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AFFIRMATIVE ACTION IN PIERCING THE BAMBOO CEILING WITHIN THE AUSTRALIAN LEGAL PROFESSION — UTOPIAN IDEAL OR DYSTOPIAN NIGHTMARE?*

K ABRAHAM THOMAS**

In memory of my paternal Grandparents
31 March 1930 – 18 October 2017
3 October 1927 – 10 December 2017

This paper considers the phenomenon of the bamboo ceiling and whether affirmative action presents an adequate means of alleviating such deeply entrenched inequalities within the Australian legal profession. It is suggested that "The Medici Effect" presents an adequate means of overcoming the problem of the bamboo ceiling. It is concluded that "The Medici Effect", bringing together different disciplines and finding their intersections, is a means of generating collaboration and invoking innovation through an influx of ideas bringing about the core notable benefit of "diversity of thought".

* This paper was selected as the winning paper of the inaugural William Ah Ket Scholarship, designed to highlight issues related to equality, diversity, and the law, while fostering the development and promotion of cultural diversity in the Australian legal profession. The scholarship is named after William Ah Ket, the son of Chinese migrants who was admitted to practice in Victoria in 1903. William completed his articled clerkship at Maddock Jamieson (now Maddocks) before signing the Victorian Bar roll in 1904. He practised as a barrister until his death in 1936. William is believed to be the first person of Chinese background to practise as a barrister in Australia. This Scholarship is initiated by the Asian Australian Lawyers Association and proudly sponsored by Maddocks.

** K Abraham Thomas (LLB, GDLP) is a solicitor at the State Revenue Office of Victoria (Legal Services). The author dedicates this paper to his paternal grandparents, who were and continue to be a source of inspiration to him.

CONTENTS

I INTRODUCTION

> It is time for parents to teach young people early on that in diversity there is beauty and there is strength. We all should know that diversity makes for a rich tapestry, and we must understand that all the threads of that tapestry are equal in value no matter their colour — Maya Angelou

This paper engages in a systemic analysis of the phenomenon termed the "bamboo ceiling", and in doing so, examines the strategy of affirmative action in piercing the bamboo ceiling within the Australian legal profession. Affirmative action is scrutinised based on its effectiveness and shortfalls in various facets of Australian society, and as evinced in other jurisdictions the world over.

On the outset, this paper recognises that any discussion of affirmative action in a vacuum that disregards broader considerations of racial, ethnic, or other minority and marginalised groups is necessarily incomplete. However, this paper selectively focuses on affirmative action specifically in relation to the "bamboo ceiling" within the Australia legal profession in the context of equality and diversity.

This paper ultimately acknowledges the benefits that affirmative action may bring in terms of equality and diversity and the potential for improved standards of both equality and diversity. However, it is postulated that although quantitative measures of diversity and equality are instructive, true diversity and true equality can only be achieved through

the harnessing of "The Medici Effect".[1]

It is suggested that harnessing "The Medici Effect" is necessary to attain the core benefit of "diversity of thought" which is necessary to break the bamboo ceiling as well as simultaneously tackle the 'traffic jam of diversity' within the Australian legal profession.[2]

II THE BAMBOO CEILING

A *An Overview*

The term "bamboo ceiling" was originally coined in 2005 by Jane Hyun.[3] The term is a derivative of the more commonly recognised metaphor known as the "glass ceiling", used to describe the intangible barriers that impede minority groups in the workforce.

The conception of the term bamboo ceiling originated in reference to the barriers Asian Americans faced in the American workforce. Today, the term itself is used in common parlance when referencing the obstacles faced by individuals of Asian descent in workforces generally, as well as the particular difficulties encountered by these individuals in attaining positions of seniority.

Australia, like most of its western contemporaries, is not immune from this pervasive and undesirable phenomenon. As stated by the Australian Human Rights Commission ('AHRC'), despite Australia's multicultural and heterogeneous composition of various nationalities and ethnicities, the under-representation of non-Anglo-Celtic backgrounds in positions of seniority is glaringly evident as represented below:[4]

[1] Frans Johansson, *The Medici Effect* (Harvard Business School Press, 2006).
[2] Tuah Nguyen and Reynah Tang, 'Gender, Culture and the Legal Profession: A Traffic Jam at the Intersection' (2017) Special Issue 2017 *Griffith Journal of Law & Human Dignity* 93.
[3] Jane Hyun, *Breaking the Bamboo Ceiling: Career Strategies for Asians* (HarperCollins, 2005).
[4] Australian Human Rights Commission, 'Leading for Change: A Blueprint for Cultural Diversity and Inclusive Leadership' (Working Group on Cultural Diversity and Inclusive Leadership, Australian Human Rights Commission, 2016) 2.

Table: Cultural backgrounds of Australia's senior leaders (in percentage terms)

	Indigenous	Anglo-Celtic	European	Non-European
ASX 200 (CEOs)	0	76.62	18.41	4.98
Federal parliament (MPs and Senators)	1.77	78.76	15.93	3.54
Federal ministry (Ministers and Assistant Ministers)	2.38	85.71	11.90	0
Federal and state public service (Secretaries and heads of departments)	0.81	82.26	15.32	1.61
Universities (Vice-chancellors)	0	85.00	15.00	0

This under-representation of non-Anglo-Celtic backgrounds in positions of seniority is closely mirrored when regard is had to senior positions within the Australian legal workforce. A survey undertaken by the Asian Australian Lawyers Association ('AALA') highlights that although Asian Australians account for 9.6 per cent of the total Australian population,[5] Asians only comprise 3.1 per cent of partners in law firms, 1.6 per cent of barristers, and a mere 0.8 per cent of judges.[6]

Statistics such as these are instructive in pointing out the lack of diversity from a quantitative standpoint. More importantly, these statistics serve a function of the phenomenon itself 'gaining currency' and in so doing, bring to light possible measures that should be implemented as well as strategies and targets that could be embarked upon to address and prevent the lacuna of diversity from exacerbating.[7] As a corollary, the publicity of such statistics has increased awareness, in turn resulting in organisations, corporations, and senior individuals taking concerted efforts to mitigate the entrenchment of the bamboo ceiling, be it real or perceived, pervasive or localised.[8]

This paper does not suggest that these statistics point to the unequivocal existence of the bamboo ceiling in the Australian legal workforce, nor does it attempt to enter into a

[5] Diversity Council Australia, 'Cracking the Cultural Ceiling: Future Proofing Your Business in the Asian Century' (Research Report, Diversity Council Australia, 2014).
[6] Asian Australian Lawyers Association, 'The Australian Legal Profession: A Snapshot of Asian Australian Diversity in 2015' (Infographic, Asian Australian Lawyers Association, 2015).
[7] Tim Soutphommasane, 'Culture, Talent and Leadership' (Speech delivered at the launch of Diversity Council Australia's Cracking the Cultural Ceiling Report, Sydney, 11 August 2014) <https://www.humanrights.gov.au/news/speeches/culture-talent-and-leadership>.
[8] Kaori Takahashi, *Australia's 'Bamboo Ceiling' in the Spotlight* (29 August 2016) Nikkei Asian Review <https://asia.nikkei.com/Business/Trends/Australia-s-bamboo-ceiling-in-the-spotlight>.

