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IDEOLOGICAL VANDALISM OF PUBLIC ART STATUES: COPYRIGHT, THE MORAL RIGHT OF INTEGRITY AND RACIAL JUSTICE

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This paper considers the regulation of ideological vandalism by the Australian copyright and moral rights regimes in the context of the defacement of public art statues that occurred in Australia and overseas during the Black Lives Matter protests in 2020. Statue vandalism is approached as a form of anti-racist or anti-colonial iconoclasm that contributes to discourse around previous and continuing racial inequities. Law is approached as a form of symbolic action that can consolidate the alienation and othering of vulnerable groups in public spaces. The authors investigate whether, when public statues are within the copyright term, intellectual property rights symbolically devalue anti-racist discourse by de-prioritising agonistic art encounters. It is identified that copyright's exclusive rights do not render direct physical interventions with the statue unlawful, but that the moral right of integrity held by the statue's creator is problematic. The moral right of integrity privileges the connection between the artist and their work as a matter of reputation, and any public interest in the graffitied counter-monument is irrelevant to a finding of infringement, which in our view justifies reform. The paper concludes that public spaces should be democratic spaces, and that intellectual property law in post-colonial states and states with a history of racial injustice should do more in support of this goal.

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CONTENTS

I INTRODUCTION

This article discusses the value of ideological vandalism[1] — that is, the purposeful 'defacement of a symbolic object for the sake of conveying a political message'[2] — for confronting public art legacies of colonial and other forms of racial oppression. It also considers the legal status of ideological vandalism as an act that, at least potentially, infringes the intellectual property ('IP') rights of authors and copyright owners. As defined by sociologist Stanley Cohen, ideological vandalism frames 'property destruction as a conscious tactic' which aims to 'draw attention to a specific grievance, to gain publicity for a general cause' or 'challenge symbolically'.[3] In examining the status of ideological vandalism under the copyright and moral rights regimes in Australia, we seek to determine whether and to what extent the political message expressed in ideological

[1] Stanley Cohen, 'Property Destruction: Motives and Meanings' in Colin Ward (ed), *Vandalism* (Architectural Press, 1973) 23–53: see especially at 39.
[2] Sabine Marschall, 'Targeting Statues: Monument "Vandalism" as an Expression of Sociopolitical Protest in South Africa' (2017) 60(3) *African Studies Review* 203, 205. Here, Marschall describes the typology of tactical/ideological vandalism advanced by sociologist Stanley Cohen. See Ibid.
[3] Cohen (n 1) 39.

vandalism is prioritised within the IP law frame, and the implications of this for how individuals engage with objects and each other in public spaces.

The assumption underpinning the discussion that follows is that IP law, through its assignations of private rights, can have an effect whether direct, indirect, or symbolic on experiences of, and discourse around, racial injustice. In the context of the global Black Lives Matter ('BLM') protest, we ask: does IP law in Australia hinder or aid the speech around racial injustice and the confrontation with colonial pasts that ideological vandalism constitutes? This article looks at possible reform opportunities but ultimately argues that this is an important issue concerning the democratisation of public spaces. For these spaces to be inclusive, individual rights must give way to the freedom to acknowledge the past. Public rights of expression, while governed by the criminal law, should not have the added layer of personal property concerns in a seemingly public domain space.

The BLM movement began in the US in 2013 and gathered momentum in 2014 in response to the deaths of unarmed black men at the hands of white police officers, who have often benefitted from impunity.[4] Since 2017, the BLM movement has enlivened resistance to racism in Australia, strengthening existing debate and community-led activism on Aboriginal deaths in custody, sovereignty, and self-determination.[5] As with contemporary social movements generally, BLM makes extensive use of an 'aesthetics of protest', generating visually compelling material through graffiti, image-based media, and performative interventions to invigorate and propel the movement.[6]

June 2020 was a watershed moment for public memory in nations with a history of colonialism or slavery — seeing statues of historical figures graffitied, toppled, beheaded, and set on fire in the wake of BLM protests prompted by the killing of George Floyd on 25 May 2020 by Minneapolis Police. In the following weeks, in Richmond, Virginia, a monument of Confederate General Robert E Lee (1807–1870) was transformed with graffiti, including anti-racist slogans and the names of black people killed in police

[4] Garrett Close, 'The Early History of the Black Lives Matter Movement, and the Implications Thereof' (2018) 18(3) *Nevada Law Journal* 1091–1112. Note that the murderer of George Floyd, Derek Chauvin, was convicted in July 2021 and sentenced to 22.5 years imprisonment.
[5] Yadira Perez Hazel, 'Bla(c)k Lives Matter in Australia' (2018) 126(1) *Transition* 59, 59–67.
[6] Johanna Gibson, 'No More' (2020) 10(3) *Queen Mary Journal of Intellectual Property* 271, 273. See also Aidan McGarry et al, *The Aesthetics of Global Protest: Visual Culture and Communication* (Amsterdam University Press, 2020).

custody (see Figure 2). Around the same time, a bronze statue of merchant Edward Colston (1636–1721), Deputy-Governor of the Royal African Company — which monopolised the English trade in African slaves — had its hands and face spray-painted red, before being tied, toppled from its plinth (see Figure 3), and dragged into Bristol Harbour in the United Kingdom (UK). On 21 June 2020, political activist Peter John Wright and an unnamed accomplice spray-painted the bronze statue of colonist Robert Towns (1794–1873) located at Pioneers Walk in the Townsville Central Business District, Far North Queensland, Australia (see Figure 1).[7] Towns' hands were painted red, with droplets of red paint accenting the base of the statue. 'Slave trader' was written over an accompanying plaque.

Figure 1: A statue of Robert Towns located in Townsville's city centre with red paint on its hands. Sofie Wainwright © 2020 ABC. Reproduced by permission of the Australian Broadcasting Corporation – Library Sales.

[7] Dorothy Shineberg, 'Towns, Robert (1794–1873)', *Australian Dictionary of Biography* (Web Page, 2006) <https://adb.anu.edu.au/biography/towns-robert-4741>.

While recent movements abroad calling for the toppling of statues have prompted replication in Australia, this phenomenon is not a new feature of the Australian political landscape, nor can its origins be reduced solely to, say, US influence on national debate. Without understating the significance of BLM-inspired action on statues, anti-colonial challenges to public memory in Australia have a distinctly local character. BLM-inspired attacks on monuments to Captain James Cook, Queen Victoria, and Governor Lachlan Macquarie have been concentrated in the days leading up to Australia Day (26 January) as part of national 'Change the Date' campaigns.

Many earlier instances attest to ideological vandalism as a political strategy in anti-colonial movements in Australia since at least the 1990s. In 1991, Aboriginal activists Gary Foley and Robbie Thorpe orchestrated the public trial of a statue of John Batman,[8] who was responsible for Aboriginal deaths during Tasmania's 'Black War' and the divisive treaty for the expropriation of Naam (Melbourne) from its original custodians. Similarly, in 1995, a memorial marking John Bowen's settlement of Risdon Cove, in current-day Tasmania, suffered the first of many attacks in recognition of it being a massacre site.[9] Like Peter John Wright's intervention on the Robert Towns statue (and countless cases globally in the BLM era), both interventions in 1990's Australia drew on the imagery of bloodshed.

In this article, we explore the contribution to public discourse of ideological vandalism of publicly placed colonial monuments, and its nature as a potentially rights-infringing act under the copyright and moral rights regimes. We seek to better understand the concerns around public art and oppression in settler-states, and how these concerns manifest in graffiti and intersect with private IP interests in these public spaces. Our turn to IP recognises that criminal law is not the only source of law that applies to public art. Even as the law might punish statue vandalism through criminal law penalties, it assimilates it within IP frameworks.[10] Many of the statues vandalised during the 2020

[8] Mark Holsworth, *Sculptures of Melbourne* (Melbourne Books, 2015) 69–70.
[9] Jeremiah Garsha, 'Red Paint: The Defacing of Colonial Structures as Decolonization' (2019) 5(1) *Transmotion* 76, 88–92.
[10] Marta Iljadica, 'Street Art and the Properties of Resistance' in Lucy Finchett-Maddock and Eleftheria Lekakis (eds), *Art Law Power: Perspectives on Legality and Resistance in Contemporary Aesthetics* (Counterpress, 2020) 198, 199.

BLM protests in Australia were within the copyright term.[11] The Towns statue, created by sculptor Jane Hawkins (1958–) in 2004 is one such example. It was first 'published' when it was unveiled *in situ* by Councillor Jack Wilson on 18 May 2005.[12] When a public art statue meets the originality threshold and the other subsistence criteria — that is, it is created by an author with sufficient connection to Australia (i.e. an Australian resident or citizen), has material form, and falls within the definition of 'artistic work' under s 10(1) of the *Copyright Act 1968* (Cth) ('*Copyright Act*')[13] — it will subsist in copyright. As a form of sculpture, statues satisfy these criteria and so enjoy coverage for 70 years after the author's death.[14] The themes of the statue, such as colonial victories or even genocide, are irrelevant to copyright subsistence — there are no provisions in the *Copyright Act* preventing IP rights in obscene or immoral material.[15] Where copyright subsists, the moral rights regime will also be enlivened,[16] providing authors the right of attribution, the right against false attribution, and the right of integrity with respect to the work under pt IX of the *Copyright Act*.[17] Analysing the interplay between the rights and interests of various IP stakeholders — the author of the statue, copyright owner of the work, the vandal who seeks to intervene in the physical object, and the broader public — prompts discussion around the racial implications of the law's regulation of public spaces, and the symbolic messages that IP law sends around the legitimacy of challenges to the continuing public presence of colonial monuments.

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[11] Notable examples of statues vandalised in 2020 in Australia that were within the copyright term include the statue of Captain James Stirling in Perth CBD designed by Clement P Somers in 1979, and the bronze busts of former Prime Ministers Tony Abbott and John Howard in Ballarat created by sculptor Linda Klarfield (1976–) and cartoonist and sculptor Peter Nicholson (1946–), respectively. Many of the high-profile statues vandalised during BLM protests overseas were *not* within the copyright term. The Lee statue, for example, pictured in Figure 2, was created in 1890 and it was likely public domain by at least 1932. Under the 1831 revision of the Copyright Act of 1790 (US), the term of protection of copyrighted works was 28 years with the possibility of a 14-year extension.

[12] 'Robert Towns', *Monument Australia* (Web Page, 2020–2021) <https://monumentaustralia.org.au/themes/people/industry/display/92821-robert-towns>.

[13] The definition of 'artistic work' in the *Act* includes 'a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not…' In the *Copyright Act 1968* (Cth) ('*Copyright Act*'), sculpture is defined non-exhaustively as 'a cast or model made for purposes of sculpture': s 10(1) (definition of 'sculpture').

[14] *Copyright Act* s 33(2).

[15] Note that this has not always been the case in Australia as copyright law historically intersected with censorship concerns. Under the *Copyright Act* s 6 'blasphemous, indecent, seditious, or libellous' was not entitled to copyright protection: see Catherine Bond, 'There's Nothing Worse Than a Muddle in all the World: Copyright Complexity and Law Reform in Australia' (2011) 34(3) *University of New South Wales Law Journal* 1145, 1152–4.

[16] *Copyright Act* s 195AZE.

[17] The right of integrity is the focus of the moral right analysis in section III.

This article firstly considers the significance of ideological vandalism by reflecting upon the meaning and function of public art statues and memorials, as well as the nature of graffiti as a generative and destructive contestation of those same monuments. Ideological vandalism of a neo-colonial, white supremacist or otherwise racist typology is not considered here, although it too constitutes a significant legacy in countries with colonial pasts and histories of slavery. It is argued that ideological vandalism in its anti-racist and anti-colonial guises contributes to public discourse around racial justice and sets the stage for a more equitable future. When practised on a monument, ideological vandalism re-writes public memory. In doing so, it produces a *counter-monument* by modifying the original monument's material characteristics and meaning.

We propose a novel take on the term counter-monument, drawing on two existing approaches. Germanophone sources, from which the term originates, employ *Gegendenkmal* (literally counter monument) to refer to a sculptural intervention which opposes an existing monument. A study by Quentin Stevens et al indicates that its usage, however, denotes a discrete object, nearby but separate from the contested monument, which it opposes through a 'dialogical' relationship.[18] A second definition of the counter-monument, following memory studies scholar James E Young's formulation, is of a commemorative strategy exhibiting characteristics atypical of the traditional monument.[19] Termed 'anti-monumental' by Stevens et al, this second approach earns its name by undermining the 'prominence and durability, figurative representation and the glorification of past deeds' characteristic of the traditional monument.[20] Vandalism can certainly do all of these things. Yet, taken by themselves, neither the anti-monumental nor dialogical conceptions are appropriate analytical frameworks for the present case. Our approach to ideological vandalism qualifies as dialogical in that it frames the counter-monument in opposition to an existing monument, but it also contains an important difference. Here the 'dialogue' occurs internally — within the object itself, between its original and modified states. Transformed through vandalism, the defaced monument exhibits characteristics atypical of the traditional monument (anti-monumental) and speaks back to itself as a new work (dialogic). In this respect, we draw on recent

[18] Quentin Stevens, Karen Franck and Ruth Fazakerley, 'Counter-Monuments: The Anti-Monumental and the Dialogic' (2012) 17(6) *Journal of Architecture* 951, 952.
[19] James E Young, 'The Counter-Monument: Memory Against Itself in Germany Today' (1992) 18(2) *Critical Inquiry* 267, 271–94.
[20] Stevens, Franck and Fazakerley (n 18) 952.

philosophical literature that theorises the efficacy of statue vandalism over alternative strategies of removal, contextualisation (through plaques containing historical revision), or counter-monuments that are placed too far from the monument or are given insufficient prominence to be effective.[21] Ideological vandalism has immediate and unavoidable effects. By inhabiting the very object of contestation, the message or speech act of the original monument is interrupted at the moment of reception, in a way that more deferred strategies are not.[22]

Second, the article considers the private rights held by artists and copyright owners in publicly placed statues, as against the vandal and the broader public's interest in speech that questions the place and role of colonial monuments in contemporary society. Australian copyright law and the moral right of integrity is the primary focus of this legal analysis. Nevertheless, examples are drawn from the US and UK where relevant to contextualise the relationship between the law and the vandalised statue and its underlying intangible property. Canadian cases are referred to in section III to discuss the nuances of Australian moral rights law, in circumstances where case law in Australia is thin.

In investigating IP law as a site where racial injustice may be perpetrated, consolidated, and exacerbated in section III, we ultimately find that the limited exclusive rights held by the copyright owner in Australia do not directly speak to protestor engagement with public statues. The copyright owner's exclusive rights and interests do not cover direct engagements with the artwork, and thus, such actions by a third party like applying graffiti to the work are not copyright infringing. The copyright regime therefore does not de-prioritise or constrain the speech of the anti-racist activist; it is silent on such actions. However, the accretion of matter and meaning produced during the additive process of graffiti likely infringes the statue artist's moral of integrity, not to mention the more

[21] See Chong-Ming Lim, 'Vandalizing Tainted Commemorations' (2020) 48(2) *Philosophy & Public Affairs* 185–216, particularly 207; Macalester Bell, 'Against Simple Removal: A Defence of Defacement as a Response to Racist Monuments' (2021) *Journal of Applied Philosophy* 1–15 <https://doi.org/10.1111/japp.12525>; Ten-Herng Lai, 'Political Vandalism as Counter-Speech: A Defense of Defacing and Destroying Tainted Monuments' (2020) 28(3) *European Journal of Philosophy* 602–16. Cf other scholars who argue for removal and/or museum display: see, e.g., Arianne Shahvisi, 'Colonial Monuments as Slurring Speech Acts' (2021) 55(3) *Journal of Philosophy of Education* 53–68; Helen Frowe, 'The Duty to Remove Statues of Wrongdoers' (2019) 7(3) *Journal of Practical Ethics* 1–31; Travis Timmerman, 'A Case for Removing Confederate Monuments' in Bob Fischer (ed) *Ethics, Left and Right: The Moral Issues that Divide Us* (Oxford University Press, 2020) 513–22.

[22] Lai (n 21) 606, 608.

destructive treatments of inscription, decapitation, or otherwise subtractive means. We argue that the law's privileging of the statue artist's control over their own work, in both the rights granted to the author and the narrow reasonableness defence to infringement, results in an illegitimate privatisation of public art spaces. How individuals receive, respond, and interact with the artwork (and with problematic histories) is constrained at the cost of the broader public. Reform is required if the moral rights regime is to cease symbolically devaluing the counter-monument's social critique.

Third, the article discusses possible reform pathways, given our identification of problems in the moral right of integrity. While the primary focus is on understanding the significance of ideological vandalism and its legal status under IP law rather than solving the law's racial implications per se, we offer ways in which the value of antagonistic public art encounters could be better recognised in the legal frame. In section IV, legislative reform to the moral rights regime and acknowledgement by the courts of the burden that such private rights have on the implied freedom of political communication are considered. Such reforms would not make permissible the vandalism of statues, but they would take the matter out of private right adjustment and permit a more robust balancing of the rights of authors against the rights of others in enjoying and engaging with public art paid for by the public purse — thus, securing more democratic public spaces.

The article concludes that ideological vandalism is a legitimate form of political speech, and that IP law should be responsive to a recalibration of stakeholder interests when ideological vandalism is of public benefit, as it is in the instance of BLM counter-monuments. Symbolic othering should be eradicated from the structure of moral rights law. The meaning and significance of public art statues and ideological vandalism will now be considered.

II PUBLIC ART STATUTES AND IDEOLOGICAL VANDALISM

A *Meaning and Significance of Public Statues of Historical Figures*

As a subtype of monument, statues are a figurative representation intended to enshrine 'a great public figure, a great public event, a great public declaration' in collective

memory.[23] Comparatively rarer is the collective, national or otherwise, that 'call[s] on itself to remember the victims of crimes it has perpetrated'.[24] Although monuments typically 'mesh with the beliefs and aspirations of the majority', they do not 'emanate' from the collective.[25] The statue in a public park or a busy city street only notionally transmits group values[26] because the curation of particular narratives, to the exclusion of others, naturalises some community values and alienates others.[27] The public statue can even be said to impose group values; its placement in the physical commons — imagined as a shared, civic physical space, occupied by a desirable singular community — effectively frames the sculpture as an object of consensus.[28] Whether state-sponsored or not, monuments are widely perceived by the public to express the attitudes, values, and beliefs of government institutions, which 'purport to speak in our name'.[29] This institutional backing endows monuments with 'considerable authority and publicity'.[30] When the community that occupies the site is not homogenous and certain groups are absent from, or are misrepresented in the narratives being memorialised, public art can become a focal point 'for disidentification and general ambivalence' rather than a 'site for identification and community unity'.[31]

In settler-states and states with a history of slavery or colonialism, statues celebrating individuals that participated in the state's oppression of vulnerable community groups can be particularly polarising. For example, while none of the vandals of the Robert E Lee statue were identified, charged nor spoken publicly about their motivations, critics of Confederate memorials and statues typically consider them 'slave trophies' and

[23] JB Jackson quoted in Elizabeth Scarbrough, 'Burying the Dead Monuments', *aestheticsforbirds* (Blog Post, 18 June 2020) <https://aestheticsforbirds.com/2020/06/18/burying-the-dead-monuments/>.
[24] Young (n 19) 270.
[25] Kirk Savage, *Standing Soldiers, Kneeling Slaves: Race, War, and Monument in Nineteenth-Century America* (Princeton University Press, 1997) 210.
[26] C Thi Nguyen, 'Monuments as Commitments: How Art Speaks to Groups and How Groups Think in Art' (2019) 100(4) *Pacific Philosophical Quarterly* 971, 979.
[27] See Chong-Ming Lim's discussion of the multiple ways in which monuments do racist work: Lim (n 21) 185–216.
[28] Kathy Bowrey, Catherine Bond and Mehera San Roque, 'Moral Rights and Public Art' (Conference presentation, Centre for Media and Communications Law Conference Melbourne, Australia, 25–26 November 2010).
[29] Lai (n 21) 605; Bell (n 21)12. For survey results into public perception of monuments in the US context, see Daniel Hemel and Lisa Larrimore Ouellette, 'Public Perceptions of Government Speech' (2017) 33 *The Supreme Court Review* 33–92.
[30] Lai (n 21) 605.
[31] Caitlin Bruce, *Painting Publics: Transnational Legal Graffiti Scenes as Spaces for Encounter* (Temple University Press, 2019) 15.

commemorative of white supremacy due to the Confederacy's defence of slavery. Walking past the vandalised Lee statue, hip-hop artist Gregory Carden, known as Radio B, commented: 'There was a lot of money and manpower and a lot of symbolism that went into creating that monument … how much effort and how much care was put into the meaning … which was the oppression of my people'.[32]

Figure 2: Defaced monument of Confederate General Robert E Lee monument, Richmond, Virginia 2020 © Mk17b. CC BY-SA 4.0 License via Wikimedia Commons

[32] Gregory Carden quoted in Sarah McCammon, 'In Richmod Va., Protestors Transform a Confederate Statue', *NPR* (online, 12 June 2020) <npr.org/2020/16/12/876124924/in-richmond-va-protestors-transform-a-confederate-statue>. Carden's emphasis on 'the oppression of my people' is particularly astute in identifying racist monument's principal wrong-doing, not in the psychological trauma they are alleged to cause, but in their erosion of the social and moral worth of persons implied as lesser through the monument. On this point see Bell (n 21) 5-6, 13. For further insight into the role of monuments in shaping citizens' attitudes and assumptions see George Tsai, 'The morality of state symbolic power' (2016) 42(2)) *Social Theory and Practice* 318, 321.

The presence of oppression behind the statue is also keenly felt by those that actively respond to it, which suggests that the meaning of public statues is located in the audience as much as the statue's author or commissioning body.[33] Affected groups may choose to take matters into their own hands and intervene in the sculptural object by spray-painting, inscribing, yarn-bombing, toppling, virtually 'griefing', or otherwise modifying or destroying it. At his hearing at Townsville Magistrates Court, Peter John Wright told the court that his graffiti of the Robert Towns bronze was 'street art' that commented on Towns' exploitation of Pacific Island labourers via his bloodied hands.[34] To Wright, the continued presence of the statue in Townsville 'is a stain on the moral conscious [sic] of this town'[35] — a stain Wright's actions sought to manifest in public discourse. Statues are not only passively viewed or experienced by the public; their meanings are collectively worked and reworked within the discursive field surrounding the work and the viewer.[36]

In calling for racial justice, BLM protest has, alongside other social movements like Rhodes Must Fall,[37] helped alter the discursive field surrounding public statues, leading to more critical understandings. Calls from within South Africa and western metropoles for the removal of colonial and racist monuments have certainly intensified in recent years. For example, two years before the Edward Colston statue was toppled into Bristol Harbour, a petition was presented to Bristol City Council with 11,000 signatures for the statue's removal.[38] However, it must be remembered that the meaning of public statues is not only subject to reinterpretation through contextual shifts, but also through direct

[33] Roland Barthes, 'The Death of the Author' in Vincent Leitch and William Cain (eds), *The Norton Anthology of Theory and Criticism* (WW Norton, 1968) 1466, 1466–9. On the field of reception studies, see generally Robert Holub, *Reception Theory: A Critical Introduction to Reception Studies* (Methuen, 1984).
[34] Peter John Wright quoted in Chloe Chomicki, 'Townsville Man Fined for Vandalising Statue of Colonist Robert Towns by Painting 'Blood on his Hands', *ABC News* (online, 18 September 2020) <https://www.abc.net.au/news/2020-09-18/robert-towns-statue-townsville-vandal-fined/12677876>. For a detailed treatment of the Towns statue as a contested object see Sebastian Rees, 'Statue of Robert Towns' (2020) V *A Contested Histories Occasional Paper* 1, 1–13 <https://contestedhistories.org/wp-content/uploads/Paper-V-Statue-of-Robert-Towns.pdf>
[35] Ibid.
[36] Richard Clay, 'Bouchardon's Statue of Louis XV: Iconoclasm and the Transformation of Signs' in Stacy Boldrick and Richard Clay (eds), *Iconoclasm: Contested Objects, Contested Terms* (Ashgate, 2007) 93, 116–18.
[37] The Rhodes Must Fall campaign is a protest movement that was initiated in South Africa in 2015. It questions the legacy of imperialist, businessman, and politician Cecil Rhodes. See generally Brian Kwoba, Roseanne Chantiluke and Athinangamso Nkopo (eds), *Rhodes Must Fall: The Struggle to Decolonise the Racist Heart of Empire* (Zed Books, 2018).
[38] Haroon Siddique and Clea Skopeliti, 'BLM Protesters Topple Statue of Bristol Slave Trader Edward Colston', *The Guardian* (online, 8 June 2020) <https://www.theguardian.com/uk-news/2020/jun/07/blm-protesters-topple-statue-of-bristol-slave-trader-edward-colston>.

physical interventions with the sculptural object. Graffiti as direct action, and as a meaning-generating act affecting how public artworks are understood, will now be explored.

