual Property Arrangements* (23 September 2016), 215 cited in David Price, Colin Bodkin and Fady Aoun, *Intellectual property: Commentary & Materials* (Thomson Reuters, 6th ed, 2017), 351-353.
11 *NRDC v Commissioner of Patents* (1959) 102 CLR 252.
12 *IP Laws Amendment (Raising the Bar) Act 2012* (Cth).
13 Article 27(3).
14 *Patent Act 1990* (Cth) s 18(2), 50; *Prohibition of Human Cloning Act* (2002); *Research Involving Human Embryos Act* (2002).
15 HCA 35.
16 *D'Arcy v Myriad Genetics* [2015] HCA 35.
17 [2019] FCA 1011.
18 566 U.S. 66 (2012).
19 Lisa Larrimore Oullette, 'Patentable Subject Matter and Nonpatent Innovation Incentives' (2015) 5 *U.C. Irvine Law Review* 1115, 1128.
20 788 F.3d 1371 (Fed Cir. 2015).
21 [2019] FCA 1011.
22 *Ariosa Diagnostics, Inc. v Sequenom, Inc.*, 788 F.3d 1371 (Fed Cir. 2015).
23 Labrador Diagnostics LLC, 'LABRADOR DIAGNOSTICS LLC'S COMPLAINT FOR PATENT INFRINGEMENT', Submission in *Labrador Diagnostics LLC v BioFire Diagnostics LLC and Biomeriuex*, 311-2873445, 9 March 2020.
24 IP Watchdog, 'As Stakeholders Await New 101 Bill, Responses to Tillis Underscore Need for Movement', *IP Watchdog* (News Article, 22nd August 2019) < https://www.ipwatchdog.com/2019/08/22/stakeholders-await-new-101-bill-responses-tillis-underscore-need-movement/id=112421/>.
25 Ouellette (n 19).
26 Ibid 1121-4; Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2116 (2013); Collaborative Servs. v. Prometheus Labs. Inc., 132 S. Ct. 1289 (2012) (No. 10-1150), 2011 WL 5439047, at *17.
27 Ibid, 1145.
28 Ibid.
29 Ibid, 1126.
30 Daniel J. Hemel and Lisa Larrimore Ouellette, 'Innovation Policy Pluralism' (2019) 128(3) *Yale Law Journal* 544, 551.
31 Lisa Larrimore Ouellette, Nicholson Price, Rachel Sachs, and Jacob Sherkow, 'How can innovation and regulatory policy accomplish robust COVID-19 testing?', *Written Description* (Blog Post, 15 April 2020) < https://writtendescription.blogspot.com/2020/04/how-can-innovation-and-regulatory.html>.
32 Thomas Pogge, 'The Health Impact Fund: Better Pharmaceutical Innovations at Much Lower Prices' in Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds), *Incentives for Global Public Health: Patent law and access to medicines* (Cambridge University Press, 2010) 135.
33 Ibid.
34 Rob Picheta and Jessie Yeung, 'Trump announced the US will pull out of the WHO. What does that actually mean?', *CNN US* (News Article, 30 May 2020) <https://edition.cnn.com/2020/05/19/us/trump-who-funding-threat-explainer-intl/index.html>; Malcolm Farr, 'Australian PM pushes for WHO overhaul including power to send in investigators', *The Guardian* (News Article, 22 April 2020) <https://www.theguardian.com/australia-news/2020/apr/22/australian-pm-pushes-for-who-overhaul-including-power-to-send-in-investigators>; Mike Blanchfield, 'China pushes back against efforts by Canada, to get Taiwan access at WHO', *The Globe and Mail* (News Article, 11 May 2020) <https://www.theglobeandmail.com/politics/article-andrew-scheer-backs-liberal-taiwan-push-at-who-as-move-long-advocated/>.
35 See Kathleen Liddell, 'The Health Impact Fund: a Critique.' Chapter Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds), *Incentives for Global Public Health: Patent law and access to medicines* (Cambridge University Press, 2010) 155.
36 Mike Blanchfield, 'China pushes back against efforts by Canada, to get Taiwan access at WHO', *The Globe and Mail* (News Article, 11 May 2020) <https://www.theglobeandmail.com/politics/article-andrew-scheer-backs-liberal-taiwan-push-at-who-as-move-long-advocated/>.
37 Thomas Pogge, 'The Health Impact Fund: Enhancing Justice and Efficiency in Global Health' (2012) 13 *Journal of Human Development and Capabilities*, (2012) 537, 539-540.
38 *Patents Act 1990* (Cth).
39 Ibid, s 133(3).
40 Ibid, s 133(3C).