dialectic of its existence or level of pervasiveness within the Australian legal sphere. Instead, the recognition of the phenomenon by renowned Australian corporations (Westpac Bank and PwC), institutions (Australian Institute of Company Directors) and individuals (Lieutenant-General (ret) David Morrison) in other sectors of the Australian workforce provides sufficient basis for similar assumptions to be made within the specific context of the Australian legal profession.[9]

B *The Australian Legal Profession "Unwigged"*

The Australian legal profession is heralded because it continues to be steeped in culture and tradition. This is perfectly evidenced by how, until most recently, the Victorian jurisdiction continued to embrace horse-hair wigs, a standard feature of court dress since the 1860s for both barristers and judges in Victorian courts. The doing away of horse-hair wigs alike in the Victorian Supreme Court arose as a result of an edict issued by the Honourable Marilyn Warren, former Chief Justice of the Supreme Court of Victoria, describing wigs as a symbol of the past with no place in the modern courtroom and of no assistance to the administration of justice.[10]

The eschewal of such long-standing tradition should not be considered a simple task or an uncomplicated exercise, particularly when considered in light of the historical and traditional underpinnings dating back to practices connected with the English aristocracy. Wigs aside, the Australian legal profession has much more deeply entrenched, intangible norms with greater implications that are less readily removed, be it through edict or otherwise.

1 *"Male, Pale, and Stale" — An Anachronistic Triple Whammy*

The Australian legal profession is beset with a triple whammy of entrenched norms. Most

[9] See Michael Smith, 'Australian Boards Need to Break Bamboo Ceiling', *Australian Financial Review* (online), 4 October 2017 <http://www.afr.com/brand/chanticleer/australian-boards-need-to-break-bamboo-ceiling-20171004-gytwf2>; Takahashi, above n 8; Liz Burke, *Australia's Shameful Bamboo Ceiling: Australian of the Year David Morrison Pushing for More Asian People in Top Jobs* (29 January 2016) News.com.au <http://www.news.com.au/finance/work/careers/australias-shameful-bamboo-ceiling-australian-of-the-year-david-morrison-pushing-for-more-asian-people-in-top-jobs/news-story/f94f5c949111bca2679e40355cd0a976>.

[10] Melissa Coade, *Vic Court Refuses to Hear Wigged Barristers* (30 May 2016) Lawyers Weekly <https://www.lawyersweekly.com.au/wig-chamber/18666-vic-court-refuses-to-hear-wigged-barristers>.

particularly, its higher echelons are anachronistically "male, pale, and stale", although currently more diverse than ever before.[11] This is in stark contradistinction to Australia's 'hugely diverse' demographic,[12] which in 2016 comprised of 49 per cent of persons being born overseas or having at least one parent born overseas.[13]

It should be appreciated that although Australia's demographic is currently very diverse, the Australian legal fraternity is plagued with anachronistic norms which have resulted in it continuing to be predominantly "male, pale, and stale":

> Any professional group which, for 700 years, has comprised solely of men is bound to have inherited attitudes which may seem unwelcoming to some new entrants … Women. Aboriginal lawyers. Lawyers from non-Anglo Celtic backgrounds. Gay and lesbian lawyers.[14]

The bamboo ceiling is a result of these aforementioned, deeply entrenched norms permeating the Australian legal profession. Although the bamboo ceiling constitutes only one of these anachronistic norms, a linear solution alone should not be adopted in an attempt to address the "paleness", with no regard made to the "maleness" or "staleness" of the profession. This triple whammy of norms is not disparate, but a collective whole that has continuously been entrenched for all these years, and will continue to get staler, "male-er", and paler *unless* measures are taken to address century-long entrenchment within the legal profession.

2 *A Traffic Jam of Diversity*

In theory, it is acknowledged that in addressing the bamboo ceiling, a linear approach should not be adopted, and instead, regard must be had to the other aspects of diversity also plaguing the system.

In practice, however, there is a "traffic jam" for diversity in the law, due to other aspects

[11] Wayne Martin, 'Cultural Diversity and the Law Conference — Access to Justice in Multicultural Australia' (Paper presented at Cultural Diversity and the Law Conference, Sydney, 13–14 March 2015) 3.
[12] Australian Bureau of Statistics, *Census of Population and Housing: Australia Revealed, 2016* (27 June 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/mf/2024.0>.
[13] Ibid; But see Martin, above n 11, 7.
[14] Michael Kirby, 'Women Lawyers Making a Difference' (Speech delivered at the Women Lawyer's Association of New South Wales, Sydney, 18 June 1997) <http://www.hcourt.gov.au/speeches/kirbyj/womenlaw.htm>.

of diversity being kept in abeyance until gender equality is resolved.[15] As pointed out by Nguyen and Tang, this "traffic jam" is exemplified by the Law Council of Australia's statement in 2016 that targets relating to the equitable briefing of female barristers will be reviewed in July 2018 as to whether the broader application of such targets beyond gender is necessary.[16]

Addressing other aspects of diversity only after the profession's "maleness" has been addressed is promising. However, without a definitive time frame, it would mean that other aspects of diversity such as that relating to the bamboo ceiling are kept in limbo pending the resolution of gender equitability in the profession:

> To wait until gender equality is achieved within the workplace would place the issue of cultural diversity on indefinite hold. In any case, the different dimensions of diversity frequently intersect. Efforts to improve the advancement of culturally diverse talent may also contribute to improve gender representation in leadership …[17]

A prolonged or indefinite stalling or abeyance not only creates a "traffic jam" for diversity but also simultaneously impedes cultural diversity and equality, made particularly worrying when considering the role and function of the legal profession in Australian society.

3 *Ivory Towers and the Control of Power*

The entrenchment of anachronistic norms such as the bamboo ceiling lead to a lack of diversity and equality and is cause for concern in any given industry or profession. However, this is amplified multi-fold in the context of the legal profession as the resulting pernicious effects are not localised merely within the peripheries of the legal fraternity. Instead, these pernicious effects extend to affect the broader community and society at large, owing to the power the profession wields in the administration (and interpretation) of justice:

> Law is not an ordinary profession … Law is about the values that inform what we do, how we do it and outcomes … therefore it's more important in law to reflect the

[15] Nguyen and Tang, above n 2.
[16] Law Council of Australia, 'National Model Gender Equitable Briefing Policy' (Policy Paper, June 2016) 7.
[17] Above n 4, 12.

> diversity of values than it is in just about anywhere else because law is about power … And if values affect the exercise of power, it is very, very important that the diversity of values and the experience of backgrounds should be reflected.[18]

Values informing a select, homogeneous group of individuals that hold the balance of power in an increasingly heterogeneous society may be perceived as a disenfranchisement to the very diversity held sacrosanct by the demographic. This, in turn, could strain the (delicate) social fabric of such a diverse society and have unintended consequences.