Figure 3: The empty pedestal of the statue of Edward Colston in Bristol, UK the day after it was toppled by protesters. Black Lives Matter placards cover the ground. 2020 © Caitlin Hobbs. CC BY 3.0 License, via Wikimedia Commons

B *Graffiti as a Generative and Destructive Act*

Within the criminal frame, graffiti is understood as vandalism, and approached as a violation against the community and a signal of disorder, as well as disrespect for the rule of law.[39] It is criminal damage — an unauthorised act upon property owned by a third party. In Queensland, where Wright's vandalism of the Towns statue took place, wilful damage to property in a public place caused by the 'spraying, writing, drawing, marking

[39] See, for example, the discussion of the 'broken windows theory' of graffiti in Gabry Vanderveen and Gwen van Eijk, 'Criminal but Beautiful: A Study on Graffiti and the Role of Value Judgements and Context in Perceiving Disorder' (2016) 22 *European Journal of Criminal Policy Research* 107, 108. See also Alison Young, *Street Art Public City: Law Crime and the Urban Imagination* (Routledge, 2014) 99.

or otherwise applying paint or another marking substance' carries a maximum penalty of seven years' imprisonment, and the court can order compensation to be paid to any person.[40] Wright pled guilty to wilful damage and was ultimately convicted and fined $500. He also agreed to pay $404.45 to Townsville City Council as compensation for the costs of cleaning the statue.[41] While 'vandalism' is a contested term for the defacement or destruction of art objects within art history circles,[42] our choice to refer to graffiti as such throughout this paper recognises the deliberate nature of the vandalic act and the criminal law ramifications that are triggered when the perpetrator is identified. Moreover, it is also used because Cohen's formulation of *ideological* vandalism lays the ground for the legitimacy of symbol destruction within political activism. It helps the reader see behind and beyond the criminality of the act and the private property dimensions of physical interventions, to its nature as social critique and political action.

Aesthetic sensibility is at play in both the production and reception of the vandalised statue. In Australia, statue vandalism has been perceived as social critique, as in Wright's justifications of his actions, as well as 'disrespectful' and 'unaustralian [sic]'.[43] Yet, regardless of these varied interpretations, it is apparent that even if graffiti is destructive, it also has a generative quality and organising potential.

The symbolic contestation of an oppressive past through the application of graffiti is more than a therapeutic manoeuvre, a reaction against oppression. It is also a 'manifest sign of readiness to grasp new human possibilities'.[44] In this sense, contemporary ideological vandalism is similar to the iconoclasm of all modern revolutionary movements, where symbolic statue-breaking is 'a regular mode of advertising the inauguration of new regimes'.[45] The counter-monument not only serves as a powerful repudiation of the racist past, it is socially significant activism that offers opportunities to shape and humanise the

[40] *Criminal Code Act 1899* (Qld) ch 469, s 9(1)-(2). Wilful damage to property is an offence under ch 46.
[41] Chomicki (n 34).
[42] See especially Dario Gamboni, *The Destruction of Art: Iconoclasm and Vandalism Since the French Revolution* (Reaktion Books, rev ed, 2018) 20–6. In art history circles, 'iconoclasm' is typically the preferred term as 'vandalism' is widely used within legal frameworks and media communications to construe an action as criminal or bereft of social legitimacy. Accordingly, it is understood as wanton destruction, the handiwork of hoodlums, and lacking any programmatic or rational basis.
[43] NSW Premier Gladys Berejiklian quoted in Danuta Kozaki, 'NSW Government to Consider Tightening Laws After Second Captain Cook Statue Vandalised', *ABC News* (online, 15 June 2020) <https://abc.net.au/news/2020-06-15/second-captain-cook-statue-vandalised-in-sydney/12354896>.
[44] Albert Boime, 'Perestroika and the Destabilization of the Soviet Monuments' (1993) 2(3) *ARS: Journal of the Institute for History of Art of Slovak Academy of Sciences* 211, 218.
[45] Margaret Aston, *England's Iconoclasts* (Oxford University Press, 1988) vol 1 'Laws Against Images', 3.

city. As street artist Crisp argues, '[t]he appearance of public spaces cannot and should not just be the domain of the wealthy and powerful'.[46]

These generative and transformational qualities of graffiti are poorly recognised in the criminal law frame. The act of vandalism is reduced to an unlawful interference with a property object, and where protest motivations exist, they may be irrelevant or at least secondary to the purpose of punishment: usually, deterrence.[47] The sentencing comments of Deputy Chief Magistrate Michael Allen in an Australian case involving the vandalism in 2020 of the (out-of-copyright) statue of mariner James Cook located in Hyde Park, Sydney are instructive. Political staffer Xiaoran Shi tagged the statue with 'no pride in genocide' and 'sovereignty never ceded' before he pleaded guilty to possessing graffiti implements and wilfully defacing the statue. Magistrate Allen stated that her $1760 fine was intended to send a message to 'would-be offenders' that 'there is no place — even in a liberal democracy such as ours — for people who are prepared to cross the line from lawful conduct to illegal conduct'.[48] He criticised Shi's actions as undermining the 'absolute, unquestionable' right to peaceful protest and lighting a 'match' under racial tensions.[49]

As Shi's sentencing took place in September 2020 after the initial burst of BLM vandalism had subsided, it is difficult to gauge the effect of this criminal penalty on would-be activists. However, it is possible that the association of vandalism with destruction and disorder through the imposition of criminal penalties could inform rather than decrease the value of the act to the vandal. Bruno Latour, for example, suggests that some protestors commit acts of statue vandalism *because* the act is perceived to be destructive by others.[50] Central to this is the mediagenic quality of monument destruction; it captures

[46] Crisp, 'One Person's Vandalism is Another's Masterpiece' (2015) Special Art Issue *Griffith Journal of Law and Human Dignity* 67, 71.
[47] Note that in the UK, 'damage caused to cultural assets' and evidence of community impact are aggravating factors for criminal damage under sentencing guidelines. For discussion, see Sadia Habib et al, *The Changing Shape of Cultural Activism: Legislating Statues in the Context of the Black Lives Matter Movement* (Report, Runnymede Trust, 2021) 2 <https://www.runnymedetrust.org/uploads/projects/CoDE%20Briefings/Runnymede%20CoDE%20Cultural%20Activism%2C%20Statues%20v1.pdf >.
[48] Michael Allen quoted in Alasdair Duncan, 'NSW Greens Staffer Convicted Over Spray Painting Captain Cook Statue in Hyde Park', *PedestrianTV* (online, 18 July 2020) <https://www.pedestrian.tv/news/xiaoran-shi-convicted/>.
[49] Ibid.
[50] Bruno Latour, 'What Is Iconoclash? Or Is There a World Beyond the Image Wars in Bruno Latour and Peter Weibel (eds), *Iconoclash: Beyond the Image Wars in Science, Religion and Art* (MIT Press, 2002) 14.

attention for a political cause.[51] In these circumstances, criminalising graffiti may consolidate, rather than remove, the value of ideological vandalism to some offenders. However, regardless of whether this relationship can be empirically proven, the criminal law framing is narrow. The formal legal framework does not attend to the range of competing public and private interests that can coexist in public spaces and be recognised, sidelined, or devalued by other forms of law. Granted that multiple laws can directly, indirectly, or symbolically shape experiences of racial justice in public art sites, and to better understand the interests that are prioritised in the regulation of the counter-monumental intervention, we will apply the alternative lens of IP to ideological vandalism in the following analysis.

III IDEOLOGICAL VANDALISM AND IP LAW

A *Rationale for an IP Lens*

While the criminal laws protecting property rights are visible — in that most people would be aware of or, at least, not surprised that some sanction would apply to property damage — there exists an undercurrent of other rights that seek to prioritise and regulate property relations within a public space. This ordering of private individual property relations through copyright (and moral rights) are hidden in that they sit behind the criminal actions. They are not unknowable but, as they take a back seat to the more prominent criminal act, they are frequently forgotten and are often highly complex. In this subsection, and the subsection that follows, we consider whether this hidden ordering ties the structure and operation of the law to the hierarchies that much of the ideological vandalism is seeking to protest. In other words, does having an artwork that is privately owned with private interests on public land consolidate the alienation and othering these hierarchies seek to reinforce? Does it lead to social differentiations ('this is mine'; 'do not trespass'), that marginalise vulnerable individuals and communities and affect experiences of and engagements within public spaces?

[51] Gamboni (n 42) 147. See generally Garsha (n 9).

We thus approach law beyond ritualistic practice as a form of symbolic action.[52] Law's communicative nature can be dissected like any other aspect of literature by analysing 'its grammatical structure in order to uncover the relationships between its meaning as a social institution and its structure as a communicative language.'[53] Considering the symbolic ordering of private IP rights facilitates exploration of whether the interests of copyright owners and authors are hierarchised over the interests of the vandal and the public in the speech inherent in the counter-monument.

The key question is not whether IP rights are, in practice, important in this space, especially if they are hidden and rarely litigated, but whether the underlying private rights are symbolic of differentiation of how individuals navigate public spaces. The status of ideological vandalism will firstly be considered as against the rights of the copyright holder, then the moral rights of the statue author.

B *Statue Vandalism as Copyright Infringement*

As previously mentioned, the themes that an artwork might explore is not relevant to the factual inquiry of whether copyright subsists in the work.[54] This means that regardless of the moral, or indeed immoral, qualities of a statue of a figure associated with colonialism, when a statue's design meets the originality threshold, it will likely subsist in copyright as an 'artistic work' under pt III of the *Copyright Act* (presuming the other subsistence criteria are met). Under s 31(b), the copyright owners of all artistic works that subsist in copyright have the exclusive right to control copies of the work; the right of first publication; and the right to make the work available online during the copyright duration — a period of 70 years after the death of the author.[55] Once this period expires, the work is public domain and able to be used without restriction. While the author is the default owner of copyright's exclusive rights as per s 35(2) of the *Act*, public sculptures are typically created pursuant to commissions that may include an express contractual agreement with the author that modifies their default IP rights.[56] The Towns statue was,

[52] Thomas Meisenhelder, 'Law as Symbolic Action: Kenneth Burke's Sociology of Law Author(s)' (1981) 4(1) *Symbolic Interaction* 43, 43–57. On law as ritualistic practice see, e.g., Emile Durkheim's work in *The Division of Labor in Society* (Free Press, 1965).
[53] Ibid 45.
[54] The morality of a work is similarly irrelevant to the vesting of moral rights in the author.
[55] *Copyright Act* s 35. The limited period of protection is one of the ways in which copyright strikes a balance between the rights of copyright owner and the public.
[56] Ibid s 35(3). Note that in Australia, the commissioned art rules do not apply to sculptures as a class of works: s 35(5).

for example, initiated and funded by Townsville CBD Promotions but ultimately commissioned by Townsville City Council.[57] The copyright owner may be Townsville City Council as the commissioning body, if an express contractual term secured their ownership rights over that of the author Jane Hawkins.

In Australia, like the question of copyright subsistence, the morality or motives behind an infringing act are irrelevant to the question of whether copyright infringement has occurred. It is simply an infringement of copyright to exercise or authorise any of the exclusive rights comprised in the owner's copyright.[58] Outside of the fair dealing defences,[59] there are specific exceptions to copyright infringement in the instance of publicly placed artworks that have a degree of permanency. These exceptions, outlined in ss 65-68 of the *Act*, seek to preserve the right to enjoy the physical commons by permitting the making of 'two dimensional copies of three-dimensional works of art that are situated in a public place'.[60] However, they do not capture other types of engagements with artworks like physical interventions. In these circumstances, the question of whether a vandal's actions are copyright infringing will be answered by examining the nature and extent of the copyright owner's exclusive rights grant. If controlling interventions with the physical object is not within the copyright owner's rights grant, then the vandal's act is neither copyright infringing nor we would argue the counter-monument symbolically de-prioritised within the copyright regime.

The owner of a copyright artwork in Australia has the exclusive right to control copies of the work, the right of first publication, and the right to make the work available online.[61] None of these rights provide for the right to modify or alter the material form of the three-dimensional artistic work. There is an adaptation right in Australia's *Copyright Act*[62] — a form of derivative right that includes dealings such as the translation of a literary work

[57] Rees (n 34) 5.
[58] *Copyright Act* s 36.
[59] Fair dealing defences include uses for news and criticism as well as parody and satire: *Copyright Act* ss 41-41A. As we find that there is no copyright infringement with statue vandalism it is not necessary to explore these sections. However, it is apposite to note that these are exceptions to copyright infringement *not* moral rights infringement for which the only defence is 'reasonable use' as discussed below.
[60] See the report of the Copyright Law Review Committee that recommended the introduction of these exceptions: *Report to Consider What Alterations are Desirable in the Copyright Law of the Commonwealth* (Report, Attorney General's Department, 1959) 43. The Committee saw it as 'reasonable' to ensure freedom in reproducing public art in the physical commons: at 43.
[61] *Copyright Act* s 35(2).
[62] Ibid s 31(1)(a)(iv).

into another language or its adaption into another forms, for example, adapting a book into a stage play — but it only applies to literary, dramatic or musical work, and not in the case of visual arts.[63] Yet, even if such an adaptation right applied to artistic works, it is unlikely that statue vandalism is the type of conduct that would fall within the ambit of such a right. This is because physically building upon or adding to the expressive elements of the original work, while it creates a counter-monument, does not transform the intangible property — that is, the object of the exclusive rights grant — from one thing into another. The copyright regime protects the intangible property, not the physical object itself.

In summary, given that copyright infringement in Australia only pertains to exercising or authorising any of the exclusive rights comprised in the owner's copyright, painting over a public statue will not be copyright-infringing behaviour, unless one of the rights specified in s 31(1)(b) are also infringed.[64] For example, by producing and publishing a three-dimensional reproduction of the statue with the graffiti applied (a violation of the reproduction right). However, in its straightforward guise as an agonistic public engagement with the physical art object, copyright does not directly act upon ideological vandalism nor speak to these types of engagements in public spaces. Nevertheless, copyright might indirectly proscribe ideological vandalism through its animation of the moral rights regime. This possibility, and the extent to which the moral rights regime prioritises the author's interest in the integrity of the artwork over other stakeholder interests, will now be explored.

C *Statue Vandalism as Moral Rights Infringement*

In Australia, when copyright subsists in a statue, the moral rights regime will be enlivened in accordance with s 195AZE of the *Copyright Act.* These rights provide for authors, artists, and performers the right of attribution, the right against false attribution, and the right of integrity with respect to certain works (literary, dramatic, musical, or artistic works, and cinematograph films) in which copyright subsists.[65] The author's right of integrity that protects against 'derogatory treatment' is particularly relevant to statue

[63] Ibid s 31(1).
[64] By extension, this means that the fair dealing defences, such as parody or satire, will be irrelevant to proceedings unless one of the rights specified in s 31(1)(b) is also infringed.
[65] *Copyright Act* pt IX.

vandalism as it captures physical interventions to the artwork. Derogatory treatment means the doing of anything in relation to the work, or of anything that results in a 'material distortion', 'destruction', 'mutilation' or a 'material alteration', that is prejudicial to the author's honour or reputation.[66] The breadth of this definition captures non-physical contextual placements, such as putting the statue 'on trial' for war crimes occurred in the public trial of the John Batman statue in 1991, the creation of completely separate objects or graphic work, and material alterations to the physical work, including the application of graffiti.

While copyright subsists, moral rights in respect of the work including the right of integrity will continue in force until copyright ceases to be held by the author.[67] This is the case irrespective of whether copyright has been assigned.[68] As such, regardless of who holds copyright in the Towns statue, the artist Jane Hawkins will hold moral rights in relation to the work until copyright expires. Moreover, in Australia one cannot sell or offer a blanket waiver as you may be able to do with copyright.[69] In this way moral rights are not property rights per se, but more akin to a personal right or tort where the tortious act is not to the person, but to the work itself. That act has repercussions on one's reputation (similar to defamation) whether it be falsely attributing it to another, not attributing it to the artist (not quite defamatory but still affecting the right to have one's reputation enhanced) or derogatory treatment of one's work.

Underpinning the doctrine of moral rights, and especially the right of integrity, is the assumption that an author and their work have an integral bond that is to be protected. Particularly, visual art is seen as a special category due to its tangibility as well as its intangible aspects.[70] While you may buy a chair and break it, paint it, and do whatever you like to it, when the piece is considered 'art' certain inalienable rights attach to it that go beyond property and contract concerns. You may not break, damage, eat, or play with art as you might a chair. This close relationship between the artist and their work encapsulates the Romantic theory of authorship which privileges the personal bond

[66] Ibid s 195AK.
[67] Ibid s 195AM(2). As noted earlier, s 35 of the *Act* gives the duration of copyright as 70 years after the calendar year in which the author of the work died.
[68] 'Subject to this section, a moral right in respect of a work is not transmissible by assignment, by will, or by devolution by operation of law': s 195AN.
[69] Right holders can consent to certain acts with respect to their work: s 195AWA.
[70] See further KE Glover, *Art and Authority: Moral Rights and Meaning in Contemporary Visual Art* (Oxford University Press, 2018).

existing between artist and work.[71] An artist's work is part of their personality and, correspondingly, an artwork is an attribute of its maker. As Raymond Sarraute has argued, moral rights 'give legal expression to the intimate bond which exists between a literary or artistic work and its author's personality'.[72] This Romantic aesthetic conceives an attack on the integrity of a work as a personal attack on the author's character, their honour, and reputation, obscuring both the motivations of the actor engaging with the work and the reception of their actions by others. The engagement with the artwork is *only* a violation of the authorial interests vested in the source work: the creation and reception of the counter-monument, the interests of the vandal and the broader public in the counter-monument's social critique is irrelevant.

The primacy of the bond between the artist and their work and the exclusion of stakeholder interests is evident in the right of integrity. The artist's reputation is so closely connected to the integrity of the piece that transforming the meaning or doing 'anything' to it, no matter how trifling, such as the temporary addition of Christmas decorations,[73] can be seen as derogatory treatment that may harm the reputation and honour of the artist. Painting over a statue simply falls squarely within the type of conduct contemplated by 'derogatory treatment': it *does something* to the work.[74] Neither the moral qualities of the work that is vandalised nor the significance of its destruction for furthering public discourse around racial injustice, is relevant to this factual inquiry.

The second requirement for moral rights infringement that the vandalism be considered prejudicial to a public sculptor's honour or reputation also privileges the author's close relationship to their work. Here, the artist does not have to prove the vandal's actions caused actual harm, merely the *capacity* for harm as the ordinary, natural meaning of 'prejudicial' encompasses future effects.[75]

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[71] Christopher Aide, 'A More Comprehensive Soul: Romantic Conceptions of Authorship and the Common Law Doctrine of Moral Right' (1990) 48(2) *University of Toronto Faculty of Law Review* 211, 211–28.
[72] Raymond Sarraute, 'Current Theory on the Moral Right of Authors and Artists under French Law' (1968) 16(4) *American Journal of Comparative Law* 465, 465. This quotation was subsequently relied on to define moral rights in Copyright Law Review Committee, *Report on Moral Rights* (Report, Attorney General's Department, 1988).
[73] See, e.g., the Canadian case *Snow v Eaton Centre Ltd* (1982) 70 CPR (2d) 105.
[74] *Copyright Act* s 195AK.
[75] This view of prejudice also aligns with the wording of the *Berne Convention Article* 6bis which uses the phrase 'which would be prejudicial'. A Canadian case (with a similar provision) also accords with the view that it is capacity rather than actual harm that need be proved: *Prise de Parole Inc v Geurin, Editeur Ltee*

Very little case law has tested the boundaries of the standard of 'prejudicial to the author's honour or reputation'. Neither 'honour' nor 'reputation' is defined in Australia, though the courts may be more familiar with the latter from defamation case law.[76] The use of both terms in the legislative provision suggests that they mean different things, which provides an author with two potential standalone pathways for substantiating infringement. In support, Perram J in the recent case of *Boomerang Investments Pty Ltd v Padgett (Liability)*[77] found in obiter that the two concepts are distinct. In this case, a songwriter duo's song had been adapted for a French airline advertisement, and the moral rights claim was rejected because the act had taken place overseas and therefore the Australian provisions could not apply.[78] Perram J stated that had the infringement occurred in Australia, it is possible that the artists' honour was injured, but not their reputation.[79] This interpretation of the law is consistent with the reasoning of Federal Magistrate Driver in the case of *Perez & Ors v Fernandez,*[80] who, in relying on the earlier authority of *Meskenas v ACP Publishing Pty Ltd,*[81] stated that 'an author may also claim for injured feelings arising from the infringement'.[82] The damages were subsequently assessed as comparable to a copyright infringement case, the magistrate stating 'I do not accept that Mr Perez's reputation has suffered any lasting damage', yet ordering compensation as well as additional damages under s 195AZA(1) for injured feelings.[83]

If prejudice to the author's honour or reputation are two distinct forms of injury, as Perram J and Magistrate Driver suggest, it could be argued that even if statue vandalism did not hurt the reputation of the sculptor as an artist, their injured feelings alone could satisfy the test for infringement. The relevance of the self-perception of an author in the work, and not simply their reputational standing in the eyes of others, means that the

(1995) 66 CPR(3d) 257 (Canada: Federal Court, Trial Division), affirmed in *Prise de Parole Inc v Geurin, Editeur Ltee* (1996) 73 C.RR. (3d) 557 (Canada: Federal Court of Appeal). However, note when it comes to the Australian right against false attribution, case law suggests actual harm is required: *Adams v Button* [2002] QSC 223, [31].

[76] Adeney argues the defamation standard should not be imported to moral rights, given the different legal contexts. See Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006) 584. See also Patricia Loughlan, 'The Right of Integrity: What is in that Word Honour? What is in that Word Reputation?' (2001) 12 *Australian Intellectual Property Journal* 189, 189–98.

[77] [2020] FCA 535 ('*Boomerang Investments*').

[78] Ibid [395].

[79] Ibid [400].

[80] [2012] FMCA 2 ('*Perez*').

[81] [2006] FMCA 1136.

[82] *Perez* (n 80), [91].

[83] Ibid [107].

author can exert absolute control over direct physical interventions in the work including but not limited to its uses in counter-monuments. Therein lies the potential for perpetuating a hierarchy that privileges the statue artist's personal experiences and concerns over all other concerns. Whether or not an author brings an infringement claim, this IP regime does not afford an opportunity to consider, let alone weigh up the private and public interests that converge in the public artwork and counter-monumental works alongside the author's interests.

This situation is compounded by the operation of the one defence to moral rights infringement that exists in Australia: reasonable use.[84] When considering whether a moral rights infringement constitutes reasonable use, the *Copyright Act* asks the court to focus on the nature, purpose, manner, and context in which the work is used by the infringer as well as any industry practice or any voluntary code of practice.[85] While this purportedly includes contextual considerations relevant to the infringement, what is reasonable will be assessed on the basis of private interests only, and particularly as they are relevant to the artist's experience.[86] This is problematic. The public interest is not necessarily commensurate with, or limited to, preserving the relationship between an artist and their work. Moreover, while the author's private interests are legally enshrined through their grant of moral rights, the vandal too has a private interest in engaging with, and contesting, the work. Furthermore, in the reasonable use provision, there is no specific mention of free speech or public comment in contrast to defamation law which includes a qualified privilege defence to take into account the balancing of political speech and reputational damage.[87] As such, it remains that the meaning of the ideological vandalism is not captured within the nature, purpose, manner, or context in which the work is used by the vandal, nor are there any other embedded statutory avenues for the work to be considered a *reasonable* use of the original work due to its nature as political speech.

[84] *Copyright Act* s 195AS.
[85] Ibid s 195AS(2).
[86] As argued by Sainsbury, while it may be that the defence leaves some room for 'transformative use' it is unlikely to include acts that are seen as offensive or speech that could have been done in some other way: Maree Sainsbury, 'Parody, Satire, Honour and Reputation: The Interplay Between Economic and Moral Rights' (2007) 18 *Australian Intellectual Property Journal* 149, 157. We argue that the courts should see the counter-monuments as transformative and reasonable, but this is unlikely in the absence of reform.
[87] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

Simply adhering to the integrity of the object without considering the possibility of other interests, even when the artist favours preservation, 'ignores the rhythm of protest, the performance of the spectator'[88] and the meaning of the iconoclastic act and counter-monument. It also dispels the opportunity for a diverse public to integrate messages of justice and other accounts of truth in public spaces, allowing the authors' moral rights to erode public agency over, access to, and enjoyment of those spaces.[89] This in turn leaves little room for equality, connection, and reconciliation to occur.