41 Ibid, s 133(5).
42 Australian Government Productivity Commission, *Compulsory Licensing of Patents*, (Inquiry Report No 61, 28 March 2016) 117.
43 Productivity Commission (n 42) 119.
44 Ibid, 118.
45 Productivity Commission (n 42) 118.
46 *Patents Act 1990* (Cth) s 133(3)(c).
47 Ibid, s 133(1).
48 *Patents Regulations 1991* (Cth) reg 12.1(1).
49 *Patents Act 1990* (Cth) s 163(1).
50 Ibid, ss 163(3)(c), 160A(1).
51 Ibid, s 163A.
52 *Patents Act 1990* (Cth) s 171(1).
53 *Patents Act 1990* (Cth) s 171(4).
54 Productivity Commission (n 42) 169.
55 Ibid.

Unilateral Humanitarian Intervention: Customary Or Criminal In The Context Of Human Rights Crisis?
April Barton, BA/LLB IV

1 Daphné Richemond, 'Normativity in International Law: The Case of Unilateral Humanitarian Intervention' (2003) 6(2) *Yale Human Rights and Development Law Journal* 45.
2 *Charter of the United Nations* art 2(7).
3 David Kennedy, 'Modern War and Modern Law,' (2017) 36(2) *University of Baltimore Law Review* 177.
4 Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention,' (1999) 93(4) *The American Journal of International Law* 825.
5 *Statute of the International Court of Justice* 1945 art 38.
6 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14.
7 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, [99].
8 *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Merits)* [1969] ICJ Rep 3.
9 Roozbeh Baker, '*Customary* International Law in the 21st Century: Old Challenges and New Debates,' (2010) 21(1) *The European Journal of International Law* 176.
10 Malcolm Evans, *International law* (Oxford University Press, 2014) 93.
11 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14.
12 Ibid at [186].
13 Louis Henkin, 'Kosovo and the Law of "Humanitarian Intervention,' (1999) 93(4) *The American Journal of International Law* 825.
14 Schachter, Oscar, *International law in theory and Practice* (Springer, 1991), 126.
15 Martii Koskenniemi, *From Apology to Utopia*, (Cambridge University Press, 2009) 13.
16 Harold Hongju Koh, 'Humanitarian Intervention: Time for better law,' (2017) *The American Society of International Law* 287.
17 Cherif Bassiouni, 'A Functional Approach to "General Principles of International Law,' (1990) 11(3) *Michigan Journal of International Law* 770.
18 David Kennedy, 'Modern War and Modern Law,' (2017) 36(2) *University of Baltimore Law Review* 184.
19 Ibid, 189.
20 *Charter of the United Nations* art 39.
21 Kimberley Trapp, 'Unauthorised Military Interventions for the Public Good: A Response to Harold Koh,' (2017) 111 *American Society of International Law* 293.
22 Ibid.
23 David Kennedy, 'Modern War and Modern Law,' (2017) 36(2) *University of Baltimore Law Review* 175.
24 *Charter of the United Nations* art 41.
25 *Charter of the United Nations* art 42.
26 David Kennedy, "Modern War and Modern Law," *University of Baltimore Law Review* 36, No. 2 (Winter 2017), 178.
27 *Charter of the United Nations* art 51.
28 *Charter of the United Nations* art 51.
29 US Secretary of State Daniel Webster dated 24 April 1841 in *Caroline Case*, 29 British and Foreign State Papers (1841).
30 *Oil Platforms (Islamic Republic of Iran v United States of America* [1996] ICJ Rep 803.
31 Christian Tams, "The Use of Force against Terrorists," *The European Journal of International Law* 20, No.2, (2009), 386.
32 Kimberley Trapp, 'Unauthorised Military Interventions for the Public Good: A Response to Harold Koh,' (2017) 111 *American Society of International Law* 293.
33 Harold Hongju Koh, 'Humanitarian Intervention: Time for better law,' (2017) *The American Society of International Law* 291.