Moreover, it may lead to the exercise of such power to be deemed draconian and oppressive due to a detachment from the norms and ideals of general society. Instead, the exercise of power would benefit most and work best when it is able to draw from a myriad of diverse talent and perspectives. A truly egalitarian society not only endeavours in principle to achieve diversity, but also utilises such a diverse talent pool in actuality and in the present. The question must be asked — can the legal profession uphold the rule of law and legal values in circumstances where it is not truly reflective of the society in which it operates?

III AFFIRMATIVE ACTION

A *Executive Order 10925 — The Seedbed of Affirmative Action*[19]

The policy of affirmative action was formally conceived and unveiled in the United States of America on 6 March 1961 by President John F Kennedy. President Kennedy issued Executive Order 10925 requiring all federally funded employers to:

> take affirmative action to ensure that applications are employed … without regard to their race, creed, color [sic], or national origin.[20]

Executive Order 10925 institutionalised affirmative action as an official policy of the United States government and is often cited as the birth of the policy of affirmative action.

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[18] Michael Kirby (Speech delivered at the Asian Australian Lawyers Association launch in New South Wales, Sydney, 10 November 2015).
[19] Judson MacLaury, 'President Kennedy's E O 10925: Seedbed of Affirmative Action' (2010) *Federal History Online* 42.
[20] John F Kennedy, 'Statement by the President upon Signing Order Establishing the President's Committee on Equal Opportunity Employment' (Presidential Statement, 7 March 1961) <http://www.presidency.ucsb.edu/ws/?pid=8520>.

Affirmative action is not without its criticism and in some jurisdictions has even been the subject of legal action questioning its very legal or constitutional validity.[21] However, affirmative action itself has come a long way in terms of its applicability and scope in the context of various jurisdictions around the world. Though limited in application, it has also been applied in Australia in the context of the education industry, police recruitment, and gender briefing of barristers, among others.

B *Affirmative Action in Australia*

1 *Police Recruitment*

In Australia, discriminatory practices have been rife in police forces around the country, largely attributable to the gender imbalance and male-dominated culture within the forces. The Victorian police force is such an example, starkly evidenced by the 1998 case of *McKenna v State of Victoria*,[22] which found that senior Victorian police officers had engaged in discrimination and victimisation of a female officer due to her gender and marital status.

Such discrimination is not an isolated example, instead sexual harassment and predatory behaviour have been found to be systemic and endemic within the Victorian police force.[23]

Former Chief Commissioner of Victoria Police, Christine Nixon, attempted to employ affirmative action in police recruitment in order to address such discriminatory practices and harassment. Although women were the primary targets of the Victoria Police proposal, there was also a focus made to recruit new police officers from Asian and Islamic groups.[24] Affirmative action was attempted through "weak forms" (such as gender-inclusive language, circulation of images of female police officers, and the encouragement of women to apply) and "strong forms" (eg quotas).[25]

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[21] See *Fisher v University of Texas* 579 US ___ (2016); See *Grutter v Bollinger* 539 US 306 (2003); See *Regents of the University of California v Bakke* 438 US 265 (1978).
[22] [1998] VADT 83.
[23] See S Walpole, 'Trends in Sexual Harassment Case Law' in R Naughton (ed), *Workplace Discrimination and the Law* (1995).
[24] Margaret Thornton, 'Affirmative Action, Merit and Police Recruitment' (2003) *Alternative Law Journal* 235.
[25] Ibid.

As with other Anglo-Saxon, male-centric professions, minority groups do not merely face linear forms of discrimination in terms of their overall under-representation, but also a perverse disparity in certain areas of a profession, namely at the senior and executive level.

In the context of Victoria Police, it has been found that the representation of women within the Community Policing Squad, Mounted Branch, and Rape Squad is significantly higher than in other divisions.[26] It is apparent that the proportion of women is higher in areas of policing deemed traditionally feminine, such as those involving juveniles, family violence, and administration.[27] However, as Burton suggests, the central question is whether women are in these particular positions as a result of personal choice or due to procedures or entrenched norms that have resulted in them being placed there.[28] It is acknowledged that this indeed is a difficult question to fully conceptualise or answer because the prevalence of minority groups in particular roles or areas within a profession may be a result of the implementation of measures, but also a consequence of intangible bias and culture that have long been entrenched.

2 *Gender Briefing*

Male-dominated professions are characterised by a lack of females entering the particular profession and evidenced by a great disparity in gender ratios from entry-level through to senior roles.

The Australian legal profession is commonly categorised as being one of these male-dominated and male-centric professions. Despite this, the Australian legal profession has improved significantly, in terms of the number of females entering the profession. Although not representative of the entire Australian legal profession, as at October 2016, the legal profession in New South Wales was described as having, for the first time ever, equal numbers of men and women in the profession.[29]

[26] Walpole, above n 23, 19.
[27] K Buckley and L Schetzer, 'The Ongoing Need for Affirmative Action in the Victoria Police Force, Brute Force II' (1999) *Police Issues Group, Federation of Community Legal Centres*, 21.
[28] Clare Burton, 'Merit and Gender: Organisations and the Mobilisation of Masculine Bias' (1987) 22 *Australian Journal of Social Issues* 425.
[29] Urbis Pty Ltd, 'NSW Profile of Solicitors 2016' (Final Report, Law Society of New South Wales, 19 July 2017).

Even more encouragingly, the Victorian legal profession has witnessed a greater number of females being admitted to the profession than males this year, with 'well over 65 per cent of the new lawyers' admitted being women.[30] This was similarly the case in New South Wales between 2015 and 2016, where the legal profession also saw a greater increase of female solicitors (5.9 per cent) as opposed to men (2.6 per cent).[31] Although relatively new, the higher number of females entering the legal profession in various jurisdictions in Australia is itself not unprecedented:

> [A]s in previous years, a higher proportion of solicitors entering the profession for the first time are females. In 2014, 58.9 per cent of solicitors entering the profession for the first time were women — a similar figure to that of 58.1 per cent in 2013.[32]

However, the number of female barristers (28.98 per cent) remains significantly lower than males (71.02 per cent), despite an almost equal overall proportion of male and female solicitors and barristers in the profession, exemplified by the various proportions in Victoria as at 31 May 2017:

	Type		
	Solicitors	**Barristers**	**Total**
Male	9,113	1,448	10,561
Female	9,781	591	10,372
Total	**18,894**	**2,039**	**20,933**

Solicitors and barristers by gender[33]

This disparity between male and female barristers has currently widened to the point that there is a clear bifurcation of a mere handful of female silks, standing at 12.3 per cent

[30] Marilyn Warren, 'Barristers, Solicitors, Law Officials and Others: On the Admission of Lawyers' (Speech delivered at the Admission of Lawyers in the Supreme Court of Victoria, Melbourne, 19 September 2017) <http://scvwebcast.com/admissions/>.
[31] Urbis Pty Ltd, above n 29, 3.
[32] Urbis Pty Ltd, '2014 Report of the Solicitors of NSW' (Final Report, Law Society of New South Wales, March 2015) 16.
[33] Victorian Legal Services Board + Commissioner, *Lawyer Statistics* (1 June 2018) <http://lsbc.vic.gov.au/?page_id=287>.