Critical reflection on IP law, and the signals it sends, requires that attention be paid to how the moral rights regime reiterates problematic hierarchies, and devalues the transformative and subversive nature of the counter-monument. Anti-racist dissent possesses genuine public interest in its acknowledgement of previous and continuing injustice, and commitment to racial equality. The moral rights regime can be used as a means for an artist to manage their externalised self-representation through their art. In doing so, regardless of whether an individual artist would sue over ideological vandalism of their work, the symbolic action of the law perpetuates inequality.

Possible pathways for remedying the racial implications of the author's right of integrity will now be considered.

IV REFORM OPTIONS

There are a few ways that reform could take place to better protect the dialogue advanced in counter-monuments and foster more democratic public spaces: reform to the reasonable use defence, extension of the public art exceptions, or investigation as to whether any other sources of rights trump that of the author.

As discussed above, there is one defence to a moral rights infringement in Australia: reasonable use.[90] As it currently stands, while public interests are technically addressed in the existing defence, in practice the public interest is aligned with the author's interest in the integrity of the work and the protection of private property overrides all other interests. To achieve the required recalibration and broadening of stakeholder interests

[88] Gibson (n 6) 279. See also Amy Adler, 'Against Moral Rights' (2009) 97(1) *California Law Review* 263, 274.
[89] Gibson (n 6) 279.
[90] *Copyright Act* s195AS.

recognised within the moral rights regime to reflect the public interest in the counter-monument, *political speech* could be added as a relevant factor to the reasonable use assessment in s 195AS. In the instance of such a reform, the intervention with the physical statue would still be infringing conduct, but it would be infringing conduct that could be excused by a defence to infringement in appropriate circumstances where the anti-racist meaning of the counter-monument is of public benefit.

Alternatively, statutory reform could take place through a designated *public art* exception to moral rights infringement. Similar to the public art exceptions to copyright infringement noted earlier, this reform would see the moral rights infringement of art in public spaces excused. The justification for this intervention is that since most public art is publicly funded, an individual should give up the right to an integrity claim.[91] However, while this reform option appears to neatly align with the public art exceptions to copyright infringement that recognise that the placement of art in the public must be met with some affordances for engagement, the introduction of such a legislative provision is potentially problematic. Without *public interest* as the basis of the exception or an associated balancing act between the interests of the various stakeholders, all physical interventions with public art would be automatically excused from right of integrity infringements. The *Act* would not affect a symbolic othering, but it also would not discern between anti-racist and racist interventions, or their relative value. The capacity for discernment between anti-racist and racist speech is crucial for the law to function appropriately as a moral signal.

To limit the possibility of reform amplifying or remaining complicit in racist agendas, we submit that a more appropriate alternative to amendment of the reasonable use defence is to investigate whether the moral rights regime unduly burdens the implied freedom of political communication. If this is the case, as the implied freedom involves a balancing exercise, it might provide a suitable legal mechanism to restrict authors' control over the work when the benefits to democratic citizenship of engagement with public art carries greater weight. This option would mean that moral rights infringement would still take place, but that the interest in political communication would effectively trump the other

[91] See for example the breadth of the panoramic exception under German law as detailed in Melanie Dulong de Rosnay, and Pierre-Carl Langlais, 'Public artworks and the freedom of panorama controversy: a case of Wikimedia influence' (2017) 6(1) *Internet Policy Review* 1, 4.

rights and interests under the *Copyright Act*. The *Copyright Act's* symbolic othering would still occur, but the implied freedom could remedy this situation without the need for statutory reform, by achieving a balancing of public interests as against private interests. The relationship between the implied freedom of political communication and the *Copyright Act* is a fruitful area of future study.

We submit that legislative reform to the reasonable use defence or, alternatively, implied freedom of political communication arguments, could achieve a better integration of messages of justice and other accounts of truth in public spaces than the current moral rights regime. In addition to the capacity to affect legal outcomes in integrity cases, these avenues would, directly in the instance of statutory reform and indirectly in the instance of the implied freedom, symbolically be recognised as legitimatising the counter-monument. This is vital in ensuring that IP law is not seen to be standing in the way of political expression around racial injustice and the democratisation of public spaces.

V CONCLUSION

When Peter John Wright and his unidentified accomplice bloodied the hands of the Robert Towns statue in Townsville, Queensland, an act both creative and destructive took place. For Wright, this act had criminal law ramifications. As social critique, however, the act also contributed to public discourse around racial injustice. In Australia, as in other settler-colonial states, this critique has often taken the form of ideological vandalism, such as the painting over of public statues, as part of grassroots de-colonial strategies.

This article investigated whether the vesting of IP rights in public art mirrors and reinforces the very power relations implicit in BLM protestors' objection to racial hierarchies embodied in the monumental landscape. It was found that interventions into the physical art object of another author are not rendered unlawful as an infringement of copyright in Australia. Nevertheless, the subsistence of copyright in the source work animates the author's moral right of integrity, which, in theory, is significantly more problematic for activists and bears racial implications. In Australia, where the threshold for prejudice to the author's honour and reputation is low, statue vandalism is likely to infringe the author's moral right of integrity. As the reasonable use defence, like the moral right of integrity, privileges the connection between the statue and the artist, there is no available defence to infringement that recognises the value and significance of the

counter-monument created by the application of anti-racist graffiti. It is severely limiting of IP law's ability to shape a just society that the statue's role in perpetuating racial hierarchies and biased narratives, and the counter-monument's role in triggering public interrogation of those narratives, are irrelevant to the application of legal principles.

Having argued in favour of reform to remedy this situation, it is worth anticipating a possible rebuttal. In light of racist forms of vandalism, it is arguable that the moral rights regime may protect racial minorities' interests (assuming that the statue artist's interest in preservation is a constant). Indeed, the political motivations driving ideological vandalism need not be limited to offensives against social injustice or racial inequality.[92] Far-right action against memorials to victims of dictatorships has occurred overseas,[93] and Indigenous monuments have suffered ignominious racist attacks in Australia. The repeated decapitation of Noongar leader Yagan's statue on Heirisson Island, Perth is a notorious example.[94] However, even if moral rights can indirectly protect the interests of the Noongar, privatising public space — as moral rights do through their privileging of the relationship between the author and their work — does not grant subject status to a racial minority, nor create a space for the reclamation of that subject status. The author's rights still dominate. Positive recognition by the law of the value and significance of anti-racist speech, and its value as against racist speech, is in the public interest.

All privatisation of public spaces should be critically considered, and even more so when systemic inequality characterises society. Public spaces ought to be democratic spaces, and states with a history of racial injustice must imagine new futures that render visible racial inequities — and seek to resolve them. When the same public sculpture that is challenged for its role in racism is protected by the formal legal frame, it is time to ask whose interests are being prioritised.[95] The neutrality of law cannot be presumed. In its current form, the moral rights regime of Australia consolidates the racial hierarchies and symbolic othering that so-called vandals seek to transform. There is a public interest in viewing, analysing, and debating the content and significance of their ideological

[92] In the South African context, Marschall observes 'black on white', 'white on black' and 'black on black' iconoclasms: Marschall (n 2) 216.
[93] In the context of Argentina, see Marisa Lerer, 'Banners, Bridges, Stencils and Christmas Trees: Creating and Concealing Aesthetic Protest Actions in Argentina' (2018) 8(2) *Public Art Dialogue* 198, 198–223.
[94] Stephen Gilchrist, 'Surfacing Histories: Memorials and Public Art in Perth' (2018) 38(2) *Artlink* 42, 46.
[95] Bowrey, Bond, and San Roque (n 28).

vandalism. The anti-racist graffiti of public art statues contributes to this venture. So too should intellectual property law.

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AUSTRALIA, COVID-19, AND THE INDIA TRAVEL BAN

OLIVERA SIMIC*

As of 20 March 2020, the Australian Government closed the country's international borders and enforced a ban on overseas travel to and from the country. The citizens of Australia have become the only citizens among democratic nations who cannot leave the country unless they receive an exemption from the Department of Home Affairs. Australia's ban on travel has been among the strictest in the world. On 30 April 2021, the Morrison Government moved to threaten Australians trying to return home from the then COVID-19-ravaged India with fines and jail time. This was the first time in its history that Australia banned its own citizens from returning to their homeland, to the point of enacting criminal sanctions for those who attempted to do so. In this paper, I look at how extraordinary measures stipulated in the Biosecurity Act 2015 (Cth) have affected Australian citizens' human rights and freedoms. I use the India travel ban as a case study in this paper. The paper argues the unprecedented move to ban all flights to and from India by the Federal Government was disproportionate, unnecessary, and life threatening for stranded citizens. I draw on media, human rights reports, and available data to analyse how the biosecurity laws were arguably enforced with little or no regard for fundamental human rights, including the right to life and healthcare. This decision ultimately resulted in the deaths of overseas citizens from COVID-19, who were banned from returning to their own homeland.

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CONTENTS

I INTRODUCTION

While most of the countries in the world have experienced thousands of deaths and cases of infection, Australia had only reported 1,637 COVID-19 related deaths and 158,547 cases since the pandemic began as of 24 October 2021.[1] However, most of the deaths and infectious cases had been acquired only from July 2021. Prior to this time in the pandemic, Australia had been largely free of the virus.

Australia has been praised for its response to the pandemic and efforts to save lives.[2] Until July 2021, the majority of infected cases were not from community transmission but detected from within the hotel quarantine system that housed Australian citizens returning from overseas.[3] Due to early closure of international borders — with exemptions only for Australian citizens, permanent residents, and their immediate family — Australians have been living mostly COVID-19 free lives. Apart from New South Whales and Melbourne, where the repeated heavy-handed lockdowns lasted more than six months during 2020 and 2021,[4] most other states and their citizens have lived "normal"

[1] 'COVID 19 summary statistics', *Australian Government Department of Health* (Web Page, 22 November 2021) <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-case-numbers-and-statistics>.
[2] William A Haseltine, 'What Can We Learn From Australia's Covid-19 Response?', *Forbes* (online, 24 March 2021) <https://www.forbes.com/sites/williamhaseltine/2021/03/24/what-can-we-learn-from-australias-covid-19-response/?sh=1de0cb483a01>.
[3] Ibid.
[4] Antonia Noori Farzan and Miriam Berger, 'Melbourne lifts one of world's longest lockdowns after 111 days', *The Washington Post* (online, 28 October 2020) <https://www.washingtonpost.com/world/2020/10/28/melbourne-australia-coronavirus-lockdown-111-days/>.

lives in comparison to other countries in the world. Australia's success relied on a strong public health response enforced by the government that focused on vigilant testing, tracing, and quarantine. It also relied on the closing of international borders which prevented citizens and non-citizens from not only entering the country, but also from leaving it.

However, this success has come with a mostly invisible and unacknowledged human cost. As of October 2021, the international border has been closed for the past 19 months, prohibiting Australians from travelling out of the country unless they have an exemption. In August 2021, the government introduced exemptions for Australian citizens who ordinarily reside in other countries too. They must seek exemption to leave Australia if they want to return to their country of residence.[5] Australia is the only country amongst the democratic nations that locked in its citizens by effectively banning them from leaving the country under the pretext of safeguarding public health.[6]

Australia is also the only country to have locked out its citizens through the imposition of travel caps on the number of people who can fly back home due to the limited number of available quarantine spaces.[7] In July 2021, the travel caps for incoming passengers were reduced even further by 50%.[8] As a result, as little as 20 passengers would touch down at the country's international airports on a daily basis.[9] It became the norm that airplanes would fly with 600 empty seats.[10] The combination of international border closures and a limited number of passengers per flight with only a handful of airlines willing to still fly to Australia created disarray in international travel. As of September 2021, more than

[5] 'COVID-19 and the border: leaving Australia', *Australian Government Department of Home Affairs* (Web Page, 5 October 2021) <https://covid19.homeaffairs.gov.au/leaving-australia#toc-3>.
[6] Sophie Meixner, 'Australia's outbound travel ban is one of the strictest coronavirus public health responses in the world', *ABC News* (online, 31 August 2020) <https://www.abc.net.au/news/2020-08-31/coronavirus-covid-outbound-international-travel-ban-morrison/12605404>.
[7] Latika Bourke, '"A bloody outrage": Leaving Aussies stranded a breach of human rights, says Alexander Downer', *The Sydney Morning Herald* (online, 8 April 2021) <https://www.smh.com.au/world/europe/a-bloody-outrage-leaving-aussies-stranded-a-breach-of-human-rights-says-alexander-downer-20210407-p57hbi.html?fbclid=IwAR1wdS-yN_5rp7GRfqy-RkHdGSAKFivId_PeQHM1qui33NBUmRFhFZyaF1Y>.
[8] 'COVID-19: Inbound passenger cap decreased', *Berry Appleman & Leiden LLP* (Web Page, 16 July 2021) <https://www.bal.com/bal-news/australia-covid-19-inbound-passenger-cap-decreased/>.
[9] Elias Visontay, 'Planes fly empty into Australia as international arrivals Covid cap bites', *The Guardian* (online, 7 July 2021) <https://www.theguardian.com/australia-news/2021/jul/07/planes-to-fly-empty-into-australia-as-international-arrivals-covid-cap-bites>.
[10] Rhiana Whitson, 'Australia plans to reopen international borders by Christmas, but detail is light on', *ABC News* (online, 27 September 2021) <https://www.abc.net.au/news/2021-09-27/travel-international-borders-qantas-cathaypacific-singapore/100485428>.

45,000 Australians remain stranded overseas, not being able to return to their homes.[11] These citizens are registered with the Department of Foreign Affairs and Trade as willing to return to Australia on one of the government's repatriation flights. Most of them remain stranded in India.[12]

At least 54 Australian citizens have died from COVID-19 while abroad waiting to return home.[13] In April 2021, exhausted and disappointed from being ignored by the government to be allowed to return to their country, three Australian citizens who had been stranded overseas for months lodged a petition to the United Nations Human Rights Committee.[14]

Australia also remains the only democratic country in the world to have locked down its citizens for the longest period. In Australia, the city of Melbourne, capital of the state of Victoria, was hitting the world record of being the most locked down city in the world.[15] The six months of heavy-handed lockdowns have triggered a mental health disaster which is still unfolding. A 'shadow pandemic' has recently seen a spike in the presentation of children in Melbourne hospital emergency departments.[16] The children in Melbourne have been banned from going to school and socialising with their peers for the duration of the lockdowns. They have suffered various mental health problems such as self-harm, eating disorders, suicide attempts, and anger issues.[17] While Australians could enjoy the privilege of not experiencing floods of infection and death due to the virus, there were

[11] Elias Visontay, 'More than 45,000 Australians stranded overseas registered for government help', *The Guardian* (online, 21 September 2021) <https://www.theguardian.com/business/2021/sep/21/more-than-45000-australians-stranded-overseas-registered-for-government-help>; Dan Conifer, 'Data reveals more than 50 Australian citizens have died from COVID-19 while overseas', *ABC News* (online, 5 August 2021) <https://www.abc.net.au/news/2021-08-05/over-50-australian-citizens-died-abroad-from-covid-19/100354220>.
[12] Sahil Makkar, 'Most Australians stranded overseas are in India, only three repatriation flights planned in June', *SBS News* (online, 4 June 2021) <https://www.sbs.com.au/language/english/most-australians-stranded-overseas-are-in-india-only-three-repatriation-flights-planned-in-june>.
[13] Dan Conifer, 'Data reveals more than 50 Australian citizens have died from COVID-19 while overseas', *ABC News* (online, 5 August 2021) <https://www.abc.net.au/news/2021-08-05/over-50-australian-citizens-died-abroad-from-covid-19/100354220>.
[14] Jane McAdam, 'Should Aussies stranded overseas go to the United Nations for help to get home?', *ABC News* (online, 3 February 2021) <https://www.abc.net.au/news/2021-02-03/should-aussies-stranded-overseas-go-united-nations-for-help/13113482>.
[15] Calla Wahlquist, 'How Melbourne's "short, sharp" Covid lockdowns became the longest in the world', *The Guardian* (online, 2 October 2021) <https://www.theguardian.com/australia-news/2021/oct/02/how-melbournes-short-sharp-covid-lockdowns-became-the-longest-in-the-world>.
[16] Patrick Durkin, 'Spike in distressed children presenting to emergency', *Australian Financial Review* (online, 2 September 2021) <https://www.afr.com/politics/daniel-andrews-acknowledges-victoria-is-not-ok-20210902-p58o55>.
[17] Ibid.

other issues perhaps more difficult to quantify than COVID-19 case numbers such as the importance of mental health that will remain a long-term concern for Australian communities.[18]

Australian states have also occasionally denied their own citizens the right to cross interstate borders and return home. The closure of interstate borders was dealt with a heavy hand; there were cases where even people who were terminally ill and needed to go back home to continue with their treatment were denied doing so.[19] Due to the closure of interstate borders, Australian citizens within Australia reportedly felt exiled like refugees and internally displaced people in their own country. Some even made makeshift camps near the borders of Victoria and New South Wales. Mainly older people have been camping in their vans in "no man's land" waiting to be allowed to return home or to see a dying family member.[20]

There have been numerous heart wrenching stories of separation of family members during the COVID-19 pandemic. The most recent case of a three-year-old boy stranded with his grandparents in New South Wales who has been refused to reunite with his parents in Queensland is just one of the many cases that the media has written about.[21] There have been more than 400 children stranded overseas indefinitely separated from their parents. More than 200 of these children have been stranded in India.[22] The Chief Health Officer said that the refusal of the Queensland Government to provide exemption to the three-year-old boy to reunite with his parents was a 'moral failure'.[23] Still, and

[18] 'COVID-19 experts and community leaders urge politicians to allow schools to open for face-to-face learning in open letter', *ABC News* (online, 12 January 2022) <https://www.abc.net.au/news/2022-01-12/keep-schools-open-despite-omicron-covid-surge-experts-say/100751796>.
[19] Sian Johnson, 'Victorian couple "stunned" woman not allowed to return home for pancreatic cancer treatment', *ABC News* (online, 3 September 2021) <https://www.abc.net.au/news/2021-09-03/fully-vaccinated-victorians-stranded-in-nsw-covid-19/100429394>.
[20] Caroline Schelle, 'Sister's mercy mission to be with terminally ill brother in Victoria', *News.com.au* (online, 15 August 2021) <https://www.news.com.au/travel/travel-updates/sisters-mercy-mission-to-be-with-terminally-ill-brother-in-victoria/news-story/c73e8a55c8b2592a7ae0c8bbe64f5b4f>.
[21] Ellen Ransley and Darren Cartwright, 'The heartbreaking face of QLD premier's iron fist approach to borders', *The West Australian* (online, 2 September 2021) <https://thewest.com.au/lifestyle/parents-grandparents-of-3yo-stuck-in-nsw-beg-qld-premier-to-let-him-come-home-c-3849972>.
[22] Tom Stayner, 'More than 200 Australian children remain stuck in coronavirus-ravaged India', *SBS News* (online, 3 June 2021) <https://www.sbs.com.au/news/more-than-200-australian-children-remain-stuck-in-coronavirus-ravaged-india/5c9324a1-27f9-41e0-b27a-d1d81dac7006>.
[23] Rebecca Masters and et al, 'Three-year-old boy granted exemption to cross Queensland-NSW border, after health minister called rules "profound moral failure"', *9 News* (online, 2 September 2021) <https://www.9news.com.au/national/coronavirus-update-border-queensland-new-south-wales-frydenberg-urges-states-to-open-up/4250dda8-b524-4b07-aaae-3222afbd0958>.

arguably one of the biggest moral failures was a ban to return from India under the threat of jail and monetary fines. The ban was controversial, in operation for two weeks in May 2021, and according to the government: 'targeted and temporary'.[24]

This paper will focus on the Australian Government's decision to stop all flights from India due to its increasing rates of COVID-19 related deaths and infections. On 30 April 2021, the government threatened fines of $66,000 or five years jail time (or both) for anyone trying to flee from India to Australia.[25] It has been estimated that out of more than 45,000 stranded citizens, approximately 9,000 of them were stranded in India at the time of the decision.[26] Although this was not the first heavy-handed measure that the Australian Government enforced during the pandemic, it is the one that sparked widespread public outrage. In a span of a few days, a multitude of media articles had been published criticising the decision, with many lawyers and academics writing about the potential unlawfulness and unconstitutionality of it. Such extraordinary measures caught many by surprise and left Australians with Indian heritage in despair, some of which were in life-threatening situations and eventually died from the virus.

First, I will briefly discuss the relevant provisions in international law. I will then turn to the India travel ban case and discuss how it affected the Indian communities in Australia and India. To conclude, I will suggest what needs to be done to compensate for the loss and abandonment of Australian citizens stranded in India and beyond. The research is a qualitative study drawing on secondary data. It is based on analyses of the government's public statements, legal documents, legal acts, articles, interviews, and legal debates published in the local and international media. I use a human rights-based approach as a

[24] Georgia Hitch, 'Scott Morrison defends India COVID travel ban after criticism of jail time and fines for citizens who try and return', *ABC News* (online, 4 May 2021) <https://www.abc.net.au/news/2021-05-04/scott-morrison-defends-india-covid-travel-ban-australia-jail/100113848>; 'Is the India travel ban constitutional?', *RN Breakfast with Fran Kelly* (ABC Radio, 3 May 2021) <https://www.abc.net.au/radionational/programs/breakfast/is-the-india-travel-ban-constitutional/13326676> ('Is the India travel ban constitutional?).

[25] Katharine Murphy, Paul Karp and Mostafa Rachwani, 'Covid crisis: Australians trying to return home from India face up to $66,000 fine or five years jail', *The Guardian* (online, 1 May 2021) <https://www.theguardian.com/australia-news/2021/apr/30/australian-government-may-make-it-a-for-citizens-to-return-from-covid-ravaged-countries>.

[26] Lydia Feng and Tony Ibrahim, 'Australians trapped in India during COVID-19 crisis fear for their families' survival', *ABC News* (online, 28 April 2021) <https://www.abc.net.au/news/2021-04-28/australians-stuck-in-india-fear-for-their-families-futures/100099416>.

conceptual framework to analyse collected data and critique the Australian Government's controversial ban of flights to and from India.

A *International Law*

Measures that limit individual rights and civil liberties must be necessary, reasonable, proportionate, equitable, non-discriminatory, and in full compliance with national and international laws.[27] The right of return is a principle in international law which guarantees everyone's right of voluntary return to, or re-entry to, their country of origin or of citizenship. The right of return is part of the broader human rights concept of freedom of movement and is also related to the legal concept of nationality. Nationality is a legal identification of a person in international law, establishing the person as a subject, a national, of a sovereign state. It affords the state jurisdiction over the person and affords the person the protection of the state against other states.[28]

In contrast to most Western democracies, where responses to the pandemic were arguably slower and perhaps more human rights oriented, the Chinese and Australian governments immediately introduced heavy-handed measures.[29] While other countries restricted freedom of movement and limited travel, Australia and New Zealand closed their borders indefinitely. As island countries it seemed appropriate and logical to do so. However, contrary to New Zealand, Australia also banned its own citizens from leaving the country without seeking government permission.

The right of return to one's country of citizenship is a principle enshrined in the 1948 *Universal Declaration of Human Rights* ('*UDHR*')[30], the 1966 *International Covenant on Civil and Political Rights* ('*ICCPR*'),[31] and the 1948 Fourth Geneva Convention.[32] The idea that a citizen has a fundamental right to return freely to their country has deep historical roots. Under common law, this stems from the *Magna Carta Project* which states, 'it shall

[27] Carl Coleman and Andreas Reis, 'Ethical considerations in developing a public health response to pandemic influenza', *World Health Organisation* (Web Page Publication, 2007) <https://www.who.int/csr/resources/publications/WHO_CDS_EPR_GIP_2007_2c.pdf>.
[28] Alfred Michael Boll, *Multiple Nationality and International Law* (Brill Publishing, 2007) 114.
[29] Conrad Nyamutata, 'Do Civil Liberties Really Matter During Pandemics?' (2020) 9(1) *International Human Rights Law Review* 62, 77.
[30] *Universal Declaration of Human Rights,* opened for signature 10 December 1948, GA Res 217A (III), art 13(2).
[31] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 12(4).
[32] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm...'.[33] The *Convention on the Rights of the Child* also creates obligations towards Australian children stranded overseas (ratified December 17, 1990).[34] Article 3 (1) makes it clear that 'the best interests of the child shall be a primary consideration' for administrative or legislative decision makers. This raises for consideration whether the rights of accompanied and unaccompanied Australian children in India denied entry to Australia have been taken into account.