Charitable Advocacy Is More Important Than Ever
Samuel Chu, BSc/LLB IV

* Bachelor of Science/Bachelor of Laws IV, University of Sydney. N.B: This article expresses my personal views only.
2 See *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539; *Charities Act 2013* (Cth) s 12(1)(l). This is the terminology that will be used throughout this paper (for consistency).
3 *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, 583.
4 See *Re Compton; Powell v Compton* [1945] Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.
5 Section 11 of the Charities Act provides that purposes contrary to law or public policy or the purpose of promoting or opposing political parties or candidates for political office are "disqualifying purposes".
6 ACNC Act s 25-5.
7 Ibid s 25-5(1)(b).
8 Ibid s 25-5(5).
9 [1917] AC 406.
10 Ibid 442.
11 *Charities Act 2011* (UK) ss 2-3.
12 *Re Greenpeace of New Zealand* [2014] NZSC 105.
13 *Family First New Zealand v Charities Registration Board* [2018] NZHC 2273. *Family First New Zealand* is, at the time of writing, currently subject to an appeal.
14 (2010) 241 CLR 539.
15 Ibid 556-557.
16 Ibid 556.
17 Charities Act s 12(1)(l).
18 See the remarks of the CEO of the Community Council of Australia, David Crosbie, in Fergus Hunter, 'Charities express alarm as long-time 'foe' Gary Johns is appointed as their regulator', *Sydney Morning Herald,* (online, 7 December 2017) <https://www.smh.com.au/politics/federal/charities-express-alarm-as-longtime-foe-gary-johns-is-appointed-as-their-regulator-20171207-h00cr5.html>.
19 Previously the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill at its first reading).
20 See Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 sch 1 pt 1 item 11.
21 Ibid sch 1 pt 2. See also Paul Karp, 'Charities warn Australia's foreign donation laws will strangle advocacy', *Guardian Australia* (online, 11 January 2018) <https://www.theguardian.com/australia-news/2018/jan/11/charities-warn-australias-foreign-donation-laws-will-strangle-advocacy>.
22 Andrew Leigh and Don Farrell, 'Banning Foreign Donations Without Hurting Charities', *Pro Bono News* (online, 26 November 2018) <https://probonoaustralia.com.au/news/2018/11/banning-foreign-donations-without-hurting-charities/>.
23 *Commonwealth Electoral Act 1918* (Cth) s 287F.
24 Paul Karp, 'Coalition bill to ban foreign political donations passes Senate', *Guardian Australia* (online, 15 November 2018) < https://www.theguardian.com/australia-news/2018/nov/15/coalition-bill-to-ban-foreign-political-donations-passes-senate>.
25 Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019 ch 2 pt 1 cl 31.
26 Ibid ch 2 pt 1 cl 22.
27 Lucy Stone, 'Committee recommends law reform to reflect charity concerns', *Brisbane Times* (online, 17 February 2020) <https://www.brisbanetimes.com.au/national/queensland/committee-recommends-law-reform-to-reflect-charity-concerns-20200210-p53zb4.html>.
28 *Electoral Act 1992* (Qld) s 281H. See also Human Rights Law Centre, 'New laws to cut the influence of money in QLD politics would be a win for democracy' (Media Release, 18 June 2020) <https://www.hrlc.org.au/news/2020/6/18/new-laws-to-cut-the-influence-of-money-in-qld-politics-would-be-a-win-for-democracy>.
29 (2019) 264 CLR 595.
30 *Electoral Funding Act 2018* (NSW) s 29(10).
31 Ibid ss 29(2)-29(3).
32 *Unions NSW v New South Wales* (2019) 264 CLR 595, 618 [53]

(Kiefel CJ, Bell and Keane JJ).
33 Luke Michael, 'High Court Ruling Another Win for Charitable Advocacy', *Pro Bono News* (online, 30 January 2019) <https://probonoaustralia.com.au/news/2019/01/high-court-ruling-another-win-charitable-advocacy/>.
34 Wendy Williams, 'Who is Gary Johns?', *Pro Bono News* (online, 7 December 2017) <https://probonoaustralia.com.au/news/2017/12/who-is-gary-johns/>
35 Ibid s 15-10(h).
36 For example, when Dr Johns chose not to denounce his previously held views that Indigenous women were "cash cows". See Luke Michael, 'Charity Advocates Ask – What is Dr Gary Johns Hiding?' *Pro Bono News* (online, 25 January 2019) <https://probonoaustralia.com.au/news/2019/01/charity-advocates-ask-dr-gary-johns-hiding/>.
37 Quote from Students Representative Council of the University of Sydney, 'Council Minutes – 13 February 2020', *SRC Meetings and Minutes* (PDF, 13 February 2020) 39 <http://srcusyd.net.au/wp-content/uploads/2020/05/1_Council-Minutes_13Feb20.pdf>.
38 Rex Martinich, 'Riverina farmers welcome Aussie Farms online activist group losing federal charity status', *Daily Liberal* (online, 19 November 2019) <https://www.dailyliberal.com.au/story/6500539/farmers-welcome-online-activist-group-losing-charity-status/?cs=9397>.
39 ACNC Review Panel, 'Strengthening For Purpose: Australian Charities and Not-for-profits Commission – Legislation Review 2018' (Report and Recommendations, 31 May 2018) pp 82-83.
40 Ibid p 82.
41 Ibid pp 82-83.
42 See, e.g., University of Melbourne Student Union, 'UMSU calls for the University to support PhD candidates' (Media Release, 10 July 2020) <https://umsu.unimelb.edu.au/umsu-calls-for-the-university-to-support-phd-candidates/>
43 See, e.g., Australian Council of Social Services, 'As impact of coronavirus grows, survey shows vital community services sinking with demand' (Media Release, 22 March 2020) <https://www.acoss.org.au/media_release/as-impact-of-coronavirus-grows-survey-shows-vital-community-services-sinking-with-demand/>.
44 Micah Australia, 'Who we are', *About* <http://www.micahaustralia.org/who_we_are>.
45 Micah Australia, *Take Action* <http://www.micahaustralia.org/take_action>.
46 Both organisations are registered as charities with the ACNC.
47 ACNC Review Panel (n 39) 82.