in Victoria,[34] and 10.0 per cent in Sydney.[35]

It comes as no surprise that bodies such as the Law Council of Australia and the Victorian Equal Opportunity & Human Rights Commission ('VEOHRC') have adopted briefing policies to improve the overall representation of female barristers as well as their representation as senior counsel in Australia and Victoria respectively.[36] For instance, the Law Council of Australia adopted the National Model Gender Equitable Briefing Policy on 18 June 2016, with the intention of briefing senior female barristers in at least 20 per cent of all briefs and/or 20 per cent of the value of all briefs paid to senior barristers, and similarly at least 30 per cent of all briefs and/or 30 per cent of the value of all briefs paid to junior barristers by 1 July 2018.[37]

It is apparent that the Law Council of Australia and the VEOHRC specifically steer clear from the use of the term "affirmative action", choosing instead to couch the respective policies as "equitable briefing". These policies are premised on targets as opposed to quotas and do not have mandatory requirements; in essence, however, they are affirmative action in gender briefing, be it that emphasis is placed on soft measures within an overall scheme of measures to 'accommodate both "soft" and "hard" forms of affirmative action'.[38]

C *Evaluation*

1 *Positives*

Affirmative action is not the panacea to breaking the bamboo ceiling within the Australian legal profession; however, it has positive ramifications in its application (if applied) to the bamboo ceiling within the Australian legal profession.

[34] Note: No of female silks: 36, No of male silks: 256, Total No of silks: 292, Percentage: 36/292 = 12.3 per cent: Victorian Bar, *Find a Barrister* <https://www.vicbar.com.au/find-barrister>.
[35] Note: No of female silks: 48, No of male silks: 392, Total No of silks: 440. Percentage: 48/440 = 10.9 per cent: New South Wales Bar, *Find a Barrister* <http://find-a-barrister.nswbar.asn.au/>.
[36] See, eg, Law Council of Australia, above n 16; Victorian Equal Opportunity and Human Rights Commission, 'Equitable Briefing Initiative' (Aggregate Data Report — Period One (January – June 2016), July 2017).
[37] Nguyen and Tang, above n 2.
[38] Julie O'Brien, 'Affirmative Action, Special Measures and the *Sex Discrimination Act*' (2004) 27(3) *University of New South Wales Law Journal* 848.

(a) A Step in the Right Direction

Any step(s) embarked upon to address issues of diversity within the Australian legal profession, be it through affirmative action or otherwise, is necessarily commendable. Whether it is *the* step that should be embarked upon to achieve equality and diversity, in this instance, the abolishment of the bamboo ceiling is a separate consideration in itself.

The implementation of affirmative action to alleviate the entrenchment of the bamboo ceiling within the legal profession, particularly in its higher echelons, is a step in the right direction of heightened cultural diversity. It is a step in the right direction not merely because of the satisfaction that can be derived (deservingly so) in acknowledging and proclaiming such tangible improvements within the Australian legal profession, but also because more laudable, heightened cultural diversity or diversity generally provides the Australian legal system and its constituent institutions and organisations a springboard to achieve improved performance in a highly globalised legal market which thrives on inclusivity, not insularity:

> diversity matters because we increasingly live in a global world that has become deeply interconnected. It should come as no surprise that more diverse companies and institutions are achieving better performance.[39]

The imperatives of breaking the bamboo ceiling through the implementation of policies such as affirmative action is all the more increased when it is recognised that the Australian legal profession, through its strategic placement in the Asia-Pacific region, is not only highly sought after by Asian markets for its well-regarded legal expertise, but also heavily relies upon these very same Asian markets for its own business growth. The implementation of affirmative action in breaking the bamboo ceiling will be mutually beneficial as it has the potential to further foster and strengthen this symbiotic relationship between the Australian legal profession and the respective Asian markets.

(b) Quick Fix Remedial Strategy

The implementation of affirmative action, particularly through "hard" measures,[40] would,

[39] Vivian Hunt, Dennis Layton and Sara Prince, *Why Diversity Matters* (2 February 2015) McKinsey & Company <http://www.mckinsey.com/business-functions/organization/our- insights/why-diversity-matters>.
[40] O'Brien, above n 38, 848.

without a doubt, be controversial and most certainly draw its fair share of diatribe from various quarters both within and outside the Australian legal profession.

Affirmative action may also be unpopular due to its apparent "artificiality" in endeavouring to bring heightened standards of diversity and equality. Nevertheless, despite its aura of artificiality, it is one of the few available 'remedial strategies' that can be implemented to address structural discrimination,[41] which has resulted in legal professionals of Asian descent being under-represented or in certain instances, unrepresented at all, in senior positions within the Australian legal profession.

In the context of norms that have been deeply-entrenched for decades or even centuries, affirmative action being a remedial strategy is a positive effect in itself solely due to the shorter period of time it will take to implement such policies to break the bamboo ceiling. The very nature of affirmative action being a 'proactive' and deliberate strategy,[42] undertaken to artificially effect improved levels of equality and diversity also has the result of providing rectification more expeditiously than what would ordinarily be expected from organisational change-type initiatives.[43] Temporally, although 'change will not happen overnight',[44] affirmative action is a relatively quick fix as tangible results will ensue in a shorter period of time. This is particularly so when regard is made to the length of time, deep entrenchment, and the level of pervasiveness of the bamboo ceiling within the Australian legal profession.

(c) Substance over Form

The *raison d'etre* of affirmative action is the appreciation that society is non-homogeneous owing to the unequal and imperfect allocation of resources between the various facets of society. It does not have any particular definition as to what it must constitute, instead it is loosely defined as:

> any policy that recognises and addresses past or present disadvantage of an identified group (based on a range of rationales from retributive justice to

[41] Phillip Tahmindjis, 'Affirmative Action in a Democratic Society' (1997) 13 *Queensland University of Technology Law Journal* 204.
[42] Ibid.
[43] Victorian Equal Opportunity & Human Rights Commission, 'Equitable Briefing Initiative' (Public Statement, July 2017) 5.
[44] Ibid.

distributive justice and arguments favouring diversity or social utility).[45]

Owing to its loose definition, affirmative action is not rigidly confined to a particular manner or mode of implementation. The loose definition of the term coupled with the lack of rigidity on the type or mode of implementation does mean that different forms of affirmative action (eg "soft" and "hard" measures) can be employed in tandem to achieve the same end-result.

This is critical because the successful implementation of affirmative action to break the bamboo ceiling will be no mean feat and would require a variety of means to achieve success, specifically tailored to address the level of hierarchy or specific sector within the Australian legal profession, which to an extent is pluralistic and made up of various facets.

Affirmative action emphasises substance over form and differs from other mechanisms employed to achieve equality and diversity due to its focus on results rather than the process. Affirmative action is less focused on the means to an end, but rather is a result-driven mechanism. This directly translates to a preponderance on equality of results rather than equality of procedure.[46] The emphasis on substance over form is imperative because it does mean there is a high likelihood of success in attaining results evincing greater equality and diversity within the Australian legal profession, when compared to a mechanism that places emphasis on the process rather than actual results.