Legal scholars have argued that one or more of these international human rights instruments have attained the status of customary international law and that the right of return is therefore binding on non-signatories to these conventions.[35] Article 12(4) of the *ICCPR* provides that 'no one shall be arbitrarily deprived of the right to enter their own country'. The Australian Government, however, rarely complies with its international human rights law obligations.[36] The limitations on the right to re-entry to the country of citizenship require serious justification. The UN Human Rights Committee has stated that there are 'few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable'.[37] However, there is no UN Human Rights Committee jurisprudence regarding how a public health emergency interacts with the right of re-entry to the country of citizenship.[38]

[33] Summerson (trans), 'The 1215 Magna Carta: Clause 42', *The Magna Carta Project* (Web Page) <https://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_42>.
[34] 'The UN Children's Convention and Australia', *Australian Human Rights Commission* (Web Page, 1991) <https://humanrights.gov.au/our-work/childrens-rights/publications/un-childrens-convention-and-australia-1991>.
[35] Eric Rosand, 'The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent?' (1998) 19(4) *Michigan Journal of International Law* 1091.
[36] Susanna Dechent, Sharmin Tania and Jackie Mapulanga-Hulston, 'Asylum Seeker Children in Nauru: Australia's International Human Rights Obligations and Operational Realities' (2019) 31(1) *International Journal of Refugee Law* 83; Jennifer Luu, 'Australia is failing to meet its basic human rights obligations, report finds', *SBS News* (online, 25 June 2020) <https://www.sbs.com.au/news/australia-is-failing-to-meet-its-basic-human-rights-obligations-report-finds/4cf3a866-edd4-49bc-88fc-de0009fcd2b1>; Ben Saul, 'Indefinite security detention and refugee children and families in Australia: International human rights law dimensions' (2013) 20 *Australian International Law Journal* 55.
[37] 'Right to freedom of movement: Public sector guidance sheet', *Australian Government Attorney-General Department* (Web Page) <ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-freedom-movement>.
[38] Liz Hicks, 'Australia and the right of repatriation: Why have "stranded" Australian citizens brought a complaint against their government in the United Nations?', *Verfassungsblog* (online, 12 April 2021) <https://verfassungsblog.de/australia-and-the-right-of-repatriation/>.

The right to return to the country of citizenship is also declared in Australian jurisprudence. During the era of the Whitlam Government (1972–1975), the extraordinary case of Wilfred Burchett declared that Australians were entitled to return to the land of their citizenship.[39] A few years later, the Fraser Government (1975–1983) signed the *ICCPR* which gives specific rights to anyone to re-enter their native land.[40] The Department of Home Affairs' website says that Australian citizenship confers 'additional responsibilities and privileges', and that one of the privileges is to 'apply for an Australian passport and re-enter Australia freely'.[41] The right to return should be a privilege of citizenship and in Australia it is not. This right to freely re-enter one's country of citizenship, which has been subject to debate and controversy in Australia since the pandemic began, has been suspended during the pandemic.

There is no codified right of return under Australian law. Australia is one of the only liberal democracies in the world without a Bill of Rights or Human Rights Act.[42] As such, it stands alone as the only developed Western democracy in the world that fails to offer its citizens the protections afforded by these acts.[43] Successive Australian governments have failed to adequately incorporate their international human rights law obligations into domestic legislation.

A 1908 domestic case does suggest citizens may have a common law right to return to Australia, provided this has not been taken away by statute.[44] Australians ultimately have no constitutional or legislative guarantee of what it means to be Australian, no

[39] Francis Galbally, 'Banning Citizens? Take a Flying Leap', *The Weekend Australian* (online, 7 May 2021) <https://www.theaustralian.com.au/commentary/banning-citizens-take-a-flying-leap/news-story/8d7d2e95d7be44673bbb4f9307bde167>.
[40] Annemarie Devereaux, 'Australia's Journey to Ratification of the ICESCR and ICCPR' (2019) 36(1) *The Australian Year Book of International Law Online* 163.
[41] 'Learn about being an Australian citizen', *Australian Government Department of Home Affairs* (Web Page, 29 October 2020) <https://immi.homeaffairs.gov.au/citizenship-subsite/Pages/Learn-about-being-an-Australian.aspx>.
[42] 'How are human rights protected in Australian law?', *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/rights-and-freedoms/how-are-human-rights-protected-australian-law>.
[43] 'Charter or Bill of Rights: Questions and Answers', *Law Council of Australia* (Web Page) <http://lca.lawcouncil.asn.au/lawcouncil/images/Factsheet-QA.pdf>.
[44] *Potter v Minahan* [1908] HCA 63.

guaranteed rights and freedoms, and no guarantee that the Australian Government will protect those same human rights it has internationally agreed to uphold.[45]

The Federal Government has prevented many Australians from entering or exiting the country during the pandemic. The government achieved this by working with airlines to ensure very few flights land in Australia, and any flights that do land have limited capacity. Without available seats, there is no practical way for every Australian willing to return home to do so. The *Biosecurity Act 2015* (Cth) ('*Biosecurity Act*') provides for the declaration of a human biosecurity emergency for up to three months.[46] The Federal Health Minister can determine 'any requirement' and make 'any direction' he feels is needed to control the disease.[47] These override other laws and cannot be disallowed by the Parliament of Australia. A person who fails to comply with directions is liable for a fine of up to $66,000 and imprisonment of five years.[48] Australia declared a human biosecurity emergency on 25 March 2020, when it became clear the pandemic posed a severe threat to the community.

The emergency has since been renewed several times and will remain in force until at least 17 December 2021.[49] A range of measures have been imposed using such powers. For example, passengers on international flights must wear face masks and report a negative COVID-19 test before boarding. While these measures do not raise constitutional issues, the power to ban citizens returning to Australia does. The only possible legal check on these powers is the Australian Constitution. To do so, it would need to establish that citizens have a right to re-enter Australia. However, the Constitution does not express any such right. It does not even mention Australian citizenship. The only mention of citizenship at all is in section 44, which establishes that a 'citizen of a foreign power' cannot sit in the Parliament.[50]

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[45] 'India travel ban exposes gaping void in Australian human rights protections', *Australian Lawyers for Human Rights* (Web Page, 4 May 2021) [7] <https://alhr.org.au/india-travel-ban-exposes-gaping-void-australian-human-rights-protections/> ('India travel ban exposes gaping void in Australian human rights protections').
[46] *Biosecurity Act 2015* (Cth) ('*Biosecurity Act*') s 61(1)(h).
[47] Ibid s 478(1).
[48] Ibid s 107.
[49] Greg Hunt MP, 'COVID-19 emergency measures extended for a further three months', *Australian Government Department of Health* (Web Page, 2 September 2021) <https://www.health.gov.au/ministers/the-hon-greg-hunt-mp/media/extension-of-the-human-biosecurity-emergency-period>.
[50] *Australian Constitution* s 44.

Australia's Constitution remarkably lacks an express Bill of Rights, meaning there is limited protection of citizenship and the right of repatriation domestically.[51] Nor does it have any explicit citizenship rights protection. As a result, citizens stranded abroad have limited avenues of legal recourse domestically.[52] While some scholars such as Professor Kim Rubenstein have argued that citizens may have a non-express right to re-enter Australia, proving this right exists would be lengthy, complex, and not guaranteed.[53] For these reasons, a group of stranded Australian citizens have brought a complaint against Australia in the UN Human Rights Committee.[54] The outcome of the Australian complaint before the Committee may provide guidance for other states and in future pandemics.

Apart from its international legal obligations, it may be argued that the Australian Government has a duty of care to take reasonable steps to not cause foreseeable harm to its citizens. A duty of care is breached when someone is injured because of the action (or in some cases, the lack of action) of another person when it was reasonably foreseeable that the action could cause injury, and a reasonable person in the same position would not have acted that way.[55] In a recent landmark judgment, the Federal Court of Australia ruled that Environment Minister Sussan Ley has 'a novel duty of care' to safeguard Australian children and vulnerable people against the traumatic and predicted consequences of climate change. Such 'duty' precludes the Minister in acting in a way that causes harm or future harm.[56] It has been declared that the Minister must consider the 'avoidance of personal injury' when making decisions about approving future mining

[51] Liz Hicks, 'Australia and the right of repatriation: Why have "stranded" Australian citizens brought a complaint against their government in the United Nations?', *Verfassungsblog* (online, 12 April 2021) <https://verfassungsblog.de/australia-and-the-right-of-repatriation/>.
[52] Ibid.
[53] Karen Middleton, 'As more than 25,000 Australians wait for the chance to return home, at least one legal expert says the travel restrictions may breach the constitutional rights of citizens', *The Saturday Paper* (online, 19 September 2020) <https://www.thesaturdaypaper.com.au/news/politics/2020/09/19/australians-stranded-overseas/160043760010443#hrd>.
[54] Daniel Hurst, 'UN urges Australia to act quickly to bring stranded Australians home', *The Guardian* (online, 16 April 2021) <https://www.theguardian.com/australia-news/2021/apr/16/un-urges-australia-to-act-quickly-to-bring-stranded-australians-home>.
[55] 'What is Duty of Care?', *Slater and Gordon Lawyers* (Web Page) <https://www.slatergordon.com.au/personal-injury/public-liability/what-is-duty-of-care>.
[56] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 [415]. See also *Plaintiff S99/2016 v Minister for Immigration and Border Protection* [2016] FCA 483. In this case the Federal Court of Australia also establishes that the Minister for Immigration and Border Protection had to "exercise reasonable care" towards vulnerable people and refugees [14].

projects.[57] It is the first time that such a "novel duty of care" has been recognised, especially in a common-law country.[58]

Since it is a new idea in common law, it could be enhanced further jurisprudentially by analogy from this landmark case.[59] The case could be potentially harnessed to establish a duty of care for citizens stranded in India (and perhaps beyond) if it can be proved that there is a sufficient 'nexus' between them and the government authorities to trigger that duty.[60] Regarding the travel ban, the Australian Government has arguably breached its 'novel duty of care'. Due to the novel circumstances surrounding the pandemic, citizens were not permitted to simply leave Australia — they required permission granted by the state authorities to travel to India and beyond. All citizens stranded in India received this permission. While they accepted responsibility that they may be stranded temporarily due to uncertainty and frequent cancelation of flights,[61] they were not informed, nor could they have imagined, at the time of leaving the country that they could be threatened with fines or jail-time for returning to their homeland. The threat was unprecedented.

In the following section, I discuss the India travel ban that potentially infringes upon four universally recognised fundamental human rights: freedom of movement (specifically the right to enter one's own country); the right to life, liberty, and security; the right to healthcare; and freedom from discrimination on the grounds of race, national or social origin. Australia has taken on binding international obligations to protect these rights by ratifying core international human rights law treaties such as the *UDHR* (of which Australia was one of 8 nations involved in drafting)[62] and the *ICCPR* (ratified 1980).[63]

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[57] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 [398].
[58] Madeleine Keck, 'Australian Court Rules the Government Has 'Duty of Care' to Protect Young People From Climate Change', *Global Citizen* (online, 2 June 2021) <https://www.globalcitizen.org/en/content/australian-court-duty-of-care-environment/>.
[59] *Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560 [139].
[60] Ibid [295].
[61] 'COVID-19 and the border: leaving Australia', *Australian Government Department of Home Affairs* (Web Page, 5 October 2021) <https://covid19.homeaffairs.gov.au/leaving-australia#toc-3>.
[62] 'Australia and the Universal Declaration on Human Rights', *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/publications/australia-and-universal-declaration-human-rights>.
[63] 'Chart of Australian Treaty Ratifications as of May 2012', *Australian Human Rights Commission* (Web Page) <https://humanrights.gov.au/our-work/commission-general/chart-australian-treaty-ratifications-may-2012-human-rights-your>.

B *India Travel Ban*

In April 2021, India was battling a second wave of COVID-19, coupled with oxygen and vaccine shortages. India had recorded more than 400,000 COVID-19 cases during this time — a global record up to that point.[64] Deaths from COVID-19 jumped by 3,523 per day, taking the total toll in India to 211,853 according to federal health ministry data.[65] The health system in the country, already in a dire situation, was on the brink of collapse. Most Indian cities were experiencing an ultimate crash of an inadequate health system. Hospitals were overwhelmed with the amount of people in need of care, along with a severe shortage in oxygen supply and life-saving equipment.[66] India's health system was reported to be at capacity and people had no access to healthcare (public or private) in those few weeks of the worse surge of COVID-19 related deaths and infections. Australian Health Minister Greg Hunt stated at the time that 'India is literally gasping for oxygen'.[67] Yet, in such a dire situation, instead of sending repatriation flights and helping stranded Australian citizens, the Australian Government's response was to announce a blanket travel ban and even criminalise the return of its citizens from India.

On 27 April 2021, in response to a rising number of positive cases in hotel quarantine from people returning from India during its second wave, the Australian Government suspended direct flights from India to Australia. On 1 May 2021, the Health Minister Greg Hunt issued a 'determination' under the *Biosecurity Act* which temporarily halted all direct and indirect air travel from India and introduced criminal penalties of five years imprisonment, fines of up to $66,000, or both. Australians exercising their right to return home could be jailed for an offence that the Parliament of Australia had never debated nor agreed upon.[68] For the first time ever, the sole act of Australians returning home from

[64] 'Delhi COVID lockdown extended as India becomes first country to record 400,000 new cases in a day', *ABC News* (online, 1 May 2021) <https://www.abc.net.au/news/2021-05-01/india-records-400-thousand-new-coronavirus-cases/100109938>.
[65] Ibid.
[66] Rashmi Rangarajan, '"Unethical and immoral": Travel bans, COVID-19, and the disregard for human dignity', *Lens by Monash University* (online, 7 May 2021) <https://lens.monash.edu/@politics-society/2021/05/07/1383185/travel-bans-covid-19-and-the-disregard-for-human-dignity>.
[67] Akshaya Kumar, 'Indian Coronavirus Outbreak Shows Australia is on the Wrong Side of the Global Fight Over Vaccine Access', *ABC News* (online, 2 May 2021) <https://www.abc.net.au/news/2021-05-02/india-coronavirus-outbreak-vaccine-trips-waiver/100107824>.
[68] *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements—High Risk Country Travel Pause) Determination 2021* (Cth).

India was regarded as a criminal offence.[69] Western Australian Premier Mark McGowan, who called for 'Australia to seriously consider possible ban on all travellers from India', publicly stated that since 'India is an epicentre of death and destruction as we speak…I don't think there is any need to go to India'.[70] While many Australians would not have any reason to travel to India during those times, some Australian Indians had travelled to India before the outbreak to visit or bury their loved ones. Indians are the second-largest group of migrants in Australia; its diaspora numbers reach approximately 700,000 and many Australians have families and loved ones in India.[71]

Indian Australians who found themselves stranded and affected by the ban all received an exemption from the government to travel for compassionate reasons to their country of heritage. Some of those stranded were granted permission to travel to care for sick relatives or attend funerals. Others travelled there pre-pandemic and have since been unable to return to Australia due to travel caps and limited flights.[72] The ability to return home during the COVID-19 pandemic was already compromised with flight disruptions and flight prohibitions but the critical point in the India travel ban case was the criminalisation issue. Despite having done nothing wrong, these Australians have been left unprotected by a government that has failed to assist its citizens in times of peril.

The ban was put in place for an initial two weeks with the possibility of it being reviewed after this period. At the time of announcing this decision, there were about 9,000 Australians stranded in India who were registered as seeking assistance to come home.

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[69] ABC News (Australia), 'Lawyer Geoffrey Robertson says India travel ban violates essential rights of citizenship | ABC News' (YouTube, 4 May 2021) <https://www.youtube.com/watch?v=LEjnc_fX7E4> ('Lawyer Geoffrey Robertson says India travel ban violates essential rights of citizenship').

[70] Jacob Kagi 'Critics blast Federal Government's "immoral and un-Australian" ban on citizens returning from India', *ABC News* (online, 2 May 2021) <https://www.abc.net.au/news/2021-05-02/india-return-policy-labelled-immoral-and-un-australian/100109898>; Pete Law, 'Mark McGowan calls for possible ban on all travellers from India after virus jumps between Mercure Hotel rooms', *The West Australian* (online, 21 April 2021) <https://thewest.com.au/news/coronavirus/coronavirus-mark-mcgowan-considers-ban-on-all-travellers-from-india-after-covid-19-spread-in-mercure-hotel-ng-b881852661z>; Angie Raphael, 'West Australian Premier Mark McGowan among those calling for a temporary ban on travellers from India', *News.com.au* (online, 22 April 2021) <https://www.news.com.au/travel/travel-updates/warnings/west-australian-premier-mark-mcgowan-among-those-calling-for-a-temporary-ban-on-travellers-from-india/news-story/df12ebeb576be31bc7f3a3c34a6f6349>.

[71] Aarti Betigeri, 'Indians are becoming visible in Australia like never before', *The Interpreter by the Lowy Institute* (online, 28 May 2021) <https://www.lowyinstitute.org/the-interpreter/indians-are-becoming-visible-australia-never>; 'The Role of the Diaspora: An India Economic Strategy to 2035', *Australian Government Department of Foreign Affairs and Trade* (Web Page) <https://www.dfat.gov.au/geo/india/ies/chapter-18.html>.

[72] Sangeetha Pillai, 'Australia's decision to ban its citizens from returning from India: Is it legal? Is it moral? Is it just?', *ABC News* (online, 7 May 2021) <https://www.abc.net.au/religion/is-australias-india-travel-ban-legal-moral-just/13335360>.

Around 650 of whom the Department of Foreign Affairs and Trade recognised as vulnerable.[73] The Department of Foreign Affairs and Trade has not said precisely how it defines who is "vulnerable", but it factors in both the health conditions and financial circumstances of those who are stranded.[74]

Foreign Minister Marise Payne said that the government was 'just following the health advice', while acknowledging the 'very, very difficult circumstances in India…for so many families… And indeed, here in Australia, for Indian Australians who are so worried about their families overseas'.[75] The decision, which has been made under the *Biosecurity Act* on the basis of the advice of the Chief Medical Officer was, according to the government, 'a temporary pause on returns'.[76] Treasurer Josh Frydenberg admitted that the government had taken a 'drastic action to keep Australians safe', relying on expert medical advice.[77] This statement is contradictory in its terms since Australian Indian citizens have been far from 'safe' but left in a life-threatening situation. Nonetheless, Frydenberg did not perceive those citizens left stranded and abandoned in India as those in need of safety. His mind was presumably fixed on the Australians onshore. Through these actions, the government produced two distinct layers of Australian citizens that were to be treated differently: those overseas and those onshore.

Allegedly, the pause in flights from India to Australia was warranted to manage the risk associated with large numbers of infectious people entering the state's inadequate hotel quarantine system.[78] Instead of building purpose-built quarantine facilities and/or allowing people to quarantine at their homes, the states have chosen to simply halt its citizens from returning home.[79] Still, even without enough hotel quarantine facilities or

[73] Stephen Dziedzic, 'About 900 Australians stuck in COVID-hit India and wanting to return now listed as " vulnerable", High Commissioner says', *ABC News* (online, 5 May 2021) <https://www.abc.net.au/news/2021-05-05/australians-health-high-commission-india-supplies-covid-19/100117620>.
[74] Ibid.
[75] Michael McGowan, 'Marise Payne denies racism motivated ban on Australian citizens returning from Covid-ravaged India', *The Guardian* (online, 2 May 2021) <https://www.theguardian.com/australia-news/2021/may/02/marise-payne-denies-racism-motivated-ban-on-australian-citizens-returning-from-covid-ravaged-india>.
[76] Ibid.
[77] Kagi (n 70).
[78] 'Reverse fines for Australians in India and bring them home safely', *Australian Medical Association* (Web Page, 4 May 2021) <https://www.ama.com.au/media/reverse-fines-australians-india-and-bring-them-home-safely>.
[79] Lachlan Gilbert, 'Quarantine quandary: the case for building dedicated facilities', *UNSW Newsroom* (online, 4 June 2021) <https://newsroom.unsw.edu.au/news/art-architecture-design/quarantine-quandary-case-building-dedicated-facilities>.

the lack of options to allow citizens to quarantine at home, it is difficult to understand how returned travellers from India could pose any risk to the community when the Morrison Government insisted that all Australians who were to be repatriated must first test negative to two different COVID-19 tests — both a COVID-19 Polymerase Chain Reaction (PCR) test and a Rapid Antigen test.[80] Those Australian citizens who were sick at the time did not have any chance to fly back home and receive healthcare but were left stranded to seek help in India's overburdened health system. [81] They were literally forced to remain there and those citizens who happened to catch COVID-19 were in real danger of losing their life due to India's overwhelmed health system. If they were allowed to return to Australia, which should be their right as citizens, they would stand a chance of surviving if they became seriously ill.

Not only were stranded citizens required to have two negative tests to be able to board a repatriation flight, but they were also escorted to two weeks of mandatory state-run quarantine as soon as they landed. With such strict conditions put in place, Australians stranded in India were exposed to the high risk of dying. By stopping all flights from India to Australia, the risk has exacerbated. A government-chartered Qantas flight did eventually depart for India after the ban was set in force carrying more than 1,000 ventilators and dozens of oxygen concentrators which were meant to help health authorities in India fighting to contain the spread of COVID-19.[82] However, it inevitably returned passenger-free to Australia.

Although other countries have also faced a high volume of cases and deaths, the flights to Australia from these countries have never been banned. The issue of racism was raised by some commentators because the same kind of rule was not imposed on people of Anglo-Saxon heritage from the UK or the US, both of which saw hundreds of thousands of

[80] Sarah Martin, '"People will die": Indian-Australian community leaders call on government to evacuate vulnerable Australians', *The Guardian* (online, 5 May 2021) <https://www.theguardian.com/world/2021/may/04/coalition-to-hold-talks-with-indian-australian-community-leaders-as-anger-mounts-over-travel-ban>.
[81] Ibid.
[82] Stephen Dziedzic, 'About 900 Australians stuck in COVID-hit India and wanting to return now listed as "vulnerable", High Commissioner says', *ABC News* (online, 5 May 2021) <https://www.abc.net.au/news/2021-05-05/australians-health-high-commission-india-supplies-covid-19/100117620>.

cases and deaths in the second wave of COVID-19.[83] Flights from these countries have never been banned nor have Australian citizens from them been threatened by criminalisation if they did try to return home. Evidently, different standards have been applied to those stranded in India. The government was widely criticised by the Australian Human Rights Commission and human rights experts raised 'serious human rights concerns'.[84] The Australian Human Rights Commission issued a briefing paper on the travel ban and stated:

> Naturalized Australians who were born in India chose to give up Indian citizenship to be Australian. In doing so they undertook obligations to Australia under the Citizenship Act 2007 but now the lack of any mutuality to that oath has been exposed. The preamble to that Act, which makes a promise of common bond, involving reciprocal rights and obligations and respect for rights and liberties is meaningless when the Federal Government excludes citizens from Australia and leaves them to fend for themselves.[85]

The government was fully aware of the dire situation it left its citizens in. The Chief Medical Officer, Professor Paul Kelly, publicly accepted that some Australian citizens stranded in India in a 'worst case scenario will die' since they won't be rescued.[86] Contrary to Australia, Taiwan sent a mercy flight to pick up their citizens who were in India.[87] Why then would Australia, which has developed a reputation of coming to the aid of its citizens in peril during terrorist attacks, natural disasters, civil strife, or armed conflict,[88] now abandon some of their citizens and practically leave them to die? The government has previously demonstrated a capacity to repatriate citizens in times of emergency and medevac the critically ill.[89] It had set a precedent by organising

[83] 'Covid-19 in the UK: How many coronavirus cases are there in my area?', *BBC News* (online, 18 October 2021) <https://www.bbc.com/news/uk-51768274>; 'Coronavirus in the U.S.: Latest Map and Case Count', *The New York Times* (online, 17 October 2021) <https://www.nytimes.com/interactive/2021/us/covid-cases.html>.
[84] McGowan (n 75).
[85] 'India travel ban exposes gaping void in Australian human rights protections' (n 45).
[86] Sarah Martin, 'Australians could die from Covid in India under travel ban, medical chief warns', *The Guardian* (online, 3 May 2021) <https://www.theguardian.com/australia-news/2021/may/03/australians-could-die-from-covid-in-india-under-flight-ban-medical-chief-warns>.
[87] Matthew Strong, 'JAL flies 41 Taiwanese, 3 Indians from India to Taiwan', *Taiwan News* (online, 8 May 2021) <https://www.taiwannews.com.tw/en/news/4198309>.
[88] Donald R Rothwell, 'When border control goes over the line', *The Interpreter by the Lowy Institute* (online, 19 May 2021) <https://www.lowyinstitute.org/the-interpreter/when-border-control-goes-over-line>.
[89] Ibid.

repatriation flights for Australians stuck in Wuhan, South America, and India earlier in the COVID-19 pandemic. Helen Irving, a professor of constitutional law, stated that 'the government has recognised in this way that it's got a duty of protection towards Australian citizens'.[90] Don Rothwell, a professor of international law, argues: 'I cannot think of any previous example where an Australian legally being in another country is now being told that if they physically cross the border, they are breaching Australian law through having committed no offence while they've been in a foreign country or having committed no offence under Australian law while they've been in that foreign country'.[91]

Renowned human rights lawyer Geoffrey Robertson stated that it was 'outrageous to condemn innocent citizens for five years…because it's never been debated or considered by Parliament'. According to Robertson, it was 'unconstitutional' to stop Australians from returning home from India.[92] Some public figures, such as ex-cricketer Michal Slater said that Prime Minister Scott Morrison has 'blood on his hands' and that the government's policy of temporarily preventing Australians from returning home was a 'disgrace'.[93] Australian cricketers, approximately 38 players and officials who were on tournament in India at the time after the ban to return to Australia was enforced, took a charter flight and went to the Maldives.[94] They spent two weeks on the resort island while waiting for Australia to lift the two week ban on flights from India.[95] The rest of the stranded Australian citizens could not afford such luxury and stayed stranded in India.