State Of Exception? A Look Into Australia's Increasingly Unexceptional National Security Laws

Jasmine Crittenden, JD I

1 Giorgio Agamben, *State of Exception* (University of Chicago Press, 2005) 3.
2 Ibid, 2.
3 Ibid, 5.
4 Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's *State of Exception*' (2006) 17(3) *European Journal of International Law* 677, 679.
5 Ibid.
6 Ibid, 683.
7 Ibid, 678.
8 *Constitution of India* art 352.
9 Ibid.
10 *Ibid*, art 19.
11 *Constitution of the Netherlands* art 103.
12 *National Emergencies Act 1976*.
13 Emily E. Roberts, 'Declarations Under the National Emergencies Act, Part 1: Declarations Currently in Effect' *Federation of American Scientists* (Legal Side Bar, 28 February 2019) <https://fas.org/sgp/crs/natsec/LSB10252.pdf>.
14 Agamben (n 1) 22.
15 Julian Burnside, 'What Price "Freedom"? The Legacy of 9/11' (2005) 68 (May/June) *Precedent*, 4, 5.
16 George W. Bush, 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism' (Military Order, 13 November 2001) <https://fas.org/irp/offdocs/eo/mo-111301.htm>.
17 Agamben (n 1) 4.
18 Ibid 1.
19 Jessie Blackbourn and Nicola McGarrity, 'Australia Has Enacted 82 Anti-Terror Laws Since 2001. But Tough Laws Alone Can't Eliminate Terrorism' *The Conversation* (online 30 September 2019) <https://theconversation.com/australia-has-enacted-82-anti-terror-laws-since-2001-but-tough-laws-alone-cant-eliminate-terrorism-123521>.
20 George Williams, 'ASIO's Extraordinary Powers' (2013) 8(1) *Journal of Policing, Intelligence and Counter-Terrorism* 66, 66.
21 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34R.
22 Ibid ss 34G(3), 34ZB.
23 Ibid ss 34D(4)(a).
24 Williams (n 20) 68.
25 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34ZO.
26 Ibid s 34ZQ.
27 Ibid.
28 *Criminal Code Act 1995* s 105.1.
29 Ibid.
30 Ibid s.104.12A.
31 *Universal Declaration of Human Rights* art 19.
32 Keiran Hardy and George Williams, 'Special Intelligence Operations and Freedom of the Press' (2016) 41(3) *Alternative Law Journal* 160, 160.
33 *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth) Division 4C.
34 *Australian Security Intelligence Organisation Act 1979* (Cth) s 35P(2).
35 George Williams, 'The Legal Assault on Australian Democracy: The Annual Blackburn Lecture' (2016) 16(2) *QUT Law Review* 19, 19.
36 Ibid.
37 Jessie Blackbourn and Nicola McGarrity, 'The Dangers of Sunsets in National Security' *AusPubLaw* (online 8 August 2016) <https://auspublaw.org/2016/08/the-dangers-of-sunsets/>.
38 Ibid.
39 Ibid.
40 *Australian Security Intelligence Organisation Amendment Bill 2020* (Cth).
41 Australian Human Rights Commission, 'How Are Human Rights Protected in Australian Law?' *Australian Human Rights Commission Website* (Web Page 27 March 2019) <https://humanrights.gov.au/our-work/rights-and-freedoms/how-are-human-rights-protected-australian-law>.
42 Matthew Sharpe, '"Thinking of the Extreme Situation ..." On the New Anti-Terrorism Laws, Or Against a Recent (Theoretical and Legal) Return to Carl Schmitt' (2006) 24 *Feminist Law Journal* 95, 96.

SYDNEY
UNIVERSITY
LAW SOCIETY