(d) Distributive Justice

And the life of man, solitary, poore, nasty, brutish and short.[47]

Thomas Hobbes described the "state of nature" as solitary, poor, nasty, brutish, and short, owing to the variability of human desires and the scarcity of resources to fulfil those desires. Hobbes believed that all humans are equal in faculties of body and mind in the state of nature. However, owing to the scarcity of resources, everyone is willing to fight against each other to obtain a greater benefit or right. Hence, Hobbes advanced the need for a "social contract" where individuals relinquish their personal liberties to the State

[45] Francesca Bartlett, 'Model Advocates or a Model for Change? The Model Equal Opportunity Briefing Policy as Affirmative Action' (2008) 32 *Melbourne University Law Review* 373.
[46] Ibid 374.
[47] Thomas Hobbes, *Leviathan, or The Matter, Forme & Power of a Common-wealth Ecclesiastical and Civill* (Andrew Crooke, 1651) 62.

(eg the government and judiciary) to alleviate this hypothetical "state of nature" which is characteristically anarchic.

John Rawls recognised the value of the "social contract" but in so doing also came to appreciate the limits of the State, instead opting to focus on the "social contract" in terms of distributive justice between individuals in a society where individuals "under a veil of ignorance" consent to certain principles of justice by agreeing to set aside their individual proclivities.

Affirmative action is a 'combination of justice with utility'.[48] It is a mechanism that predominantly focuses on utility by preventing future injustice, although to a much smaller extent, it serves as a form of retributive justice capable of addressing and correcting past inequality and the lack of diversity.

There has long been an argument favouring the implementation of affirmative action based on distributive justice.[49] Distributive justice places a strong emphasis on the egalitarian distribution of scarce resources, particularly in circumstances where such distribution would be most beneficial and desperately needed. Affirmative action has a great untapped potential to effectuate distributive justice by improving the egalitarian representation of Asian legal professionals across the various sectors and hierarchies within the Australian legal workforce. Affirmative action is a proactive measure that not only has the capacity to break the bamboo ceiling to bring current distributive justice through present implementation but is also 'more than the simple termination of discriminatory practices',[50] as it has the positive effect of reducing the future entrenchment of the bamboo ceiling by addressing and correcting the present.

A corollary of being proactive, affirmative action also has the potential to positively 'change a culture, both in the macro and micro sense'.[51] This ability to change a culture is paramount, as it will ensure that the positive ramifications of affirmative action, such as distributive justice are not ephemeral but will continue for as long as the particular

[48] Tahmindjis, above n 41, 203.
[49] Bartlett, above n 45; See also Ronald F Fiscus, 'The Constitutional Logic of Affirmative Action' (1992); Gwyneth Pitt, 'Can Reverse Discrimination Be Justified?' in Bob Hepple and Erika M Szyszczak (eds), *Discrimination: The Limits of the Law* (1992) 281; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985); Alan Goldman, *Justice and Reverse Discrimination* (Princeton University Press, 1979).
[50] O'Brien, above n 38, 840.
[51] Tahmindjis, above n 41, 204.

culture prevails. In the present context, the importance of a change in culture is all the more pertinent considering the aforementioned entrenchment of culture and tradition in the Australian legal profession.

2 *Negatives*

This paper acknowledges that affirmative action has potentially innumerable positive ramifications, but to focus solely on these would be myopic and one-dimensional. To obtain a holistic perspective, it is apposite also to consider the negative effects of affirmative action.

(a) Innocuous Term for Positive/Reverse Discrimination?

Affirmative action is founded on virtuous principles; it is proactive rather than reactive, and it focuses on substance over form, among others. It is a mechanism that can be suitably employed to deal with the structural discrimination of legal professionals of Asian descent, evinced by their under-representation in positions of seniority within the various facets of the Australian legal profession. However, this suitability is tainted when delving deeper into its means of implementation. Although not axiomatic, affirmative action involves 'making distinctions between people on the basis of their difference'.[52] On a superficial level, this conscious decision to make such distinctions between people based on their difference is tantamount to discrimination, not merely ideologically, but is also 'legally understood as a form of discrimination'.[53]

In Australia, various legislation dealing with discrimination have provided that "special measures" undertaken to prevent discrimination against particular groups of disadvantaged persons are exceptions to the general prohibition on discrimination.[54] In the same vein, the exemption accorded to such measures is embodied in section 8(4) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) which states as follows:

[52] Bartlett, above n 45, 374.
[53] Ibid 375.
[54] See, eg, *Equal Opportunity Act 2010* (Vic) s 12; *Equal Opportunity Act 1984* (WA) s 51; *Discrimination Act 1991* (ACT) s 27; *Anti-Discrimination Act 1996* (NT) s 57; *Anti-Discrimination Act 1991* (Qld) s 105; *Equal Opportunity Act 1984* (SA) s 65; *Anti-Discrimination Act 1998* (Tas) ss 25, 26.

Recognition and equality before the law

(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.[55]

Proponents of affirmative action will eschew the label of "reverse discrimination" accorded to affirmative action and are likely to highlight instead the positive effects that could potentially manifest from its implementation. However, the downside of implementing such a mechanism to deal with discrimination is not limited to the negative connotations associated with the discriminatory character of affirmative action itself.

More troublingly, the negative connotations associated with the intrinsically discriminatory character of affirmative action could potentially lead to greater detriment than good and may further 'exacerbate discrimination against a group (being provided with assistance)'.[56] This, in turn, could be counter-productive to the fundamental precepts meant to be achieved through the implementation of affirmative action.

Affirmative action may potentially further entrench the already deeply-entrenched norms and 'unconscious bias' prevalent within the profession. The criticism levelled at the initiatives undertaken for the equitable briefing of female barristers, deemed by its opponents to be a form of 'tokenism',[57] brought about by 'a touch of social engineering',[58] are recent cases in point highlighting the increased opposition and discrimination that could inadvertently arise from affirmative action.

(b) Dichotomous Relationship with Merit

Affirmative action has received its fair share of backlash due to its intrinsically discriminatory character, albeit its purpose being to combat various forms of discrimination itself. Adding to this list is affirmative action's dichotomous relationship with merit. The implementation of affirmative action to improve the representation of

[55] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8(4).
[56] Bartlett, above n 45, 381.
[57] Janet Fife-Yeomans, 'Gender War in Sydney Legal Ranks over New Female Quota System', *The Daily Telegraph* (online), 27 January 2017 <http://www.dailytelegraph.com.au/news/nsw/gender-war-in-sydney-legal-ranks-over-new-female-quota-system/news-story/5a721353ffe67d9d8c88f4b79f9c0721>.
[58] Jeffrey Phillips, 'Affirmative Action Creates Obstructions on the Level Playing Field', *The Australian* (online), 24 March 2017 <http://www.theaustralian.com.au/business/legal-affairs/affirmative-action-creates-obstructions-on-the-level-playing-field/news-story/62262dece0d14eccc4a01ab5cef06998>.