C *An Avenue for Administrative Appeal*

[90] Daniel Hurst and Elias Visontay, 'Constitutional question: is it legal to limit how many Australian citizens can fly home each week?', *The Guardian* (online, 26 August 2020) [22] <https://www.theguardian.com/australia-news/2020/aug/26/constitutional-question-is-it-legal-to-limit-how-many-australian-citizens-can-fly-home-each-week>.
[91] 'Is the India travel ban constitutional?' (n 24).
[92] Sheri Mimis, 'Human rights lawyers "outraged" by "unconstitutional" India travel ban', *9 Now A Current Affair* (online, 20 May 2021) <https://9now.nine.com.au/a-current-affair/coronavirus-human-rights-lawyer-geoffrey-robertson-outraged-over-australias-india-travel-ban/5b91d2f2-4b36-4352-a71f-9b6e61153701>.
[93] 'Former cricketer Michael Slater says Scott Morrison has "blood on his hands" over India travel ban', *The Guardian* (online, 4 May 2021) <https://www.theguardian.com/sport/2021/may/04/former-cricketer-michael-slater-says-scott-morrison-has-blood-on-his-hands-over-india-travel-ban>.
[94] Carly Waters, 'Australian cricketers and staff touch down in Sydney after leaving coronavirus-stricken India', *9 News* (online, 17 May 2021) <https://www.9news.com.au/national/australian-cricket-players-to-arrive-in-sydney-after-india-evacuation/71e88d72-c7e2-41eb-b5bc-442a528ed267>.
[95] Rob Forsaith and Glenn Valencich, 'COVID-positive Aussie cricket great in limbo as Maldives BANS travellers from India', *7 News* (online, 14 May 2021) <https://7news.com.au/sport/cricket/australian-ipl-stars-hoping-to-return-soon-c-2838534>.

The Minister has relied upon section 477 of the *Biosecurity Act* which has been the principal basis on which the Commonwealth has been seeking to implement the whole raft of health measures in the pandemic. Section 479 of the *Biosecurity Act* allows the Minister for Health the virtual sweeping power to declare a law and have Australian citizens incriminated by it, which according to Robertson contradicts the idea of democracy set up by the Australian Constitution.[96] The question remains whether the Health Minister exceeded his lawful authority. The *Biosecurity Act* requires that the measures must be 'appropriate and no more restrictive and intrusive than is required in the circumstances'.[97]

This is a question of proportionality and Ministerial discretion. It is also a matter subject to judicial review regarding whether the Minister acted *ultra vires* and succeeded the authority and secretion they had to operate under the Act. The Ministerial decision was subject before the courts in the case that sought to challenge the Ministerial order. The challenge was lodged in the Federal Court on the grounds it was unconstitutional and illegal.[98] It set the precedent of how far Ministerial power in decision making can go. Melbourne citizen Gary Newman, 73, who had been stuck in India since March 2020, told the court his common law right to return home had been contravened by the biosecurity order preventing people from returning to Australia if they had been in India for the past 14 days.[99] His main argument was that he and 9000 other Australians had travelled there with the government's permission that was granted in most of the cases on compassionate grounds.[100] There was an expedite hearing because if it was not overturned, Australians could be banned from returning from another place tomorrow.

The government lawyers told the court the Act prevailed over such rights if it was needed to protect the national interest, stating 'there's nothing in the statute to suggest that precise matters identified by my opponents needed to be taken into account for an

[96] 'Lawyer Geoffrey Robertson says India travel ban violates essential rights of citizenship' (n 69).
[97] *Biosecurity Act* (n 46) s 477(4)(c).
[98] Stuart Marsh, 'Legal challenge against India travel ban rejected in the Federal Court', *9 News* (online, 10 May 2021) <https://www.9news.com.au/national/australia-india-travel-ban-rejected-by-federal-court/f49670d3-c45d-44cc-8572-3d1747294bf8>.
[99] Elizabeth Byrne, 'Federal Court throws out part of challenge to Federal Government's India travel ban', *ABC News* (online, 10 May 2021) <https://www.abc.net.au/news/2021-05-10/federal-court-judge-throws-out-part-of-india-travel-ban/100129520>.
[100] Hannah Ryan and Tiffanie Turnbull, '"WE ARE NOTHING": Over 9000 Australians stranded in India amid worsening COVID-19 crisis', *7 News* (online, 3 May 2021) <https://7news.com.au/lifestyle/health-wellbeing/we-are-nothing-aussie-stranded-in-india-c-2732378>.

emergency power directed to the national interest'.[101] On 10 May 2021, a bid to overturn Australia's ban on travellers returning from India was rejected. The precedent was significant, as the ban had a disturbing effect by effectively criminalising the right to return to Australia even in life threatening situations. Many stranded Australians overseas and their families in Australia were outraged by this decision. As Satinder Pal, one of the stranded Australians of Indian heritage stated: '…I didn't come here for a holiday. I didn't come here by choice. My father was dying'.[102] The Association of Australian Medical professionals issued a public statement on their position regarding the travel ban:

> Rapid escalation of community transmission of COVID-19 in India is exposing Australians to a risk of avoidable illness and death, because of poor access to vaccination, poor or no access to healthcare, and the ban on travel to Australia. The order to imprison or fine those who might breach the current ban is seen by the medical profession as mean-spirited at a time when Australia should in fact be aiding India by bringing Australians home in order to avoid further burden on their collapsing health system.[103]

Although there was public outrage when the ban was effective, many have remained silent. Maybe the most surprising was that churches and church leaders did not speak up about what was also an ethical issue. Geoffrey Robertson, discussing the India travel ban wondered whether the parable of the good Samaritan has any resonance in the Australian community today.[104] How was such a move by the government possibly morally and ethically acceptable and why have progressives stayed silent on the undermining of democratic commitments?[105]

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[101] Elizabeth Byrne, 'Federal Court throws out part of challenge to Federal Government's India travel ban', *ABC News* (online, 10 May 2021) [11] <https://www.abc.net.au/news/2021-05-10/federal-court-judge-throws-out-part-of-india-travel-ban/100129520>; *Newman v Minister for Health and Aged Care* [2021] FCA 517.
[102] Ryan and Turnbull (n 100).
[103] 'Reverse fines for Australians in India and bring them home safely', *Australian Medical Association* (Web Page, 4 May 2021) <https://www.ama.com.au/media/reverse-fines-australians-india-and-bring-them-home-safely>.
[104] ('Lawyer Geoffrey Robertson says India travel ban violates essential rights of citizenship') (n 69).
[105] Tim Soutphommasane and Marc Stears, 'Government responses to COVID-19 are undermining our democratic commitments: why have progressives remained silent?', *ABC News* (online, 1 September 2021) <https://www.abc.net.au/religion/tim-soutphommasane-and-marc-stears-covid-why-are-progressives-s/13521952>.

II CONCLUSION

This paper has argued that while Australia has been very successful at curtailing the spread of the COVID-19 virus, it has also left thousands of people in distress at being separated from their loved ones across borders — some in life threatening situations. Those who were already marginalised individuals and groups, such as refugees and migrants, have been made even more at risk of death or serious health consequences because they are unable to rely on the healthcare systems in the countries they have been stranded on.

The closure of international borders and occasional closures of interstate borders has brought suffering to many Australian citizens who are unable to return to their loved ones even in the last hours of their lives.[106] Migrants who have overseas family members have been indefinitely separated for the past 19 months. Citizens who have family members spread across different states in Australia have been cut off from their families for prolonged periods of time. The difference between these two categories of citizens is that the international borders have not been re-opened even once during the past 19 months, whilst state borders have had periods when they were fully open so that people could travel and unite with their families.

Under the *ICCPR*, citizens have a clear right to enter their country of citizenship. If this right is squashed or allowed to some citizens and denied to others, then what is the point of citizenship and passports when citizens cannot enter their own country?[107] The right to enter one's own country should not be arbitrarily denied, and in the case of the India travel ban, a complete, blanket exercise of the common law instrument denying all Australians in India the right of entry no matter the circumstances is unacceptable. The failure of the Australian Government to return citizens and permanent residents to their country of citizenship arguably amounts to an Australian policy failure and a breach of international law.[108]

[106] Simon Atkinson, 'Covid: The lives upended by Australia's sealed border', *BBC News* (online, 15 September 2021) <https://www.bbc.com/news/world-australia-58540905>.
[107] Kim Rubenstein, 'Why MPs are unwilling to do more for Australians trapped by COVID travel bans?', *The Sydney Morning Herald* (online, 21 April 2021) <https://www.smh.com.au/national/why-mps-are-unwilling-to-do-more-for-australians-trapped-by-covid-travel-bans-20210419-p57kkm.html>.
[108] Rothwell (n 88).

There is a state duty to protect and help its citizens, not to leave them in the lurch. Indian Australians have disproportionately harmed by egregious human rights violations — in particular, their right to life and healthcare. The Australian Government needs to provide symbolic and material reparations to Australian citizens stranded and left behind in India. An apology and financial compensation to the families who lost their loved ones during those times should ensue. As nationals of Australia, Indian Australians stranded in India had every right to expect protection from their government and not abandonment and the endangerment of their lives in times of peril. The Australian Government could have sent rescue missions as other countries have done and repatriate its citizens. Further, it could have aided the vaccination of Australian citizens in India. The case of the India travel ban raises legal, moral, and ethical questions raised by the (in)action of the Australian Government towards its citizens stranded in India who wished to return home.

Australia lacks an express Bill of Rights. Its constitution is one of the world's oldest operating; however, unlike other old constitutions, it has not been amended to incorporate rights catalogues.[109] Although the ban lasted for two weeks only, it may have felt like an eternity to those individuals stranded and at risk of dying. The Australian Government, once it resumed flights from India, did not rush to bring home as many stranded citizens as possible but kept all the strict protocols to repatriate stranded citizens. Potential passengers had to have two negative tests and the first repatriation flight brought only 80 out of 9000 stranded citizens back home.[110]

Immediately upon landing, the passengers were escorted to two weeks of state-run quarantine at their own expense. The feeling of abandonment and disappointment among Australians of Indian heritage still revibrates.[111] And while open wounds still have not healed, oddly and most recently the Queensland Premier Annastacia Palaszczuk

[109] Liz Hicks, 'Australia and the right of repatriation: Why have "stranded" Australian citizens brought a complaint against their government in the United Nations?', *Verfassungsblog* (online, 12 April 2021) <https://verfassungsblog.de/australia-and-the-right-of-repatriation/>.
[110] Stephen Dziedzic and Tom Lowrey, 'First repatriation flight from India arrives in Darwin following end of COVID-19 travel ban', *ABC News* (online, 15 May 2021) <https://www.abc.net.au/news/2021-05-15/india-repatriation-flight-lands-in-darwin/100141594>.
[111] Antoun Issa, 'Have Australians in India been abandoned because people of colour are seen as "less" Australian?', *The Guardian* (online, 7 May 2021) <https://www.theguardian.com/australia-news/commentisfree/2021/may/07/have-australians-in-india-been-abandoned-because-people-of-colour-are-seen-as-less-australian>.

sarcastically told a reporter, 'Well, where are you going to go? Are you going to go to India?' when asked about opening international travel.[112] Rachita Narula, an Australian of Indian heritage, wants to know why the Premier singled out India. She and the Indian community were perplexed by Palaszczuk's comments and want to know 'why only India?'.[113] They have not received an answer to their questions nor an apology for singling out this community yet again.

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[112] Elizabeth Cramsie, 'Annastacia Palaszczuk's comments about COVID-19 travel overseas perplexes Queensland's Indian community', *ABC News* (online, 25 September 2021) <https://www.abc.net.au/news/2021-09-25/qld-coronavirus-covid-19-overseas-travel-palaszczuk-india/100487030>.

[113] Ibid Rashida Yosufzai, 'Australian Indians slam Queensland premier's "sarcastic" comment', *SBS News* (online, 25 September 2021) <https://www.sbs.com.au/news/australian-indians-slam-queensland-premier-s-sarcastic-comment/6c6cafa9-8039-445b-9e25-2fe2563d11b7>.

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LAW AND LITIGATION FOR THE CONSERVATION OF FOREST COMMUNITIES

LAURA SCHUIJERS & LEE GODDEN*

Australia's natural environment is in decline and under increasing threat. The extent and severity of biodiversity loss is highlighted by the second independent, 10-yearly review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) ('EPBC Act'). The Review points to climate change as a critical compounding danger — one to which Australia and its unique flora and fauna are highly vulnerable. In this article, we discuss the role of law in protecting and extending the public interest in nature conservation, with special focus on the forest context. The term 'public interest,' while complex in meaning, typically refers to public or community values, as opposed to private interests such as those of property rights holders. We consider the recent judgments in Friends of Leadbeater's Possum Inc v VicForests (No 4) [2020] FCA 704 ('Leadbeater's Possum') and Bob Brown Foundation Inc v Commonwealth of Australia [2021] FCAFC 5 ('Great Forest') with respect to the ongoing function of the Regional Forest Agreements ('RFAs') in exempting the operation of the EPBC Act. In light of the Review's comment that Australia's federal environmental law is not fit for purpose, as well as the gaps and limitations in the law revealed by the two court cases, we conclude that legal reform is needed. Without legal reform, there can be no guarantee that cumulative threats to forest biodiversity will be adequately managed because although the relevant legislation appears to embody principles of ecologically sustainable development on its face, it also prevents key decision-makers and operators from being held to account. The inescapable dependency of humans on nature means the insufficiency of environmental laws fundamentally concern us all.

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I PEOPLE, PLANET, PROSPERITY

Human-nature dependency was first articulated in international law in 1972 through the *Stockholm Declaration*, 'Our Common Future'.[1] Despite the mounting evidence of conjoined futures between the human and more-than-human world, globally, human development has escalated alongside mounting biodiversity loss. Internationally, as well as within Australia, legal frameworks have failed to stem this loss. Biodiversity loss is a critical factor in unsustainable development trajectories because ecological systems are life support systems. Loss of biodiversity in forests has been a particular concern over past decades, but robust legal measures for forest protection have failed to emerge. In Australia, the national environmental law (i.e., the *EPBC Act*) provides a regulatory exemption for forest activities. Accordingly, and given the dire global situation of biodiversity loss and its acute dimensions in relation to forests within Australia, this article explores the potential for law to better realise a stewardship mandate for biodiversity protection in forests. Any such mandate to secure the interdependencies of

[1] *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1973, adopted 5-16 June 1972) Principle 1.

human dignity and biodiversity protection must include accessible and tangible measures for concerned communities to take legal action to secure biodiversity futures.

A *Biodiversity Loss and a Diminished Humanity*

Development that puts life support systems and so life itself irrevocably at risk is unsustainable development. Research has revealed human dependencies on biodiversity for health, productive agriculture, strong economies, a stable financial system, and liveable cities.[2] Because biodiversity loss is so significant, scientists have concluded that we have entered into a sixth global mass extinction — experts have signalled the 'extreme urgency' of a global response.[3] None of the previous five extinction events were caused by one species, as this one is, and in each case although it was possible for life to recover, it took millions of years for diversity to re-establish.[4] An effective response to this crisis will necessarily involve an aggregation of national and regional-scale actions, including strengthening relevant laws. Similarly, concerted international action is also required, as no one international treaty can solve the problem without local implementation.

A significant barrier to preventing biodiversity loss is that environmental law, a product of the intersection of politico-economic and conservation systems, incorporates a balancing exercise for decision-making. This balancing exercise is premised on a simplistic understanding that biodiversity conservation and socio-economic development present competing priorities.[5] This understanding fails to recognise the complex interdependencies within social-ecological systems, including the management of natural resources.[6]

In 2021, the World Economic Forum listed biodiversity loss as a principal existential threat for humanity,[7] a sentiment reiterated in UNEP's 5th *Global Biodiversity Outlook*,[8]

[2] UNEP, *Global Biodiversity Outlook 5* (Secretariat of the Convention on Biological Diversity, 2020) <https://www.cbd.int/gbo/gbo5/publication/gbo-5-en.pdf>.
[3] See, e.g., Gerardo Ceballos, Paul R Ehrlich and Peter H Raven, 'Vertebrates on the Brink as Indicators of Biological Annihilation and the Sixth Mass Extinction' (2020) 117 *Proceedings of the National Academy of Sciences* 13596; E O Wilson, *The Future of Life* (Vintage, 2003); K R Shivanna, 'The Sixth Mass Extinction Crisis and its Impact on Biodiversity and Human Welfare' (2020) 5 *Journal of Science Education* 93.
[4] *Ceballos* (n 3) 13596.
[5] Jacqueline Peel, 'Ecologically sustainable development: More than mere lip service?' (2008) 12 *Australasian Journal of Natural Resources Law and Policy* 34, 35.
[6] See Barbara Cosens, 'Resilience and Law as a Theoretical Backdrop for Natural Resource Management: Flood Management in the Columbia River Basin' (2012) 42 *Environmental Law* 241.
[7] World Economic Forum, *The Global Risks Report 2021* (16th ed, 2021) 5.
[8] UNEP (n 2) 8-9.

and a sign that even conventional economic establishments are recognising changing values. Estimates suggest that more than 50% of global GDP is moderately or highly dependent on nature.[9] Well-established links between human rights and the environment, recently reiterated by the UN Human Rights Council which recognised a specific human right to a healthy environment,[10] help to support the notion that biodiversity conservation is critical because ecological systems are a basic tenet of human survival. The dependency is not only physiological, but psychological. Emergent scientific scholarship has identified the 'entanglement' of humans with the material environment.[11] The emotional attachment of people to 'special natural places' is well documented in contemporary Australian society.[12] Indeed, the phenomenon of associating emotional wellbeing with the capacity to engage with nature has been long understood in many cultures.[13] Human dignity is a dimension of our existence that is nourished and revitalized by our capacity to afford living space to other lifeforms; to extend a duty of care to the more-than-human world.[14]

B *Human influence and the Anthropocene*

The notion of the Anthropocene as a geological epoch defined by the pervasive impact of humans as an agent of environmental change, together with the anthropogenic nature of

[9] See World Economic Forum, *Nature Risk Rising: Why the Crisis Engulfing Nature Matters for Business and the Economy* (January 2020) <https://www3.weforum.org/docs/WEF_New_Nature_Economy_Report_2020.pdf>. For a discussion of the contribution of nature-based projects to economic stability and post pandemic recovery, see e.g., United Nations Green Climate Fund, *GCF Annual results report - Climate action during the pandemic 2020* (Report, March 2021) 6 <https://www.greenclimate.fund/sites/default/files/document/gcf-annual-results-report-2020.pdf>.

[10] *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, UN HRC, 48th sess, Agenda Item 3, UN Doc A/HRC/48/L.23/Rev.1 (5 October 2021).

[11] See, e.g., Karan Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007).

[12] Lesley Head, 'Grief, Loss and the Cultural Politics of Climate Change' in H. Bulkeley, M. Paterson, and J. Stripple (eds) *Towards a Cultural Politics of Climate Change: Devices, Desires and Dissent* (Cambridge University Press, 1st ed, 2016) 81 <doi:10.1017/CBO9781316694473.006>.

[13] In Japanese culture, the practice of shinrin-yoku emphasizes immersion in forests as a spiritual and psychological tool to improve wellbeing and reduce stress. Peer-reviewed research has confirmed these benefits: see, e.g., Yasuhiro Kotera, Miles Richardson and David Sheffield, 'Effects of Shinrin-Yoku (Forest Bathing) and Nature Therapy on Mental Health: a Systematic Review and Meta-analysis' [2020] (July) *International Journal of Mental Health and Addiction* 1 <doi: 10.1007/s11469-020-00363-4>; Mindfulness and Shinrin-Yoku: Potential for Physiological and Psychological Interventions during Uncertain Times' (2020) 17(24) *International Journal of Environmental Research and Public Health* 9340: 1-13 <doi:10.3390/ijerph17249340>.

[14] Lee Godden, 'Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage and Others' in H. Douglas et al (eds) *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 138, 140.

the current mass extinction event, clearly places humans in the role of environmental stewards (willingly or not). Law plays a critical role in managing biodiversity loss. Laws with safeguards of transparency in relation to decision-making and accountability to interests beyond government decision-makers can assist in the prevention of biodiversity loss. Laws that are difficult for the public to challenge through litigation can lock in biodiversity decline as this lack of public challenge is a barrier to legal reform and (hopefully) enhanced legal protections. A range of reports and parliamentary inquiries have found serious deficiencies in the Australian national legal framework for biodiversity protection, particularly with respect to forests.[15]

We focus on forests for two reasons. First, as noted, there is an important and concerning exemption from federal environmental law for activities that happen in forests covered by specific forest agreements, which has come to light through recent public interest litigation. Second, the burning of Australia's forests across 2019-2020 resulted in such significant loss of species and their habitat that forest systems — and Australians' concern for and dependency on them — are dramatically changed.[16]

II ENVIRONMENTAL LAW AND FOREST CONSERVATION

C The Federal EPBC Act and the Commonwealth-State RFAs

Environmental law in Australia has attempted to further the sustainable development agenda through five principles of ecologically sustainable development ('ESD') since the 1990s.[17] These principles are embedded into statutes and other instruments. They include that conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making (the biodiversity conservation principle); that the present generation should ensure the health and diversity of the environment

[15] See particularly Legislative Council Environment and Planning Committee, *Inquiry into Ecosystem Decline in Victoria* (Parliament of Victoria 2021) tabled 2 December 2021 <https://www.parliament.vic.gov.au/images/stories/committees/SCEP/Ecosystem_Decline/Report/LCEPC_59-05_Ecosystem_decline_in_Vic.pdf >, and the *EPBC Act* Review Report which we discuss in Graeme Samuel, *Independent Review of the EPBC Act: Final Report* (Report, October 2020) 16 <https://epbcactreview.environment.gov.au/resources/final-report>.

[16] Commonwealth, *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 324.

[17] The Australian ESD principles first emerged in the National Strategy on Ecologically Sustainable Development Australia. Ecologically Sustainable Development Steering Committee, *National Strategy on Ecologically Sustainable Development* (Australian Govt. Pub. Service, 1992) and the *Intergovernmental Agreement on the Environment* (1 May 1992).

for future generations (the intergenerational equity principle); and that if there is a threat of serious or irreversible harm, lack of full scientific certainty should not be a reason to postpone measures to prevent environmental degradation (the precautionary principle). The ESD principles might be viewed as a recognition of the public interest in nature conservation — collectively, they serve to impose ecological concerns on the human development agenda, promoting development that is sustainable, from an ecological perspective, and from which present and future generations can benefit.[18] The principles are found both in the *EPBC Act*, and the RFA regimes.[19]

The *EPBC Act* is Australia's central piece of federal-level environment legislation. Across well over 500 provisions, it (*inter alia*) provides for threatened species to be documented through listing, critical habitat to be registered, and it creates a strict liability offence for knowingly damaging threatened species' critical habitat without a permit. It binds the Commonwealth and Commonwealth agencies to threatened species recovery plans and threat abatement plans if in place. Yet many more species are listed than have active recovery plans,[20] and the critical habitat register has not been updated in 16 years.[21]

Principally, the *EPBC Act* operates in practice as a procedure-oriented statute that calls for impact assessment to be conducted where a proposed project, or 'action,'[22] is likely to have a significant impact on one of nine protected aspects of the environment. These nine aspects, commonly referred to as matters of national environmental significance, broadly correlate with nine areas in relation to which either Australia has international responsibility (through having signed an international treaty), or the Commonwealth is involved.