Asians, particularly in senior positions within the Australian legal profession will be controversial at the very least.

The pertinence of merit will also be reduced significantly by implementing affirmative action to break the bamboo ceiling. It is acknowledged that this argument is countered by proposing that "soft" measures such as targets rather than "hard" measures such as quotas are implemented instead. However, any weight placed other than on the principle of merit, be it through racial preference being "a" factor rather than "the" factor, or through "soft" rather than "hard" measures, will still result in other minority groups being jeopardised in terms of their opportunities and dreams. Despite the pervasive and systemic under-representation of Asians in the higher echelons of the Australian legal profession, it is less than ideal if such minority groups are jeopardised even if only to a limited extent.

Moreover, to undertake affirmative action to attain equality of representation of Asians in the upper echelons or positions of seniority in the profession is erroneous. Not only will it result in an oppositional relationship to merit, but it will also impede the attainment of 'true equality' within the profession and between different minority groups.[59]

(c) Where to Draw the Lines?

An additional setback likely to be faced during the implementation of affirmative action to break the bamboo ceiling is quantifying the standard that should be set. In the context of gender, the target or goal is much simpler, with most policies implementing a target of 50 per cent or close to 50 per cent female representation.

However, with race preferences, more particularly Asian legal professionals, it is uncertain how and where the lines are to be drawn with any affirmative action policies and what percentage should be attributed to a target, quota, or other guiding attribute.[60]

[59] *The Ian Potter Museum of Art (Anti-Discrimination Exemption)* [2011] VCAT 2236, [32].
[60] See generally Edmund Tadros, 'PwC Splits with Deloitte, EY and KPMG on Diversity Targets', *Australian Financial Review* (online), 1 August 2017 <http://www.afr.com/business/accounting/deloitte-ey-kpmg-and-pwc-split-on-diversity-targets-20170724-gxhyju>.

The uncertainty in defining the quantum of a guiding attribute such as targets is further hampered by the lack of understanding both in quantitative and qualitative terms on the present levels of cultural diversity or lack thereof. The lack of information evidencing the actual scale and magnitude of the under-representation of Asians, or even more generally non-Anglo Celtic professionals in particular facets of the Australian legal profession, is an underlying reason for the uncertainty on where the starting point is for affirmative action. This uncertainty is not limited to where the starting line should be drawn, but also where the line should end. In the United States of America, this very issue was judicially considered by O'Connor J in the seminal affirmative action case of *Grutter v Bollinger*:

> [W]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [eg diversity] approved today.[61]

As highlighted by O'Connor J, affirmative action policies require a well-defined timeframe. Absent a "sunset clause" to limit the length of time affirmative action should be in place for, there will be no strict parameters to define how long such policies should be implemented for before it becomes ineffective or even counter-productive.[62] Not only will it be onerous to pre-empt how long affirmative action should be implemented for, but it is highly speculative to pre-empt the appropriate duration based on no past data or comparable examples.

The term "Asian" does not generally come across as being equivocal. Drawing the lines to establish the parameters of what constitutes "Asian" for the purposes of the bamboo ceiling is not a simple exercise when it is appreciated that the term is more commonly used in Australia to refer to an individual who is of Southeast Asian and East Asian origin rather than an individual who originates from Asia as it is geographically understood. For example, individuals from South Central Asia such as India, Pakistan, Sri Lanka, Bangladesh, Kazakhstan, and Kyrgyzstan to name a few, are not commonly referred to in anecdotal terms as "Asians" in Australia. Although nuanced, further compounding the problem is whether "Asian" with regard to the bamboo ceiling should relate to an

[61] *Grutter v Bollinger* 539 US 306, 343 (O'Connor J) (2003); See also Joel Goldstein, 'Justice O'Connor's Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter' (2006) 67 *Ohio State Law Journal* 83.

[62] See especially Adrian Liu, 'Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans' (2008) 13(2) *Michigan Journal of Race & Law* 407.

individual who identifies as Asian in terms of cultural and ethnic background or Asian due to nationality and country of origin.

(d) Merely Changes the Shares of the Cake

Affirmative action is touted as a form of distributive justice through its combination of justice and utility. Conversely, it can also be said that affirmative action is only the means to a particular end. Affirmative action in itself is not looked at as a measure of success despite its ability to affect distributive justice.

The redistribution of human capital through affirmative action is merely the process undertaken to bring about beneficial change. Any action taken to break the bamboo ceiling, affirmative action included, increases the likelihood of such beneficial change occurring, but it does not guarantee that positive effects are definite. Such a redistribution may potentially evince better levels of equality and diversity, but to equate such a redistribution to equality will be myopic, especially because true equality is a concept that is brought about by a confluence of not only measurable statistics, but it is also made up of intangible factors such as the eradication of unconscious bias.

In the context of the systemic entrenchment of the bamboo ceiling in the Australian legal profession, affirmative action can be implemented to collectively improve the representation of Asian legal professionals as a group. Owing to its collective manner of implementation relating to a particular group as a whole, affirmative action is unable to distinguish on a case-by-case basis between a member of such a group who has been discriminated against from a member who has not experienced any discrimination.[63] Consequently, in changing the shares to only collectively favour a group, affirmative action is not suited to assist members within a discriminated group who are in greatest need of such a redistribution. Instead, the benefits may only be experienced by the well-connected and most successful members of that discriminated group.[64]

The mere hiring of Asian legal professionals or the placing of Asian legal professionals in positions of seniority in the profession would not break the intangible, deeply entrenched

[63] Tahmindjis, above n 41, 205.
[64] See Alan Goldman, *Justice and Reverse Discrimination* (Princeton University Press, 1979); Phillips, above n 58.

norms such as the bamboo ceiling and unconscious bias that have perpetuated for well over a century in the Australian legal profession.

Affirmative action can facilitate redistribution by assisting with 'changing the shares of the cake but leaving the unsatisfactory nature of the cake untouched'.[65] In doing so, it is able to circumvent, but not necessarily break, the bamboo ceiling itself.

3 *Conclusion*

There is no denying the fact that affirmative action is founded on intrinsically virtuous principles and can bring a number of various positive ramifications in the context of attempting to break the bamboo ceiling and being able to contribute to overall improved levels of equality and diversity in the Australian legal profession.

However, the bamboo ceiling exists not solely due to the entrenchment of anachronistic norms such as unconscious bias. In conceiving the term "bamboo ceiling", Jane Hyun also highlights that this ceiling is not always imposed by others and is partly due to Asian professionals' self-limiting cultural influences on their behaviour, attitude, and performance in various social and professional settings.[66]

Affirmative action is useful to a limited extent to address the external systemic entrenchment of anachronistic norms as imposed by other individuals or the profession itself; however, it is ultimately unable to completely break the bamboo ceiling until Asian legal professionals are able to internally address their self-limiting influences.

Moreover, owing to its localised manner of implementation targeting specific groups, affirmative action is unable to simultaneously address other diversity issues also plaguing the Australian legal profession. Although not particularly dystopian, in addition to its negative effects, the inability to simultaneously address other aspects of diversity is a serious shortfall considering that 'different dimensions of diversity frequently

[65] Margaret Malloch, 'One Step Forward: Two Steps Back? Women and Affirmative Action: A Case Study of the Victorian Teaching Service' (Research Paper 33 1995–1996, Department of the Parliamentary Library) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9596/96rp33>.
[66] Hyun, above n 3.

intersect'.[67]

IV HARNESSING "THE MEDICI EFFECT"

> The Medicis were a banking family in Florence who funded creators from a wide range of disciplines. Thanks to this family and a few others like it, sculptors, scientists, poets, philosophers, financiers, painters, and architects converged upon the city of Florence. There they found each other, learned from one another, and broke down barriers between disciplines and cultures. Together they forged a new world based on new ideas — what became known as the Renaissance. As a result, the city became the epicenter of a creative explosion, one of the most innovative eras in history. The effects of the Medici family can be felt even to this day.[68]

Though not quite as epochal as the Italian Renaissance centred in the city of Florence, the attempt to break the bamboo ceiling in the Australian legal profession will be a momentous and revolutionary task in itself.

Affirmative action may be one of the several mechanisms employed to break the bamboo ceiling. However, owing to its shortfalls previously discussed, a broad-based approached is needed. This broad-based approach that should be adopted is "The Medici Effect", which can be incorporated under the overarching broader framework to break the bamboo ceiling while also tackling the "traffic jam of diversity" in the Australian legal profession.

Johansson conceived the concept of the Medici Effect, which can be created to bring together different disciplines by searching for where they connect.[69] The Medici Effect is highly instructive in amalgamating intersections between the various aspects of diversity within the Australian legal profession to create an 'explosion of extraordinary ideas and take advantage of it as individuals, as teams, and as organisations'.[70] It is based on creating intersections between different disciplines and cultures. The Medici Effect is not a quantitative mechanism based on restrictive quotas or other statistical measures of success; instead, it is based on qualitative precepts that address underlying problems

[67] Australian Human Rights Commission, above n 4, 12.
[68] Johansson, above n 1, 2.
[69] Johansson, above n 1, 3.
[70] Ibid.

through an appreciation of the value of diversity, thereby facilitating the intersection of disparate cultures and disciplines.

Harnessing the Medici Effect would serve as a prime catalyst to generate ground-breaking and novel ideas to embark on the exercise of not only breaking the bamboo ceiling, but also addressing other aspects of diversity that collectively plague the Australian legal profession. The catalytic nature of the Medici Effect has resulted in its ability to bring a wholesome range of limitless benefits to any particular aspect of society requiring intervention and innovation, as the need should arise. It would do a great disservice to the very essence of the concept to prescriptively list the ways that it should be implemented, due to its intrinsic fluidity and flexibility to any aspect of society requiring intervention and innovation.

Harnessing the Medici Effect has the potential to bring varied benefits for heightened standards of equality and diversity in respect of various facets of the Australian legal profession. In the context of the bamboo ceiling, the Medici Effect has the potential to break the bamboo ceiling by imbibing diversity of thought within the profession. This paper posits that diversity of thought will best be achieved by a two-pronged approach encompassing engagement and the implementation of an institutional framework.

A *Engaging "Diversity of Thought"*

Assimilating the Medici Effect to bring about benefits in diversity within the Australian legal profession is promising due to its broad-based ability to enable diversity of thought to flourish within the profession.

Diversity of thought will be a fundamental cornerstone to eradicate the bamboo ceiling due to its flexibility derived from the idea of 'more-than-one-way'.[71] As an organisational resource, this enables diversity of thought not to just be a race-centric solution to break the bamboo ceiling and other aspects of diversity similarly affecting minority cultural or ethnic groups (eg Aboriginal legal professionals). It is also placed in a prime position to intervene and address aspects of diversity currently plaguing the Australian legal profession, such as that relating to gender, sexual orientation, socio-economic status, age,

[71] Susan Woods, 'Thinking About Diversity of Thought' (Working Paper, Workforce Diversity Network, 2008) <http://digitalcommons.ilr.cornell.edu/workingpapers/108/>.

and health to name a few. To ensure that such engagement succeeds in its ability to bring its "more-than-one-way" ability of creating all-encompassing diversity, rather than mere localised benefits specific only to a particular group, three factors need to be in place to utilise this powerful resource—1) *willingness*, 2) *readiness* and 3) *opportunity*.[72]

1 *Willingness*

Firstly, an individual who has diverse identity and experiences needs to possess the *willingness* to share these differences with the broader community. Individuals, who due to their difference think differently, control the ability to inform others of their thinking by either revealing that thinking or staying silent. [73]

Informal sharing utilising the power of social media (eg Facebook, Instagram, Twitter) or even a casual coffee catch-up to share these differences is sufficient. However, more formal platforms such as conferences and symposiums will better facilitate the broader reach of such differences in thinking being shared.

2 *Readiness*

Secondly, *readiness* to listen to and learn from such diversity of thought is similarly as essential.[74] Both interpersonal skills (eg communication, dialogue, conflict resolution) and diversity skills (eg self-awareness, awareness of others, flexibility) that facilitate such learning need to be developed.[75]

Although it is possible for anyone to self-learn such general skills, it would be best for such skills to be inculcated through a variety of means. In the context of the bamboo ceiling and other aspects of diversity within the Australian legal profession, this could possibly be formally implemented through the premise of Continuing Professional Development ('CPD') sessions.

This paper also suggests that a new group termed "diversity" could be added to the already existing groups comprising of substantive law, professional skills, practice management, and ethics. However, whether this new group is enacted in legislation as

[72] Ibid 2.
[73] Ibid 3.
[74] Ibid.
[75] Ibid.

one of the requisite mandatory groups in the respective CPD rules is beside the point of imbibing true diversity of thought within the Australian legal profession.

3 *Opportunity*

Thirdly, avenues that open *opportunity* for learning from diversity of thought are just as needed.[76] Such opportunities should be implemented at the micro level (eg individual companies, organisations, educational institutions) and also at the macro level (country-wide, state-wide, profession-wide).

At the micro level, these opportunities may be implemented through a variety of means, for example, reduced hierarchy, group process, focus groups, cross-functional teaming, and idea generation.[77] From a profession-wide, macro perspective, such avenues that open opportunities may be tangentially implemented through broadly-addressed schemes. In the context of the Australian legal profession, a rating system which measures diversity best-practices closely echoing other legal rating guides, such as 'Doyles Guide' and 'Chambers and Partners',[78] should be considered as a potential means to facilitate such opportunity for learning from diversity of thought.

A diversity best-practice guide as such will definitely be a refreshing change to current legal rating guides whose sole emphasis is on reputation associated with legal prowess and experience. More importantly, it will serve as a salient message to the fiercely competitive legal profession that success in the profession should begin to be measured by yardsticks other than legal prowess and will include a legal professional's ability to emulate diversity of thought, among other praiseworthy yardsticks.