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[18] There has been compelling critique of how the ESD principles operate in practice, and suggestion that they be replaced with a new societal goal for environmental law that recognises the inherent value of nature: see The Australian Panel of Experts in Environmental Law, *The Foundations of Environmental Law: Goals, Objects, Principles and Norms* (Technical Paper 1, 2017).

[19] In this article, these are our focus, although other laws, particularly state and territory laws, also form an important part of the matrix of environmental law, and many also contain the ESD principles.

[20] We note, additionally, the recent intention expressed by the current Federal Government to scrap many active recovery plans: see Lisa Cox, 'Coalition proposes to scrap recovery plans for 200 endangered species and habitats' *The Guardian* (online) 18 September 2021 <https://www.theguardian.com/environment/2021/sep/18/coalition-plans-to-scrap-recovery-plans-for-200-endangered-species-and-habitats>.

[21] Australian Government, 'Amendment to the Register of Critical Habitat pursuant to section 207A of the *Environment Protection and Biodiversity Conservation Act 1999*', *Federal Register of Legislation* (Web page) <https://www.legislation.gov.au/Details/F2009B00249> ('*EPBC Act*').

[22] 'Action' is defined by ss 523-524A of the *EPBC Act*.

Forests generally are not a matter of national environmental significance under the *EPBC Act*.[23] However the *EPBC Act* can nonetheless be triggered in a forest context. The presence of a listed threatened species or ecological community whose critical habitat is in or near the forest can trigger the *EPBC Act* because listed threatened species and ecological communities are a matter of national environmental significance. Similarly, where the forest serves as a part-time home to a migratory species, the *EPBC Act* may be triggered because listed migratory species are also a matter of national environmental significance. Additionally, the *EPBC Act* may be triggered where the forest is a protected heritage place or houses a protected wetland — World and National Heritage places are each matters of national environmental significance listed in pt 3 too, and so are wetlands listed under the Ramsar Convention. If the *EPBC Act* is triggered, federal ministerial approval under ch 4, pt 9 is required before the action can go ahead. The approval needs to consider an assessment of the relevant likely impacts on any implicated protected matters of national environmental significance, and other specified considerations — including the principles of ESD. Otherwise, significant penalties apply.[24]

There is an important carve-out. However, if the action is an 'RFA forestry operation' within the *Regional Forestry Agreements Act 2002* (Cth) ('*RFA Act*'), and it will not take place in a World Heritage property or a Ramsar Wetland,[25] then the entire assessment and approval requirement is exempt, so long as the forestry operation is conducted in accordance with the relevant *RFA Act*.[26] An RFA is an agreement between a state government and the Commonwealth, effectively a long-term forest management plan.

Environmental matters not directly linked with the assessment and approval by the Commonwealth government — in other words, matters that are not considered of national environmental significance by the *EPBC Act* — are entrusted to the regulation of the states and territories. Additionally, through bilateral agreements entered into with the Commonwealth, state, and territory processes that assess environmental impacts on the nine matters of national environmental significance can be accredited at the

[23] The matters of national environmental significance are identified in *EPBC Act* ss 12-24 and ss 18-19 deal with listed threatened species and listed threatened ecological communities. These listings of matters of national environmental significance in pt 3 will form a trigger for impact assessment when there is an impacting action, see above footnote for action definition.
[24] See particularly pt 3, s136 of the *EPBC Act.*
[25] Ibid s 42.
[26] Ibid s 38

Commonwealth level.[27] This means that states and territories are heavily involved in federal decision-making as well as in managing conservation at the state and territory level. The federal and state/territory division of responsibility over the environment, which has been in a state of flux over the course of successive federal governments, was a core issue in the so-called 'forest wars' of the 1980s and 1990s. It was in response to the forest wars that it was eventually decided that the states would manage forestry operations, and that the federal government would essentially not intervene. This is reflected in the s 38 exemption, and the *RFA Act*. RFAs were designed to give effect to the vision outlined in the National Forest Policy Statement of 1992. This vision foresaw a complementarity between conservation and commercial objectives[28] — much has changed in thirty years to call into question whether complementarity is possible, yet the RFAs have not been significantly updated. Currently, there are 10 RFAs, covering areas of New South Wales, Tasmania, Victoria, and Western Australia.

D EPBC Act-RFA Forest Litigation and the EPBC Act Review

The second and most recent review of the *EPBC Act*, conducted across 2019-2020 and chaired by Prof Graham Samuel, flagged the *Leadbeater's Possum* case, discussed below, as raising doubt as to whether forestry operations are or are not within the purview of the within its purview (at that stage no judgment had been delivered). The Samuel Review expressed 'low confidence that the environmental considerations under the *RFA Act* are equivalent to those imposed by the *EPBC Act*'.[29] It called for harmony between the RFA provisions and those of the *EPBC Act* through national environmental standards ('ESD'), to which both the RFAs and *EPBC Act* could, it is implied in the Review's report, be brought into alignment.[30] The low confidence in the RFA model expressed in the Review is echoed by a report which described RFAs as 'legally uncertain and failing in practice'.[31] Despite the identified incongruence between the *EPBC Act* and the less stringent RFAs, the *EPBC Act* was not considered by the Review to be setting a particularly high bar. Samuel concluded that the *EPBC Act* is not protecting Australia's environment,

[27] Ibid ss 166-177.
[28] *National Forest Policy Statement – A New Focus for Australia's Forests* (Commonwealth of Australia 1992, 2nd ed 1995) 2.
[29] Samuel (n 15).
[30] Ibid ch 1.
[31] Margaret Blakers and Brendan Sydes, *No longer tenable: Bushfires and Regional Forestry Agreements* (Report, Environmental Justice Australia, 27 March 2020) 4 [6] <https://www.envirojustice.org.au/wp-content/uploads/2020/03/EJA-report-No-longer-tenable-1.pdf>.

and that it is essentially not fit for purpose.[32] He identified significant environmental loss, and a need to restore this loss,[33] signalling an imperative not only for conservation but for restoration.

Exactly how the proposed national standards would extend conservation and promote restoration under the *EPBC Act* given it is largely applied to project-by-project decision-making, is an important question which requires clarification. One of the greatest challenges with the *EPBC Act* operating one action at a time, is that it is not well equipped to manage impacts that occur on a broad scale, to which individual actions contribute cumulatively. Climate change and biodiversity loss are the two most pertinent examples of cumulative impacts, and in the case of threatened forests, both are compounding; a complex context for forestry operations in forests threatened by climate change and the risk of fire. At the point that an approval decision is made on an individual project, environmental, social, and economic considerations all weigh into the decision.[34] The need to achieve specific standards through decision-making that can factor in impacts across space and time could potentially be a required consideration at this decision point, as are the ESD principles. However, the familiar problem arises that there will inevitably be many ways a standard could be achieved.[35]

Perhaps, national standards could be viewed as giving ESD a specific form. Attributing a form or mechanism to a general values-based imperative or idea can tend to motivate action. The *United Nations Framework Convention on Climate Change* (‘*UNFCCC*’) is a pertinent example — the Convention has signalled the need to avoid ‘dangerous anthropogenic interference with the climate system’ since 1994,[36] yet it was not until this

[32] Samuel (n 15) 150, 166.
[33] Ibid ch 8.
[34] *EPBC Act* s 136.
[35] There is no formula for how conflicting factors should be weighted and balanced, nor is a significant degree transparency required other than that a ‘reasons for decision’ is made publicly available. There is no requirement that what is known in the US as the ‘no action alternative’ be considered, nor the opportunity cost associated with foregoing the economic and social benefits associated with not taking the action that harms the environment. These factors all contribute to the limited accountability to conservation goals under the *EPBC Act*.
[36] *United Nations Framework Convention on Climate Change*, opened for signature 20 June 1992, 1771 UNTS 107 (entered into force 21 March 1994) art 2.

was quantified as a 1.5-2°C increase in global mean temperature above pre-industrial levels via the Paris Agreement, that momentum was rapidly catalysed.[37]

Two recent court cases have called into question the applicability of the *EPBC Act* where the s 38 exemption is no longer operating. In *Leadbeater's Possum*, Justice Mortimer found that because the Victorian RFA requires application of the precautionary principle to the conservation of biodiversity values (pursuant to the *Code of Practice for Timber Production 2014* (Vic) cl 2.2.2.2), and the precautionary principle was not applied or likely to be applied by VicForests, the *EPBC Act* applied to the forestry operations that were in question in the case. These were, namely, forestry operations in native forests in the Victorian central highlands, critical habitat for the *Petauroides volans* (Greater Glider) and *Gymnobelideus leadbeateri* (Leadbeater's possum) species. Mortimer J found that VicForests had not applied the level of conscientious and careful engagement required of the precautionary principle, rather, its conduct with respect to the conservation of the threatened species was a 'poor compromise in the face of the need to be seen to be doing something'.[38] Her decision was overturned on appeal by the Full Federal Court, which agreed that VicForests had not taken an adequately precautionary approach[39] but which found that s 38 exempted the forest operations, considering the appeal as turning on a question of statutory construction.[40] The Court was assisted by the explanatory materials to the legislation (the *EPBC Act* and the *RFA Act*) which it felt supported the purpose of s 38(1) as preventing the application of federal law to RFA forestry operations. In December 2021, the High Court refused Friends of Leadbeater's Possum special leave to appeal.[41]

Following Mortimer J's decision at first instance, the Bob Brown Foundation launched an action in the Federal Court against Sustainable Timber Tasmania challenging whether the Commonwealth-Tasmanian RFA was, in fact, an RFA for the purposes of the *RFA Act* and

[37] Articles such as Christophe McGlade and Paul Ekins, 'The geographical distribution of fossil fuels unused when limiting global warming to 2°C' (2015) 517 *Nature* 187, cited over 1500 times, played an important role in helping to aid an understanding of what the 1.5-2°C target looks like in the practical context of fossil-fuel-powered economies.
[38] *Friends of Leadbeater's Possum Inc v VicForests (No 4)* [2020] FCA 604, [937].
[39] *Leadbeater's Possum* [2021] FCAFC 66 [161]-[243].
[40] Ibid [19].
[41] High Court of Australia, 'Results of Applications Listed at Canberra Friday 10 December 2021' (10 December 2021) <https://cdn.hcourt.gov.au/assets/registry/special-leave-results/2021/10-12-21_SLA_Canberra.pdf>.

s38(1) of the *EPBC Act*.[42] The arguments raised by the Foundation in relation to the Tasmanian RFA slightly differed from the position that was argued by Friends of Leadbeater's Possum. The issue was not whether the proposed operation was in accordance with the RFA, but whether the RFA itself was valid and therefore could be protected by the *EPBC Act* exemption.[43] If it was not valid then, the Foundation argued, there was a breach of the *EPBC Act* on account of likely significant impacts to the critically endangered *Lathamus discolor* (swift parrot). The Court also found that the case essentially involved a matter of statutory construction, and that the Tasmanian RFA was an RFA within the meaning of 'RFA' in the *RFA Act*.[44] The High Court rejected the Bob Brown Foundation's application for special leave to appeal in June 2021.[45]

E *Accountability*

A significant weakness of the *EPBC Act* broader than the forestry carve-out is that its overarching conservation goals, expressed as ESD, are not justiciable.[46] Thus, they are not readily enforceable, providing no guarantee as to what will happen in practice.[47] In accordance with the separation of powers doctrine, recognized within the *Commonwealth of Australia Constitution Act 1900* (Cth),[48] there is a system of checks and balances between the three arms of the state: the legislature, executive government, and the judiciary. Under this doctrine, the courts have a circumscribed role in oversight of executive government and the policy-making process. Generally, the review avenue available to potential litigants is judicial review, which is where the Federal Court examines whether the decision was made according to law.[49] Typically the arguments will turn on whether a relevant matter needed to be considered and was not, or an irrelevant factor was considered. The former situation can involve alleged failure to consider an ESD principle. Merits review is generally not open to approval decisions made under the *EPBC Act*. In a merits review, the court examines the substantive merits of the decision, and can decide whether the decision is a 'good' one in that it accords with

[42] *Great Forests* [2021] FCAFC 5, 4 [3]; 12 [29].
[43] Ibid 4 [2].
[44] Ibid 12-13[33].
[45] *Bob Brown Foundation Inc v Commonwealth of Australia & Ors* [2021] HCASL 125 H4/2021.
[46] See Samuel (n 15) ch 9.
[47] Ibid ch 9.
[48] Ch I-III.
[49] The grounds for judicial review under the *EPBC Act* reflect the scope in the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

the relevant evidence. Effectively, the court would 'stand in the shoes of the original decision maker' and remake the decision.[50] Accordingly, the focus for the judiciary in *EPBC Act* cases is with ensuring that government ministers charged with decision-making powers and responsibilities follow legally mandated processes. Although the legislation directs the government decision-maker to have regard to the ESD principles in making certain decisions, including approval decisions, ministerial discretion tends to be preserved concerning whether and how the principles should influence the approval decision.

Moreover, it is not open to anyone wishing to challenge a decision on the basis that it was made inconsistently with the *EPBC Act* to bring legal action. Although *EPBC Act* standing is considered 'extended' compared with the *Administrative Decisions (Judicial Review) Act 1977* (Cth), it is not open; this has been deemed a 'significant inhibitor' of effective environmental public interest litigation.[51] An applicant must meet the statutory judicial review 'special interest test', including being able to demonstrate that, at minimum, at any time in the two years immediately before the decision, they were engaged in a series of activities to protect, conserve, or research the environment.[52] Standing operates with respect to applications for injunctions as well as review decisions, which is important in the forest context. Restricted standing remains a barrier to access to the courts for much of the public, as are the associated costs in bringing an action.

There are no specific measures in the *EPBC Act* that enable RFA operations (covered by the respective RFAs) to be legally challenged, either through judicial or merits review. RFA operations covered by the respective RFAs. The absence of a means of specific legal challenge to RFA forestry operations, highlights why the legal actions in the *Leadbeater's Possum* and *Great Forest* cases adopted specific strategies that sought to work around this exclusion from review for RFA operations. Respectively, the cases challenged firstly the continued implementation of the RFA exemption where there is a breach of the core principles of the *EPBC Act*, and secondly the very legality of any such 'exemption' from the otherwise governing provisions of the *EPBC Act*. The judgements are of clear legal significance for the operation of the RFAs under the *EPBC Act*, but more widely the

[50] See Lee Godden, Jacqueline Peel and Jan MacDonald, *Environmental Law* (OUP, 2018) 144-149.
[51] Chris McGrath, 'Flying foxes, dams and whales: Using federal environmental laws in the public interest' (2008) 25 *Environment and Planning Law Journal* 324, 357.
[52] *EPBC Act* s 487.

outcomes of the legal actions indicate the ad hoc quality of litigation in ensuring the overarching legislative purpose of ESD is achieved.

Over the years, public interest litigation that has sought to enforce environmental protection laws including. The *EPBC Act* has been deemed 'lawfare',[53] a nod to the discourse of battle that also characterised the 'forest wars'. Yet, as Samuel recognised, the ability of the public to hold decision-makers to account is fundamental to the foundation of Australia's democracy.[54] To characterise these actions as 'lawfare' misrepresents the importance of legal review in Australian society.[55] Chief Justice Preston of the Land and Environment Court of NSW has said, 'an essential forum for reasserting [public] participation in the governmental process is in the courtroom'.[56] Conflict language that promotes an 'us versus them' mentality therefore overlooks the complexity of the issues at stake, and the multivariate interests of stakeholders.

The Samuel Review identified that 'a dominant theme in the 30,000 or more contributions received by the Review is that many in the community do not trust the *EPBC Act* to deliver for the environment.'[57] Samuel noted that access to judicial review is important for both the rule of law and the effectiveness of the *EPBC Act*.[58] Following significant interest in and litigation responding to approvals relating to the proposed Carmichael coal mine in Queensland, the federal government at the time introduced a bill to further limit the public's ability to enforce the *EPBC Act*.[59] The fate of the bill, which ultimately lapsed due to concerted opposition, epitomizes the public's unmet need to feel heard on environmental matters.

The Review, in acknowledging the weakness of public participation and enforceability measures in the *EPBC Act*, proposed an independent Environment Assurance Commissioner to prove oversight and audit the effectiveness of the *EPBC Act* and its

[53] Chris McGrath, 'Myth Drives Australian Government Attack on Standing and Environmental Lawfare' (2016) 33 *Environment and Planning Law Journal* 3.
[54] Bruce Lindsay and Hanna Jaireth 'Democracy and the environment' (2016) *Australian Environmental Review* 245.
[55] Samuel (n 15) 10.
[56] Brian J Preston, 'The Role of Public Interest Environmental Litigation' (2006) 23 *Environmental and Planning Law Journal* 337, 337, referring to Joseph Sax, *Defending the Environment: a Handbook for Citizen Action* (Knopf, 1971), xviii.).
[57] Samuel (n 15) 81.
[58] See ibid.
[59] Environment Protection and Biodiversity Conservation Amendment (Standing) Bill 2015 (Cth); see also Commonwealth, *Parliamentary Debates*, Senate, 14 September 2015, 6722 (Scott Ryan).

operation. This suggestion has not been adopted. But oversight via an independent commissioner might result in better alignment of the *EPBC Act* with a broad public interest, and reduce the need for public interest litigation, while preserving access to justice as a fundamental social right.

III ACKNOWLEDGING CHANGE

The 2019–2020 Australian fires burnt more forest and woodland habitat within a season than any on record, constituting an ecological disaster.[60] Bushfire exacerbates the impacts of actions in forests such as forestry operations because it decreases the environment's resiliency and its capacity to withstand and adapt. Significantly, in relation to ongoing forestry operations, fire affects the extent of critical habitat for species at risk.[61] The compounded impacts of fire and forestry threaten to be detrimental to species whose critical habitat comprises, for example, old hollow-bearing trees, as well as to the ecosystems of which they are a part. Cumulative threats make the conservation and sustainable management of forests particularly important, underscoring the need for regulation that allows for habitat restoration and regeneration,[62] as well as for flexibility. Increased environmental fragility as a result of environmental change should be recognised in approval decision making, as part of the context in which a decision is made. It is directly pertinent to considering whether impacts are likely to be significant.[63] As Preston CJ noted in the *Bushfire Survivors* case in the NSW Land and Environment Court,

[60] Commonwealth, *Royal Commission into National Natural Disaster Arrangements* (Report, 28 October 2020) 324.
[61] James A Fitzsimons, 'Urgent Need to Use and Reform Critical Habitat Listing in Australian Legislation in Response to the Extensive 2019–2020 Bushfires' (2020) 37 *Environmental and Planning Law Journal* 143, 143-4.
[62] Martin suggests regulation 'should be flexible enough to recognise where and when harvesting should or should not take place': Rhett Martin, 'Victorian Ecological Sustainable Forest Management: Part VI – Identifying Change Mechanisms in Regulation and a New Model for Victorian Forestry Practice' (2020) 37 *Environmental and Planning Law Journal* 18, 20.
[63] Context forms part of the way in which the significance of an environmental impact is defined, according to case law: *Booth v Bosworth* [2001] FCA 1453. For a discussion on context and resilience see Laura Schuijers 'Environmental Decision-Making in the Anthropocene: Challenges for Ecologically Sustainable Development and the Case for Systems Thinking' (2017) 34 *Environmental and Planning Law Journal* 179, 198; see also The Hon Justice Brian J Preston, 'Contemporary Issues in Environmental Impact Assessment', Climate Impact Seminar, 'Are Climate Impacts Impacts? Climate Science in the EIA and Judicial Review' (27 February 2020, Helsinki, Finland) < https://lec.nsw.gov.au/documents/speeches-and-papers/Preston_CJ_-_Contemporary_Issues_in_Environmental_Impact_Assessment_27.02.20.pdf>.

threats to the environment change over time, and the law can and must accommodate such change.[64]

The formal conservation documents published by governments detailing the pressures on Australia's threatened species ('Conservation Advices') explicitly recognise the links between fire and species decline, even those that have not been updated since the 2019–2020 fires. These documents must be considered in approval decisions under the *EPBC Act* where the threatened species 'matter of national environmental significance' has been triggered.[65] Conservation Advices for the Leadbeater's Possum and Greater Glider species were referred to in the *Leadbeater's Possum* original judgment. Mortimer J's decision that VicForests did not apply and would not in future apply the precautionary principle in planning and engaging in forestry activities in the Victorian Central Highlands which had recently been severely impacted by fire was explicitly informed by the advices. On a broader scale, both the State of the Forests and State of the Environment reports recognise the interlinkages between cumulative environmental threats to forests.[66]

The *Leadbeater's Possum* case and its social and environmental context support a contention that, in this time of change, forestry operations in Australian native forests may have lost social acceptance — a social license to operate.[67] After the 2019–2020 fires, a survey by the Australia Institute (which has been collecting data on attitudes toward climate change and the environment for well over a decade) reported that an overwhelming majority of Australians felt worried that Australia's native forests and

[64] *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 ('*Bushfire Survivors*'). That case involved the interpretation of a law governing the NSW EPA and imposing on it a duty of care to protect the environment. The court interpreted the duty as requiring protection of the environment from climate change, given that climate change is presently such a significant threat to the environment: see Laura Schuijers, 'Climate of Change in the Courtrooms' (2021) 84 *Law Society Journal* 78.

[65] *EPBC Act* s 139.

[66] See Montreal Process Implementation Group for Australia and National Forest Inventory Steering Committee, ABARES, *Australia's State of the Forest Report 2018* (Report, 2018); Australian Government, Department of the Environment and Energy, *Australia State of the Environment 2016*: Overview (Report, 2017) <https://soe.environment.gov.au/theme/overview>.

[67] See, e.g., Emma Field, 'Native forest logging support low in regional Australia, leaked report shows' *ABC News* (Live Blog, 9 December 2018, updated 15 February 2019) <https://www.abc.net.au/news/2018-12-09/forestry-survey-rejects-native-forest-logging/10597490>; on the concept of social licence, see, e.g., Justine Lacey, Peter Edwards and Julian Lamont, 'Social licence as social contract: procedural fairness and forest agreement-making in Australia' (2016) 89(5) *Forestry: An International Journal of Forest Research* 489 <https://doi.org/10.1093/forestry/cpw027>.and generally, Paul Martin and Mark Shepheard 'What is meant by the social licence?' in P. Martin and J Williams (eds) *Defending the social licence of farming: Issues, challenges and new directions for agriculture* (ProQuest Ebook Central, 2012) 17.

unique wildlife will never be the same.[68] Support for native forest logging has concomitantly declined.[69] Native forestry is being phased out in Victoria, toward a total ban by 2030. In the case of the Victorian Central Highlands, most of the felled forest is destined for pulp and paper pursuant to an agreement with a Japanese-owned paper mill, the Wood Pulp Agreement, which is due to expire in that year.[70] Western Australia is planning an earlier phase-out. Mortimer J's judgement was scathing of VicForests' approach to conservation, and her conclusion that its logging operations were unlawful had widespread impacts. Subsequently, Australian retailer Bunnings announced that it will no longer source native timber harvested by VicForests,[71] in deference to a perception that Bunning's customers' purchasing decisions are motivated by environmental concerns. This reflects an emerging trend, whereby public interest litigation is 'mediatized' and this media exposure is an important driver for change.[72] As not everybody reads legal scholarship, therefore how the media presents high profile court cases can influence community views on an industry's social licence.

Clearly, a major global shift in attitude toward environmentally destructive activities is underway. A risk to the environment is now often viewed as a concomitant risk to mainstream business, and economic and financial institutions. In turn this stems from a resurgent public interest in conservation and restoration. Following the global Taskforce on Climate-Related Financial Disclosures ('TCFD'), and a small suite of litigation,[73] Australian financial and business communities have recognised that investing in

[68] Australia Institute, *Polling – Bushfire crisis and concern about climate change* (Report, January 2020) <https://australiainstitute.org.au/wp-content/uploads/2020/12/Polling-January-2020-bushfire-impacts-and-climate-concern-web.pdf>.
[69] Emma Field, 'Native forest logging support low in regional Australia, leaked report shows' *ABC News* (Live Blog, 9 December 2018, updated 15 February 2019) <https://www.abc.net.au/news/2018-12-09/forestry-survey-rejects-native-forest-logging/10597490>. Ecologists point to ecological collapse of logged forests in Victoria but these findings are contested, see discussion in Rhett Martin 'Victorian Ecological Sustainable Forest Management: Part VI – Identifying Change Mechanisms in Regulation and a New Model for Victorian Forestry Practice' (2020) 37 *Environmental and Planning Law Journal* 18, 19.
[70] Ricky French, 'Possum Magic Could Fell an Industry', *The Australian* (Sydney, 19 September 2020).
[71] 'Bunnings Ends Sourcing Timber from VicForests' (Media Statement, 1 July 2020) <www.bunnings.com.au/media-centre>.
[72] Claire Konkes, 'Green Lawfare: Environmental Public Interest Litigation and Mediatized Environmental Conflict' (2018) 12 *Environmental Communication* 191.
[73] See, e.g., *McVeigh v Retail Employees Superannuation Pty Ltd* (Federal Court of Australia, NSD1333/2018, commenced 21 September 2018); *O'Donnell v Commonwealth* (Federal Court of Australia, VID482/2020, commenced 23 December 2020).

activities that impact and will be impacted by climate change carries a serious risk.[74] A Taskforce on Nature-Related Financial Disclosures ('TNDF') has recently been established. This trajectory of change is significant for efforts to halt biodiversity loss, and could implicate forestry operations in the same way that the TCFD has affected fossil-fuel intensive industries. These trends suggest that the *EPBC Act* forestry carve-out is out of step with public expectations. Moreover, despite the increasing pressure from public interest forestry litigation, the actual outcomes for biodiversity protection that are achieved, indicate particular limitations to following a litigation pathway-at least while the RFAs survive in the politico-legal sphere. Instead, comprehensive legal reform of forestry-operation exemptions and associated laws at the state level as well as the Commonwealth may better serve the enhanced public expectation of biodiversity conservation that can address the diverse, emergent challenges.

IV CONCLUDING THOUGHTS

Australia's national environmental law seeks to conserve the environment and protect biodiversity, on which we all depend. Environment protection is an element of human dignity, and we are diminished if we ignore the stewardship responsibility that has arisen from the current crisis. However, the capacity of the general public to ensure that government decisions are made consistently with the legislation's conservation and protection purposes, and with the principles of ESD is highly constrained. The recent Review of the *EPBC Act* highlighted critical issues within it, including the *RFA Act–EPBC Act* interplay. It concluded that the *EPBC Act* is failing to protect Australia's natural environment and raised concerns about the biodiversity standards of both the RFAs and the *EPBC Act*. In the *Leadbeater's Possum* case, expert evidence demonstrated the perilous state of forest biodiversity facing continuing anthropogenic threats. Yet two courts reached different outcomes in interpreting whether the s 38 *EPBC Act* exemption should be regarded as removing RFA mandated forestry operations from legal scrutiny. The High Court unfortunately declined to offer a third interpretation with a refusal of a

[74] Australian Sustainable Finance Initiative, *Australian Sustainable Finance Roadmap: a plan for aligning Australia's financial system with a sustainable, resilient and prosperous future for all Australians* (Report, November 2020) <https://static1.squarespace.com/static/5c982bfaa5682794a1f08aa3/t/5fcdb70bfe657040d5b08594/1607317288512/Australian+Sustainable+Finance+Roadmap.pdf>.

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Notwithstanding the gathering momentum of forest litigation, Australian environmental laws need to facilitate more transparent decision-making building on the Samuel Review options, and by embedding stronger accountability mechanisms than the current codes that regulate forestry in RFAs. The value of independent review reports and state of the environment reporting is not maximised unless the information found through those processes is fed back via legislative and policy reform. Legal reform of the *EPBC Act* that responds to the biodiversity crisis and to the cumulative threats of climate change and forestry operations is urgently needed. Incorporating the suggestions of the Samuel Review, such as to hold the government accountable to national environmental standards, is an important step. At this critical point in time, augmenting rather than 'rolling back' existing laws, and addressing anomalies such as a major exemption for forestry practices is vital to ecological survival. The biodiversity crisis demands a dignified, comprehensive, and apolitical response.

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POWER AND CORRUPTION RISK: A BRIEF HISTORY AND A LONG FUTURE

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This article commences with definitions of corruption and integrity and relates them to each other and to power, its use and abuse. It then discusses how, as power evolves and grows, the opportunities for the abuse of that power to (i.e., corruption) grow too. Those opportunities deliver a history of corruption from ancient abuses of priestly, gubernatorial, and military power to modern state capture. The creation of power provides opportunities for abuse and the risk that those opportunities will be exploited in all countries, including Australia. Anti-corruption measures provide a form of insurance against that risk. The paper examines the development of anti-corruption measures from the execution of those caught out, to anti-corruption agencies, to national integrity systems, and to international collaboration to develop such systems. However, those who pursue power to abuse it for their own ends do not stand still. They collaborate in 'national corruption systems' and emerging global corruption systems. The paper argues that the remedy lies in the development of global integrity systems while strengthening our own integrity systems to build integrity and combat corruption at home and contribute to those goals abroad. The article concludes with a glossary of governance terms and relates them to integrity and corruption.

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I INTRODUCTION

I was born in Brisbane in 1952, but my family moved south the following year. I came to appreciate the move as corruption reached its apotheosis under the leadership of Sir Joh

Bjelke-Petersen,[1] Russ Hinze, Commissioner Terry Lewis, and the many who profited from mutually beneficial interactions with them. Return was not contemplated, even in jest. However, when Griffith approached me to see if I was interested in becoming a Foundation Dean of Law in January 1991, the prospect was exciting. Tony Fitzgerald's Inquiry had exposed the corruption and charted a course for reform of all Queensland's public institutions through the Electoral and Administrative Reform Commission. I was thrilled to meet him and was delighted that he agreed to chair the Advisory Board for the research centres I established and led (the National Institute for Law, Ethics and Public Affairs and, later, the Australian Research Council Key Centre for Ethics, Law, Justice and Governance). As someone coming from an ethics centre,[2] I was drawn into the process and recognised that this was distinct and better than the anti-corruption regime in Hong Kong which others were copying. I was able to proselytise the Queensland reforms and, particularly, the Queensland path to reform. Queensland went from the 'Deep North to a Global Governance Exemplar' in five years,[3] proving wrong those who thought that change must take a long time.[4] I have had the honour to address many international audiences on integrity and corruption. One of the issues I have turned to frequently, but not in an academic journal, is the relationship between power and corruption.

I will commence with definitions of corruption and integrity and relate them to each other and to power. I will then discuss how, as power evolves and grows, the opportunities for the abuse of that power to (i.e., corruption) grow too. Those opportunities deliver a history of corruption from ancient abuses of priestly, gubernatorial, and military power to state capture. I will then look at the development of anti-corruption measures from the execution of those discovered, to national integrity systems, and international collaboration to develop them.

However, those who pursue power to abuse it for their own ends do not stand still. I will emphasise the collaboration of the corrupt in national corruption systems and emerging global corruption systems. I will conclude by arguing that the remedy lies in the

[1] When I introduced him at a Key Centre function and said he was the reason I had come to Queensland, he joked that he could not take responsibility for that.
[2] I was Deputy Director and Principal Research Fellow (the research equivalent of Associate Professors) at the Centre for Philosophy and Public Issues at Melbourne University.
[3] Charles Sampford 'From Deep North to Global Governance Exemplar: Fitzgerald's Impact on the International Anti-corruption Movement' (2009) 18(3) *Griffith Law Review* 559.
[4] A view that stalls and eventually stymies reform.

development of global integrity systems while strengthening our own integrity systems to build integrity and combat corruption at home and contribute to those goals abroad.

II 'CORRUPTION' AND 'INTEGRITY'

Integrity and corruption are conceptually linked terms — with one the obverse of the other. Transparency International ('TI') defines corruption as the 'misuse of entrusted power for private benefit or personal gain' (including party political gain).[5] By contrast, integrity is 'the *use* of public power for officially endorsed and publicly justified purposes'.[6] The latter definition is primary because you cannot know what an abuse is if you do not know what the correct 'use' is. The form of official endorsement will vary from system to system but, in a democracy, the officially endorsed uses of public power are those set by the elected government and legislature. Indeed, democratic competition is about differing views as to how public power should be used for the benefit of citizens.[7]

III THIS IS ABOUT POWER

Both definitions centre on power — specifically its uses and abuses. This is not to restate Lord Acton's famous dictum (that power corrupts, and absolute power corrupts absolutely). The relationship between power and corruption is contingent rather than a necessary one. However, wherever there is power, there is the risk of its abuse. That risk must be recognised and minimised by appropriate governance and integrity measures (see below). We must recognise that corruption is attracted to ungoverned power — power that is not channelled by governance integrity measures towards the purposes for which the power is justified. For them, the point of gaining power is to use it in their own interest.

While there are many ways that power can be abused for personal gain (the ingenuity of the corrupt is considerable), I wish to distinguish two different forms of abuse. One is

[5] 'Personal' gain is very widely construed. It extends beyond personal enrichment and includes benefits to the power holder's family, associates, political party – indeed, anyone other than those who are the publicly intended beneficiaries of that power.

[6] I will not go into detailed argument here, but I would distinguish between originally intended purposes and publicly justified purposes on the basis that the purposes for which institutional power is used may change over time. However, any new uses of entrusted power must be publicly justified and officially endorsed.

[7] Note that this approach treats integrity as a process value rather than a substantive value. It is a question of living by the publicly stated values relevant to your role.

when the power holder uses the power directly for their own benefit — using property with which you have been entrusted for your own use, stealing entrusted money, using entrusted power to force others to do what you want. The other form of abuse is when the exercise of public power is for the benefit of another who rewards the power holder for the abuse — a corrupt exchange that we recognise as bribery. We could distinguish these two forms of abuse as unipolar and bipolar corruption. The power that is relevant to unipolar corruption is that which has been entrusted and which there is a risk of abuse. In bipolar corruption, the power held by the corruptor is as relevant as the power held by the corrupted. The risk lies in the power held by each and risk management needs to be applied to both.

IV EVOLUTION OF CORRUPTION

As power evolves and grows, so too do the opportunities for corruption. Human imagination, innovation, and drive give us scientific and engineering advances. They also give us new forms of social organisation — from the hunting party to the sovereign state, to the global corporation that bring together people, power, and resources capable of achieving much more than unco-ordinated individual behaviour. But that same imagination, innovation, and drive also generate new ways of abusing institutional power. The potential for corruption is built into all institutions because of the dynamics of collective action and agency. The reason why we create and support governments (and joint stock companies and international non-governmental organisations ('NGOs')) is because so often more can be achieved collectively than individually with the pooling of people power and resources for shared goals. However, that opens the possibility that institutional leaders may turn that entrusted power to their own benefit or use against their citizens/stockholders/bondholders.

Accordingly, the history of institutional innovation is also the history of corruption. I will not attempt a full history of either, but I will provide a few snapshots. In late Republican Rome, provincial governorships were seen as a license to amass personal fortunes through corruption. Cicero's prosecution of the Sicilian governor Verres in 70BC was remarkable for its oratory, audacity, and rarity. The Roman generals enjoying *imperium*, the power of command, started using that power against the Republic they were supposed to defend. In Medieval Europe, the Church claimed the power to provide

salvation and eternal life — and extracted a very good income from the sale of 'indulgences' and the provision of special masses.[8] The great lords or 'tenants-in-chief' received land and serfs from the king so that they could provide men at arms to fight the king's wars and defend his territory. However, these men at arms were often turned against the king to wrest extra privileges and sometimes the crown itself. The sovereign states that emerged in seventeenth century Europe were designed to eliminate reliance on these *over-mighty* subjects by creating a national bureaucracy, collecting taxes, and paying for a standing army. However, this created new opportunities for corruption by the bureaucrats and generals reminiscent of Ancient Rome. Nicholas Fouquet was Louis XIV's minister of finance — having bought two public offices and being given a third as a favour by the corrupt Cardinal Mazarin, he was the leader of the 'tax farmers' who took a cut from the taxes they collected. He built Vaux le Vicomte, the most magnificent chateau in France and entertained the king in August 1661 in such a lavish manner that the King had him arrested.[9] The following century, Napoleon used the army command given him to defend the French Republic to take it over — setting the example to be followed by hundreds of later generals, colonels, a flight lieutenant[10] and even a master sergeant.[11] Thus, financial corruption and *coups d'état* became diseases of the modern state as the great power of the modern state attracted those who wanted to engage in unipolar corruption. As corporations grew in number and strength, some found a variety of ways to secure what they wanted from government through multiple forms of bipolar corruption.[12]

More recent multi-ethnic empires provided further examples of financial corruption. Christopher Columbus wanted to become Viceroy of the territory he conquered and 10% of all taxation. Robert Clive was not as demanding but made much more money in Bengal. Neither left a good example to the local inhabitants who finally regained control of their territory.

[8] Those corrupt enough to think they could buy salvation from a supposedly omnipresent and omniscient God were likely to be in need of it.
[9] The arrest was by a captain of musketeers named d'Artagnan — leading Dumas to craft a series of books about him and three other musketeers culminating in the story of the 'man with the iron mask'.
[10] Jerry Rawlings of Ghana.
[11] Samuel Doe of Liberia.
[12] From outright bribes to funding party elections.

V GOVERNANCE AND RISK

All institutions concentrate power, people, and resources to achieve certain publicly stated goals which are, or are seen to be, of benefit to the relevant community. However, that concentration of power, people, and resources could be used for other purposes that might harm that same community. Police forces and the armed services are supposed to protect citizens but can use their coercive force to secure bribes, to terrorise inhabitants, or even to seize state power. Banks and other financial institutions concentrate the resources of their shareholders, depositors, and others who entrust them with their money. These resources are supposed to ensure liquidity for those who engage in the provisions of goods and services to others. Yet, at the same time, those resources can be used in transactions that generate very high fees for the financial intermediaries because they create great risk for those who have entrusted their money to them.

For anarchists, the dangers are just too great. But most of us are sufficiently keen to reap the intended benefits of states and corporations that we are prepared to take a risk. The American revolutionaries considered the former issue very carefully. For them, governments are instituted to support the 'inalienable rights to life, liberty, and the pursuit of happiness'[13], but they recognized that governments could abuse their power and turn against the people they were supposed to benefit. If so, revolution was justified. But the alleged abuses by the British government did not mean that they abandoned the idea of government. They sought to create new institutions of government that would support the claimed inalienable rights. However, they wanted to reduce the risk of future abuse[14] by creating a system of 'checks and balances' that developed into a form of 'risk management' that we now recognise as 'governance'.

[13] US Declaration of Independence 1776.

[14] The drafters of the US Constitution not only looked to the alleged British abuses but also looked to ancient Rome to consider how that republic had gone wrong. While they initiated and/or developed some important protections against the abuse of governmental power, it was blind to a range of other abuses – not least with respect to Blacks whom they enslaved and Indians whose land they were stealing. The last is particularly ironic. The British drove the French out of North America in the 'French and Indian War' (known in Europe as the 'Seven Years War') making the American colonies far more secure. But the colonists were less willing to be taxed to pay for their security when they felt more secure. And their increased sense of security meant that they were much keener to take Indian land as far as the Mississippi. Other problems emerged from the choice of a strong executive — borrowing the British Constitution when kingly power was at its strongest since William III and stronger than it was ever to be again. Indeed, it is ironic that the 'loss' of the American colonies was the catalyst for the Crown's loss of its power to choose the Prime Minister when George III's Prime Minister, Lord North, finally convinced George III that he could not remain PM without the confidence of the House of Commons.

Governance is about the allocation and direction of power within individual institutions and within polities, as a whole. While the term is relatively recent, the idea is not and a number of 'governance disciplines' have been developed. All of them recognise and theorise corruption and other governance problems within institutions but do so in different ways.

When lawyers look at institutions, they see formal rules (either constitutions or networks of contracts). They see problems arising from poorly drafted rules, and the answer lies in more and better rules. Ethicists look to informal norms and values. If there is a problem, it is that those values have not been clearly articulated, applied to those at the coalface, and the answer lies in properly doing so. Economists see institutions in terms of incentives and disincentives. Problems arise from perverse incentives, and the answers lie in aligning incentives with the behaviour required. Political scientists see institutions in terms of power, and institutional problems arise from those who exercise it and or how they exercise it.

In doing so, most governance disciplines explicitly acknowledge the importance of power and its abuse. Law seeks to set out what powers officials have; how they must be exercised; for whose benefit it is to be exercised; and, penalties for using it for other purposes. Ethics is always particularly concerned about how those who hold power should be exercising it — asking hard questions about their values, giving honest and public answers, and then living by those answers.[15] Political science is, first and foremost, a study of how power is exercised. Economics is one governance discipline that avoids discussion of power because it seeks to describe a world in which all exchanges are voluntary and Pareto efficient.

All of these governance disciplines have important but limited insights into the nature, problems, and solutions for institutions including, of course, corruption. No single discipline can solve institutional problems by themselves, but together they go a long way towards such solutions. Such solutions start with clarity of values including values about means and the ends for which politicians promise to deliver if entrusted with the people's power. This should provide the basis for considering the ethical standards officials should

[15] Charles Sampford, Carmel Connors and Noel Preston, *Encouraging Ethics and Challenging Corruption: Public Sector Ethics in Theory and Practice* (Federation Press, 1st Edition, 2002).

follow and the legal regulation and economic incentives to make it likely that those standards will be followed.

VI THE EVOLUTION OF ANTI-CORRUPTION RESPONSES

The long history of institutional power and its abuse by the corrupt has led to a wide range of responses. The first instinct is a strong 'legal' response in which the corrupt are executed by the King or Party. Not infrequently, the head of state who felt cheated did not take a chance on the accused being acquitted (Louis XIV was not the last to do so, though he only insisted on life imprisonment). The rule of law ruled out such certainties of outcome. But in any case, its limitations must be recognised.

Prosecutions still have a cathartic effect and may help to mobilise reform. Criminal laws can support other reforms. But they are not the key part of the answer. First, prosecutions take a long time and are frequently inconclusive. Even if successful they will not bring back the destroyed shareholder wealth, the stolen money, the uncollected revenue or even a significant proportion of it. Even for the few who are brought to justice, most of the wealth that has been destroyed or stolen will be irrecoverable. This is not just because it cannot be traced but often because it no longer exists. Second, as we all know, laws whose purposes are not internalised are rarely effective. This is where ethics comes in. Third, they do not address the key institutional questions of why the corrupt 'bad apples' got to such positions of power and were tempted to abuse that power for their own ends. If there are a lot more crooked CEOs or senior public servants, it is not because there are more bad people in a particular country; it is because its corporate, bureaucratic and/or political institutions generate a lot of temptations and opportunities for corruption and tend to promote those who will give in to those temptations.

The point is that many of the problems that lead to corruption are essentially institutional rather than individual, and you cannot fix institutional problems merely by punishing individuals. Much of this is appreciated. In fact, there are almost as many zealous proponents of ethics and institutional reform as single solutions to governance problems. After law reform has failed — as it always does if tried in isolation — the other solutions are preached from a range of soapboxes.

Those pressing for essentially ethical solutions emphasise that law is ineffective if not backed up by the values of those they are supposed to govern. This leads to attempts to create codes of conduct and to persuade relevant players to abide by them. Some enthusiasts (not including myself) push for a form of what I call 'bare ethics' — a supposed comprehensive solution involving voluntary codes and 'all regulation short of law'. Yet ethics without the sanction of law to back it up is a 'knaves charter,' a guide for the good and a dead letter for the bad.

Those pressing for institutional solutions are attuned to the institutional nature of many of these problems. They recognise that much of the problem lies in the opportunities and temptations for corrupt and unethical behaviour, and the difficulty in detecting it. The solution becomes the creation of new agencies and the reform of existing ones — ticking every box on the list of institutions that have worked in other countries.

Institutional solutions have taken a variety of forms — removing temptations to act corruptly, making it more difficult to act corruptly (from the separation of powers to administrative law), and making it easier to detect corruption (from regular audits and assets checks to financial tracking). By the late 1980s, a common response was the creation of a single, very powerful, anti-corruption agency along the lines of the Hong Kong Independent Commission Against Corruption ('ICAC') enforcing very strong anti-corruption law. However, this model caused concern for placing too much reliance on a dangerously powerful single institution. In the 1990s, the approach to reform taken in Queensland and Western Australia (two Australian states plagued by corruption) reflected a new approach. The answer to corruption does not lie in a single institution, let alone a single law, but rather in the institutionalisation of integrity through several agencies, laws, practices, and ethical codes. Instead of a single agency, what was needed is a *combination* of state institutions and agencies (courts, parliament, police, prosecutors, Director of Pupblic Prosecutions), state watchdog agencies (ombudsman, auditor general, parliamentary committees), non-governmental organisations and the norms (including values and laws) and incentive mechanisms by which relevant groups live.

This combination has been given various names. Following work with the Electoral and Administrative Reform Commission and the Parliamentary Committee to which it

reported, I called it an 'ethics regime'.[16] The idea was adopted by the United Kingdom Nolan Committee on Standards in Public Life[17] and the Organisation for Economic Co-operation and Development ('OECD') which renamed it an 'ethics infrastructure'.[18] Under the different names, this approach has become the preferred model for governance reform within national and sub-national jurisdictions.[19] However, the term with the widest currency is Pope's 'national integrity system'[20] which was widely promoted by Transparency international ('TI') and is the term used in the subsequent joint work with TI, which I had the privilege to lead while working closely with Pope. Our team developed the conceptual analysis, methodology and a sophisticated tool for mapping and assessing 'integrity systems'.

In an effective integrity system, the relationships between the various elements of the system will be rich and varied. Relationships will be those based on powers and responsibilities set out in the constitution and other laws, on mutual involvement in each other's knowledge gathering or policy formation, and on support for each other's operational effectiveness. Some relationships will be supportive, some procedural and some will involve 'checks and balances'. However, these should not be seen as limiting

[16] Charles Sampford, 'Law, Institutions and the Public Private Divide (Keynote address)' (Conference Paper, Australasian Law Teachers Association Conference, 1990) published as 'Law, Institutions and the Public Private Divide' (1992) 20 *Federal Law Review* 185.
[17] Charmain Lord Nolan, *Standards in Public Life: First Report of the Committee on Standards in Public Life* (London: HMSO, 1995).
[18] OECD, *Ethics in the Public Sector: Current Issues and Practices* (1996) ('*Ethics in the Public Sector*'); OECD, 'PUMA Draft Checklist' in *Symposium on Ethics in the Public Sector: Challenges and Opportunities for OECD Countries* (1997); OECD, 'Survey of Anti-Corruption Mechanisms in OECD Countries' in *Symposium on Ethics in the Public Sector: Challenges and Opportunities for OECD Countries* (1997); OECD, *Council Recommendations on Improving Ethical Conduct in the Public Service - Background note* (1998).
[19] See e.g., Muhittin Acar and Uger Emek, 'Building a clean government in Turkey' (2008) 49(3) *Crime Law and Social Change* 185–203; Frank Anechiarico, 'Protecting integrity at the local level' (2010) 53(1) *Crime, Law and Social Change* 79; Nathalie Behnke and Jeroen Maesschalck, 'Integrity Systems at Work: Theoretical and Empirical Foundations' (2006) 30(3/4) *Pub Administration Quarterly* 263; Leo Huberts, Jeroen Maesschalck, and Carole Jurkiewicz, *Ethics and Integrity of Governance* (Edward Elgar, 2008).
[20] Petter Langseth, Rick Stapenhurst, and Jeremy Pope, 'The Role of National Integrity Systems in Fighting Corruption' (1997) 23(1/2) *Commonwealth Law Bulletin* 499. See also Jeremy Pope, *Confronting Corruption: The elements of a National Integrity System* (TI, 2000). The choice of the term 'integrity system' rather than 'anti-corruption' system was inspired. Corruption (the abuse of entrusted power for personal gain) is a derivative concept and a derivative goal. One cannot know what an abuse is without knowing what the legitimate uses of those powers are. Integrity (the use of entrusted power for publicly justified ends) is primary. We want effective institutions that deliver a sufficient proportion of their promises. If all we just wanted to avoid government corruption that goal could be achieved in theory by not having government and in practice from anti-corruption practices that prevented the government doing anything.

and negative but as part of the way that the integrity system keeps its elements to their mission and prevents them from abusing their power for other purposes.