B *Implementing Diversity of Thought*

Engagement is a rudimentary step in creating a diversity of thought within the Australian legal profession. However, to ensure that such engagement continues to flourish on a broad scale throughout the profession, it is imperative that diversity of thought is implemented through structural frameworks.

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[76] Ibid.
[77] Ibid.
[78] See generally Doyles (2018) <http://doylesguide.com/>; See generally Chambers and Partners <https://www.chambersandpartners.com/>.

This paper suggests that an institution or regulatory authority should be established to deal primarily with diversity and equality (or the lack thereof) within the Australian legal profession. It is acknowledged that this can be put in place through a variety of different forms, be it through an independent Australia-wide regulatory authority or a state-specific organisation within the respective frameworks of each of the various state and territory law societies.

More critically, the implementation of such a framework should predominantly focus on the cardinal benefits such an organisation or regulatory authority will bring, including improving understanding as well as the facilitation of "directional" and "intersectional" ideas, both of which will assist with attaining desired levels of diversity and equality within the Australian legal profession.

1 *Understanding*

There is a general lack of understanding of the less than favourable standards of diversity and equality in the Australian legal profession. This transcends to a lack of understanding afforded to specific constituent groups within the profession. The 'gap[s]' in data on diversity and the almost palpable inexistence of empirical data on legal support staff are indicative of this lack of understanding in respect of the different facets of diversity and equality within the overall fabric of the Australian legal profession.[79]

The establishment of an institution or regulatory authority would provide much-needed structure for the implementation of diversity of thought.[80] It is recognised however that the implementation of such understanding within a profession categorically classified as "male, pale, and stale" will be no mean feat. In fact, it would entail breaking deeply entrenched, anachronistic barriers that take pride of place almost as much as the esteemed culture and status of the profession itself. Consequently, the utilisation of traditional forms of pedagogy to imbibe understanding on issues pertaining to equality and diversity will be futile.

This paper suggests that the Medici Effect is well-suited for implementing diversity of

[79] Nguyen and Tang, above n 2, 101; Cf Sundeep Aulakh et al, 'Mapping Advantages and Disadvantages: Diversity in the Legal Profession in England and Wales' (Final Report for the Solicitors Regulation Authority, October 2017).
[80] See generally Solicitors Regulation Authority <https://www.sra.org.uk/home/home.page>.

thought, being primed for breaking down 'associative barriers',[81] while simultaneously harnessing understanding by adopting the following ground-breaking and novel principles built into its ethos:

- Being exposed to a range of cultures;[82]
- Learning differently;[83]
- Reversal of assumptions;[84] and
- Trying on different perspectives.[85]

The above four principles, premised on the broad-based and dynamic framework of the Medici Effect, is apt for implementing diversity of thought due to its ability to deal with complex and non-linear barriers that remain and frequently intersect within the Australian legal profession, including the bamboo ceiling.

2 *Directional and Intersectional Ideas*

The terms "structure" and "framework" or "organisation" and "authority" commonly carry connotations associated with prescriptiveness and archaism. The implementation of an institutional framework premised on the Medici Effect should be distanced from any such associations to do with notions of conformity or prescriptiveness. Instead, the implementation of a framework should endeavour to attain true diversity of thought through the establishment of both "directional" and "intersectional" ideas.

Directional ideas are necessary for realising and putting into place short-term goals in a 'particular direction',[86] such as obtaining particular statistics of a particular minority group in the profession or the specific attempt to incrementally fill gaps in data on diversity within the profession. On the other hand, intersectional ideas do not possess a pre-determined direction or trajectory; they are sporadic and widespread, aligned towards the creation of intersections through the creation of a viral-like cultural phenomenon and, as Johansson puts it, 'an epidemic of an idea virus'.[87]

[81] Johansson, above n 1, 48.
[82] Ibid 46.
[83] Ibid 49.
[84] Ibid 53.
[85] Ibid 57.
[86] Ibid 16.
[87] Ibid 18.

The very foundation of an intersectional idea is its capability to spread ideas in an epidemic fashion without a pre-determined boundary or direction. Hence, to prescribe what it could or should entail artificially circumscribes its very essence. However, on the basis of attempting to proffer examples of intersectional ideas, it could be that new law award categories such as "Diversity Lawyer of the Year" or "Diversity Legal Practice of the Year" are created.[88] Similarly, an area of specialisation in "Diversity and Equality" could be newly established under the Accredited Specialists program.[89]

It should be appreciated that intersectional ideas are not confined to the boundaries of a particular profession or industry. The malleability of intersectional ideas has the potential to provide opportunities for the legal profession to adopt and collaborate with other industries that have in place well-known diversity and equality schemes within their respective industries. For example, the respective law societies could adopt the structure of the Australian Football League's established 'AFL Community Ambassador Program' or collaborate to come up with a "Legal Diversity Week",[90] held in conjunction with the 'AFL Multicultural Round',[91] to promote diversity of thought through the pervasive influence of sport.

Intersectional ideas are full of novel conceptions when compared to directional ideas that may come across as being predictable and even potentially rigid. However, both forms share a symbiotic relationship with each other and are both needed for long-term success to eventuate.[92] A framework based solely on intersectional ideas may seem novel and fanciful but is likely to end up being a far-fetched and lofty ideal at best. Similarly, a framework based solely on directional ideas may be viewed as dire and ubiquitous, which may result in the lack of participation by legal professionals.

Necessarily, an institutional framework will provide the right impetus for the facilitation of both directional and intersectional ideas for the implementation of diversity of thought through vibrant and novel methods that continue to improve and evolve in a particular

[88] Note: This will enable the award to be open to both government organisations and private practice firms that engage in legal practice.
[89] See generally Law Institute of Victoria, *Accredited Specialists* <https://www.liv.asn.au/Specialists>.
[90] See generally AFL Community, *AFL Community Ambassadors* (2017) <http://community.afl/programs/community-ambassador-program>.
[91] See generally ALF, *AFL Multicultural Round* (25 July 2015) <http://www.afl.com.au/news/event-news/multiculturalround>.
[92] Johansson, above n 1, 18.

direction.[93]

V CONCLUSION

The Australian legal profession of today is situated in a globalised world characterised by unrelenting upheaval and change. It is not isolated or immune from similar upheaval occurring in other jurisdictions the world over. As mentioned in this paper, the Australian legal profession has a symbiotic relationship with the various Asian markets. This is perfectly elucidated by Chief Justice Martin who noted that Perth is closer to Singapore than it is to Sydney and shares the same time zone as many Asian commercial centres.[94]

As a key player in the global and respective regional markets, the Australian legal profession needs to strategically engage rather than insulate or disengage itself from other countries to ensure that the rule of law in Australia and the Asia-Pacific region is upheld.[95] This will require Australia to emulate diversity of thought, which can only be achieved in turn once such tenets of diversity and equality are first holistically embraced and imbibed as part of the intrinsic fabric of the Australian legal profession as a whole.

[93] Johansson, above n 1, 18–9.
[94] Wayne Martin, 'After Dinner Address' (Speech delivered at the 10th Anniversary Conference of the Asia-Pacific Regional Arbitration Group, Melbourne, 27 March 2014).
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