While the term 'national integrity system' was used to describe the relatively well integrated and developed governance systems found in some western jurisdictions and advocated for others, every jurisdiction has an integrity system of some description in place, whatever its challenges. A National Integrity System ('NIS') can vary in completeness and effectiveness, but there is almost always some base on which it can be built. Even if it is not effective in promoting and supporting public integrity, it will almost always contain some institutions or entities that could become vital elements in an effective integrity system. Institutions that play no part in the integrity system in one context may play a prominent role in others (e.g., religious institutions do not appear in most descriptions of western integrity systems, but the Catholic Church played a critical role in the emergence of the Polish integrity system and liberal Islamic faith-based NGOs may be an important part of an emerging Indonesian system).

Since 2000, two methodologies have been developed by TI research partners to map and describe national integrity systems — an early, static 'tick box' model, developed by Jeremy Pope and Alan Doig, that seeks to take a quick snapshot of the individual elements of the integrity system, and a more recent, more ambitious dynamic model and methodology developed by Jeremy Pope and I that seeks to see the way that a particular integrity system is actually operating.

VII INTEGRITY SYSTEMS AS A FORM OF RISK MANAGEMENT THAT PROVIDE INSURANCE AGAINST CORRUPTION

Integrity systems can be seen as a form of risk management. One of the most important drivers of integrity system reform should be the identification of integrity risks. It is not necessary to prove that the risk has materialised (though this will provide conclusive evidence of the existence of the risk) for us to take action.

Like all insurance, there will be costs. Integrity measures utilise money and talent. While almost always ensuring better decisions and avoiding corrupt decisions, they may make decisions slow or timid, or even stall decision making completely in ways that prevent

public agencies providing the benefits they claim to deliver as surely as if they were acting corruptly.

Some important insights flow from this:

1. The purpose of integrity measures is to ensure, as far as is reasonably possible, that government agencies do what they claim to do.
2. Like all risk management, you should look at the probability of the risk and the seriousness of the risk as well as the costs of insurance.
3. Like insurance the cost of integrity measures is real but is generally a small proportion of the total. I am not sure what the cost of parliament, courts and the various integrity agencies is but let us assume that it is 5%. The purpose of the 5% investment is to ensure that we get the other 95%.
4. But if extra integrity measures eat into the 95% without significantly reducing risk, they are either not worth it, or the integrity measures have been poorly designed.
5. Similarly, if the extra integrity measures mean that we start getting a lot less for that 95%, they are either not worth it, or the integrity measures have been poorly designed.
6. Even if the risk has materialised, it does not necessarily require action if the risk is proven to be very rare or that it has been dealt with effectively.
7. However, confidence in integrity measures is important so that sometimes we may engage in integrity measures to ensure confidence. This is related to another point — that risk can never be fully quantified and, in human systems, a risk that is not addressed may encourage behaviour to exploit that risk. For these reasons, it is rational to err on the side of over insurance rather than under-insurance.

Having recognized the value of a risk-based approach, the next question becomes one regarding the means for reducing the risk that power will be abused. We can distinguish seven ways of reducing that risk.

1. Increase clarity in what behaviour is required (through codes, training, and availability of advice).
2. Reduce temptation — there is a temptation where governments have the power to make decisions that particularly favour individuals by increasing the value of their property in the broadest sense. The classic case is building approvals and rezoning.

If there is a betterment tax or a charge for service provision, there is less temptation.

3. Align incentives to the behaviour required
4. Reduce opportunity — ensure that those who benefit cannot be involved in the decision.

   Those who are interested:

   a. Do not decide — conflict of interest rules.
   b. Do not have input — lobbying rules for those who could benefit from government decisions and independent policy implementation for politicians who would like to 'rort the pork'.
5. Make it easy to do the right thing (through formal processes backed by data and software).
6. Increase likelihood of those who choose to do the wrong thing being discovered:
   a. Transparency — we know what is done and who benefits and who has spoken to whom about what.
   b. Integrity agencies — ICACs, ombudspersons.
   c. Right to know/Freedom of Information ('FOI').
   d. Independent internal and external auditors who report to a relevant parliamentary committee (in government) or audit committee in corporations.
   e. Approval and checking processes that make it easy to do the right thing and hard to do the wrong thing.
   f. Requirement to give reasons and defend them under administrative law.
7. Increase sanctions on those who are discovered (while recognizing that increased sanctions are generally ineffective if the chances of being discovered are low).

VIII INTERNATIONAL COLLABORATION

Since the 1990s, there has been considerable international collaboration to strengthen the integrity systems of our nation states. There was benchmarking and comparative studies by OECD (comparing 'ethics infrastructures' in 1997) and the United Nations Office for Drugs and Crime (U). The United Nations Development Program (UNDP) and the World Bank provided aid for institutional strengthening within integrity systems. Unfortunately 'donee' countries would often fund 'experts' on their own institutions who

sought to replicate them within the 'donee' country without a great deal of regard for either the institutions that were already there or the new institutions being created in the likeness of the donor's own institutions. States have signed the United Nations ('UN') convention against corruption and various Group of 20 ('G20') initiatives. Companies have signed up for the UN Global Compact, the UN Principles of Responsible Investments, the Earth Charter, Greencross, Caux roundtable principles, Inernational standard ISO 46000, the partnering against corruption initiative, Extractive Industries Transparency Initiative, and others. However, there are concerns about how these initiatives can be co-ordinated. But there are three serious reservations that this can be enough.

IX CORRUPTION SYSTEMS

While NISs were seen to be the answer to corruption, TI's early comparative studies generated some surprising results. While countries with stronger national integrity systems were generally less corrupt than those with weak national integrity systems, the correlation was not as great as it might be imagined. Some countries with very low levels of corruption seemed to lack institutions that TI's model of a national integrity system seemed to need. Some highly corrupt countries appeared to have all the elements of the TI model — and some new ideas and improvements of their own that should have made their integrity systems even more effective.

Unfortunately, the strength of a national integrity system is not the only relevant variable in determining the level of corruption.[21] It is quite possible that the more significant variable is the strength of what I call the 'national corruption system' ('NCS') — which is, in many states, better organised, better resourced, and more effective than the NIS. This may explain why some states with apparently limited integrity systems are relatively free from corruption and some states with apparently extensive integrity systems remain highly corrupt. Coalitions of leaders are needed to create, reinforce, and integrate the institutions of the NIS and to co-ordinate their activities.[22] While a NIS may be seen as the best way to promote integrity, the corrupt are often far more organised and (in some

[21] See Alan Doig and Stephanie McIvor, 'The National Integrity System: Assessing corruption and reform' (2003) 23 *Public Administration and Development* 317. This article built on a TI-sponsored research study funded by the Dutch Government into the NIS in practice. It assesses the findings of the study to consider how the approach can work in practice, and what the approach can reveal about the causes and nature of corruption as well as the implications for reform.

[22] This was a major conclusion of the first World Ethics Forum held in Oxford in 2006.

states) NCSs may be better organised, better resourced, and more effective — with long established patterns of behaviour, strong institutions, clear norms, and effective positive and negative sanctions. The NCS will seek to disrupt and corrupt the NIS. As a corollary, the NIS should positively react. It should not merely seek to deter, detect, and prosecute bribe givers and bribe takers but should first set out to map and understand the corruption system then plan how to disrupt and destroy it.

Organised crime (whether gangsters or corrupt cliques) will always attempt to suborn or intimidate police, judges and any one official or institution within the NIS. A corollary, however, is not always noted. The task of the NIS is not just to prosecute corrupt individuals. It is to disrupt the corruption system so that it is difficult for it to function. Corruption flourishes in well-established networks where trust is present on both sides of the exchange relationship. This phenomenon is as old as human civilisation; it is subject to continual change and redefinition. Too often, moral accusations are aimed at the failings of individuals, thus distracting attention from institutional and structural patterns of corruption. Systemic, pervasive sub-systems of corruption can and have existed across a range of historical periods, geographic areas as well as religious, political, and economic systems. A key operating feature of corruption sub-systems is that they are relatively stable networks that survive changes in personnel.[23] Such networks support the common good of elites or social groupings rather than uphold the national public good. The failure of public trust leads to solidarity networks within a state. It is important to understand how corrupt and unethical subsystems operate to reform and change them. We can certainly recognise a well organised corruption system in 1980s Queensland and in many other jurisdictions. We can also recognise some of the means of breaking corruption systems from the Queensland experience (sequential investigation with immunity for those who come forward when their information is still useful) and

[23] See Richard Neilsen, 'Corruption networks and Implications for Ethical Corruption Reform' (2003) 42 *Journal of Business Ethics* 125. Neilsen identifies examples of exclusive corruption networks as criminal organisations such as the Mafia and the Japanese Yakuza and more subtle types of corruption networks, known as 'crony capitalism', as informal networks of large family businesses and where government officials control such activities as large loans from state bank that are not repaid, preferential government contracts, protected monopolies, investment banking and brokerage conflicts of interest, auditing, and consulting conflicts of interests etc.

approaches to tackling other systemic abuses (general amnesties for those who tell all and a version of truth and reconciliation commission).[24]

X GROWTH OF POWER BEYOND NATION STATES AND THE OPPORTUNITY FOR GLOBAL CORRUPTION SYSTEMS TO EMERGE

For the last two decades, the primary focus of corruption studies and anti-corruption activism has been corruption within sovereign states. International activism was largely directed at co-ordinating national campaigns and to use international instruments to make them more effective domestically. This reflects the broader fact that, since the rise of the nation state, states have comprised most of the largest institutional actors and have been the most significant institution in the lives of most individuals. This action made states the 'main game in town' for the 'governance disciplines' — lawyers, political scientists, economists, and ethicists. It also made it fair game for the corrupt.

However, over the last twenty years, the flow of money, goods, people, and ideas across borders has threatened to overwhelm the system of sovereign states. Much activity has moved outside the control of nation states at the same time as nation states have 'deregulated'. In so doing, they have transferred power from those exercising governmental power at the nominal behest of many of its citizens to those with greater wealth and/or greater knowledge in markets in which knowledge is typically asymmetric.

It is now recognised that many governance problems have arisen because of globalisation and can only be addressed by global solutions. It must also be recognised that governance problems at the national level contribute to governance problems at the global level and vice versa. This is true of current issues from the melting Greenland glaciers to the ethical and financial meltdown of Wall Street. It is also true of traditional issues involving interlinked domestic and international conflict and the toxic symbiosis of foreigners paying bribes to officials which are deposited by subsidiaries in tax havens in helpfully secretive banks.

[24] See Charles Sampford (n 3).

This is not about the United Nations and other intergovernmental organisations. Corruption within the UN system is limited because there is limited power. We have seen the 'oil for food' (in which almost all corruption was by the Iraqi government and corporations). We have seen 'jobs for the boys' and one or two cases of 'jobs for the girlfriends'. The most serious issues are attempts to buy UNSC votes in an attempt to secure support for violent action that would otherwise be in clear breach of the UN Charter.

The forms of power that we need to be concerned with include those which are increasingly beyond state regulation. These include:

- The long standing and increasingly profitable operations of organised crime — including the arms trade and drug trafficking.
- Deregulated corporations who can operate in multiple companies and shift money and assets (especially intellectual property) to maximise profit and avoid regulation and taxation. These corporations have the opportunity to assist communities and economies to develop but often play one country off against another. Many will use their unregulated commercial power to secure compliance of states through corruption and offers states and/or political parties that they cannot refuse.
- Transport and shipping using flags of convenience.
- Banks and financial institutions who can move money from one currency to another, sometimes using bank bailout money to speculate against the currencies of the countries which saved them — and sometimes merely providing conduits for corrupt money to move beyond the hands of local enforcement authorities.
- Private military companies — the mercenaries who flourished in Europe before the rise of sovereign states and are re-emerging as sovereign states weaken. Some of these are employed by sovereign states to avoid their responsibilities under international law. Some are employed by corporations and may break the supposed monopoly (and general superiority) on the use of force by sovereign states.
- Surveillance by states across borders — aided by corporations whose are separately securing networks of surveillance.

There is an opportunity for global corruption systems to emerge with a combination of the above. We can see state capture through corruption, or the use of states as bases for operations in other states that are illegal and or highly damaging. Corrupt payments or corrupt favours can be used to ensure that corrupt actions re not defined as criminal — or passed but not enforced. When financial power is linked to surveillance or, worse, state or non-state use of force, we enter potential nightmare territory. The abuse of financial power produced a global financial crisis in which banks pressed governments to save them (sometimes using threats that would otherwise be considered extortion).[25] When financial power is recklessly used to seek profits, we may face another global financial crisis.

This is not to say that a global corruption system has emerged. I am not suggesting that a majority of those in a position to do so act corruptly or that they succeed when they attempt to. Some attempts by corporate interests to stage coups have been spectacularly ineffective when using mercenaries — though commercial interests have sometimes been willing participants in coups backed by foreign governments. However, the risk is there and must be addressed to ensure that corrupt corporations do not profit at the expense of ethical ones and thereby become a larger part of global capitalism. We must also be on the lookout for behaviour that benefits corporations and governments at the expense of the communities they are supposed to serve for which excuses are proffered (such as 'everyone else does it,' 'I have to serve my shareholders,' 'my workers are getting $2 a day instead of $1 per day,' 'health and safety regulation is the responsibility of the local government and we comply — and giving gifts to local inspectors is part of the culture,' 'it is legal to advertise tobacco so there should be no constraint on our advertising and packaging'). We must also be careful about the co-option, willing or wilfully blind, of those who do not see themselves as doing their job — such as bankers operating under strict secrecy regimes (which the Swiss nearly perfected before pressure from the EU and which other countries have taken up).

[25] I am reliably told that the Irish bankers demanded a government guarantee of their debts or all ATM machines would cease dispensing cash that afternoon.

As emphasised above, governance reform and integrity measures are justified by the risk of corruption which may materialize. We do not have to await proof that the risk has materialised. Once it does, it will be much harder to deal with.

XI SYSTEMIC COLLABORATION — BUILDING GLOBAL INTEGRITY SYSTEMS TO DEAL WITH GLOBALISING CORRUPTION SYSTEMS

As always, this leads us to the question: *what is to be done?*

The application of the NIS approach to global problems was suggested by Prof Ramesh Thakur when he was United Nations University Senior Vice Rector and UN Assistant Secretary General working with Kofi Annan on UN reform. In 2008, TI also recognised its value and commissioned me to write the conference overview paper ('From National Integrity Systems to Global Integrity Systems') for the 13th International Anti-corruption Conference 2008 (13 IACC).[26]

In doing so, we should learn from the lessons of studying national integrity systems. The first lesson is that corruption does matter. Corruption is not a minor issue, let alone a sustainable alternative route to development. Corruption is linked to the failure of states to achieve the goals they set themselves for — the very simple reason that the power, people, and resources allocated to achieving those goals are used for other purposes. The second lesson is the approach to be taken in combating corruption. If corruption involves the abuse of entrusted power for personal gain, the attempt to limit corruption in an emerging global order involves identifying:

1. Areas of significant power.
2. The ostensible purpose (the claimed purposes that are used to publicly justify the existence of that power and the ends for which it may be legitimately used).
3. Potential abuses of that power by those who hold it and the benefits they and others will gain from them.
4. Potential corruption systems that may emerge to organise those abuses of power.

[26] Charles Sampford, 'Global transparency: Fighting corruption for a sustainable future: From National Integrity Systems to Global Integrity Systems' (Conference Paper, 13 IACC, Athens, November 2008).

5. Potential integrity systems that disrupt corruption systems and increase the likelihood that powers are used for their ostensible purpose not abused for other purposes.

In studying global integrity systems, we should not cease to study national integrity and corruption systems as these are a part of the global systems which operate at global, regional, national, sub-national levels, as well as through corporations and the professions.

Unfortunately, governance experts are not well equipped to handle global problems. As we saw earlier, most are tied to mono-disciplinary approaches to institutions, their problems, and their solutions. This is exacerbated by the fact that most focus on one 'level' of governance: global, regional, national, corporate, professional, or not-for-profit institutions. However, many of the most intractable global problems involve mutually reinforcing weaknesses in institutions at the global, regional, national, sub-national level as well as corporations, professions, and NGOs. Corruption flourishes because of weaknesses in all levels. Thus, solutions to global problems do not lie in new norms or reformed institutions at any one level but the identification of normative, legal, institutional and governance changes at some or all levels and their integration into emerging Global Integrity Systems. We need multi-disciplinary, multi-country, multi-cultural research teams.

XII NO ROOM FOR COMPLACENCY IN AUSTRALIA

Queensland went from the "deep north" to a "global exemplar" in five years.[27] It became a model of national integrity systems and the basis for thinking about a global integrity system. However, Commonwealth governments have been less interested in the Queensland model than many other national governments. There may be many causes/excuses:

- Traditional feelings of superiority by national bodies.
- The emphasis on intra institutional integrity measures rather than jurisdiction wide measures (a useful part of any integrity system but one which works better with national integrity institutions).

[27] See Sampford n3

- Memories of State corruption — reinforced by current examples.
- The view that there is more opportunity for corruption at state and, especially, local government (where fortunes can be conferred by rezoning and planning applications).
- The reforms of the 1970s and 1980s including what was widely called the 'New Administrative Law' and the ceding of boundary setting to the independent electoral commission.

However, there is a great deal of power at the national level. Indeed, the vertical fiscal imbalance between the Commonwealth and the states put most public moneys in the hands of the Commonwealth. This is exacerbated by the states having responsibility for most of the expenditure (e.g., health, education, roads) for which they must seek federal funds. Accordingly, the Commonwealth has much more discretion over spending and taxes.

Unsurprisingly, those in government have been experimenting with how such power can be used/abused for personal or party-political gain. In Australia, the abuses are less likely to be for personal gain, at least when in office. The strength of the economy and the enormous salaries paid to senior executives, mean that those seeking great wealth are much less likely to enter politics than in nation states with weak economics in which official corruption is the best way to make money. Some seek to make that up with lucrative board positions after retirement from politics and use loopholes left in lobbing rules that do not count those employed by large companies as 'lobbyists.'

This should not be a reason for relative complacency. The fact that our politicians are less likely to be in it for personal financial gain means that they are more likely to enter politics to gain power for their parties and themselves. Some of the worst abuses involve the use of entrusted power to secure re-election. Indeed, I have long argued that the one power with which we cannot entrust to politicians is the conditions for their re-election — not because all will abuse that power but that the temptation creates too great a risk.[28]

There are two related areas where Commonwealth government power can be abused: by choosing the circumstances of their own re-election and by reducing their accountability

[28] See invited submissions to Senate Finance and Public Administration Legislation Committee's 2002 inquiry and the Senate Finance and Public Administration References Committee in 2005.

prior to such elections. Intersecting with these opportunities are elements of corporate power that can be abused for corporate gain. I am not going to directly allege the abuse of such power — merely that there is a strong risk of such abuse and widespread agreement that the risk has materialised. In some areas, like government advertising there is universal agreement that the risk is present and that it has materialised. As I argued before three separate senate committee enquiries, the Liberal-National party coalition allege that the Australian Labor Party ('ALP') abused the power, the ALP allege that the Coalition had abused their power and the minor parties think that both had. That is close to 100% agreement that the abuse has occurred. These risks are exacerbated by the opportunities for corporations to abuse their considerable power.

XIII CHOOSING THE CIRCUMSTANCES OF THEIR RE-ELECTION

Australian governments have largely eschewed the attempts at voter suppression rampant in the United States (despite some back bench urgings). However, virtue seems to stop there.

1. One major issue is the timing of elections. While most states now have fixed terms and fixed dates for elections, Commonwealth governments still retain the right to call an election whenever they want provided no more than three years have elapsed since the House of Representatives met after the previous election.[29] Governments can choose a time when they think they are most likely to win because there has been recent good news or likely bad news to come. It also puts the opposition at a distinct disadvantage in having to plan for multiple scenarios and to prepare policies and candidates for a potential early election.
2. Government advertising has been shifting from information campaigns to publicly funded advertisements for their policies — with a sharp spike in the third year of government. The Howard government's publicly funded campaign in favour of the GST was run the last few weeks before the calling of the 1998 election. As the legislation was not proposed to be introduced until after the election and would only be introduced in the case of a Coalition win, it seems impossible to deny that this was a direct subsidy to the election campaign.

[29] *Commonwealth of Australia Constitution Act 1900* (Cth) s32.

3. Pork barrelling involves the expenditure of government funds to increase votes in marginal electorates, rather than according to general transparent principles of general application.
4. Power over political donation laws.
5. Power to make a lot of decisions favourable to favoured individuals and corporations — including corporate and, especially, media regulation.
6. Power to award lucrative contracts without tender.

Both parties abuse their power in most of these ways. In relation to the second and third, they seem to be learning from each other, pushing the envelope further and using the bad behaviour of their predecessors as a precedent and/or justification for their own.

XIV AVOIDING ACCOUNTABILITY

Elections are the ultimate accountability mechanism, involving a choice between parties on their past performance in the exercise of entrusted power and their promises about the future exercise of that power. Between elections, integrity institutions are needed to do two things. First, they must ensure, as far as possible, that governments only exercise the powers they have for the purposes for which they are entrusted. Secondly, information about what they have done needs to be revealed and scrutinised so that electors can make informed choices about the parties they vote for.

Governments have many opportunities to use their powers to influence these accountability processes. They seem to be discovering those powers and using them more and more frequently.

1. Power to control information, including preventing public access to the information, collected with powers entrusted to them at public expense. While the New Administrative Law included FOI reforms, governments have been restricting access through fees and exemptions (including widespread claims of cabinet confidentiality, commercial in confidence and security).
2. Restrictions on judicial review — both in conduct subject to such review and in the courts in which cases can be heard (in some cases leaving only the High Court).
3. Power to make appointments to judicial office: while there has not yet been an attempt to stack the High Court American style, we are seeing more and more political appointments at lower levels of the judiciary (and members of the

Administrative Appeals Tribunal (AAT) who review government decisions on merit).

4. Power to make appointments to other integrity institutions.
5. Cutting the budgets of integrity institutions who ask probing questions of government (e.g., Australian Information Commission and Australian National Audit Office).
6. Power to sack secretaries who used to be 'permanent' without reason (or rather, for the worst of reasons).
7. The statement of ministerial standards reads very well and bans misleading either the parliament or the people. However, the person with the power to decide whether there has been a breach and the consequences is the Prime Minister ('PM'). The PM is fundamentally and irredeemably conflicted because the reputation of their government is likely to be affected. This is even worse when it is the PM who is accused of misleading or other breaches.
8. Finally, we have seen strong government opposition to the kind of anti-corruption agency that has been successful in Australian states and elsewhere. Instead, they push for a Commonwealth Integrity Commission that includes various measures that were used to Newman government to neuter the Queensland Crime and Misconduct Commission in 2013 and which hampered the effectiveness of Victoria's Independent Broad-based Anti-Corruption Commission ('IBAC') until removed.

XV CORPORATE POWER

Our economy has largely performed well. Most Australians want a market economy as well as democracy, with the latter regulating the former to ensure that it works for the overall benefit of Australians.[30] The kind of market economy we have developed has allowed the generating of considerable individual and corporate wealth. At the same time political parties are heavily reliant on donations. There is a temptation for the wealthy to seek, and politicians to grant, several valuable favours — higher levels of access; congenial laws, regulations, and regulators — and sometimes, even tender free contracts.

[30] Indeed, the benefits to be derived and the means for securing them should be the centre of political debate.

Media corporations have power, know it and exercise it. Media corporations can play favourites in promoting some politicians over others, or secure favours under implied threat of doing so. Indeed, politicians are so fearful of adverse coverage that they anticipate what media wants. There is a particularly dangerous cycle when powerful media companies seek to increase media concentration. Giving in to them helps increase their power and increases the strength of the implied threat and the difficulty of saying 'no' to them.

XVI CONCLUSION

I started this article, like my own return to Queensland, with an expression of admiration for the Fitzgerald inspired governance reforms in response to Queensland's corruption crisis that came to a head in the late 1980s. I outlined meanings of integrity and corruption which are interlinked by their relationship to the use and abuse of entrusted power. This in turn highlighted one of the central themes of this piece: the links between power and corruption. We need institutions with the power, people, and resources to do, collectively, the things that we want to do but cannot readily do individually. That power will attract those who want to help the institution live up to this promise of beneficial collective action. However, it will inevitably attract those who want to use that power for personal gain. Accordingly, the history of power is the history of corruption. We must recognise that risk and build mechanisms to reduce that risk. Following the Fitzgerald reforms, best practice involves an ethics regime, or integrity system of norms, laws and institutions designed to promote integrity and combat corruption. At the same time, those who seek to abuse power are innovative, resourceful, and persistent and we must recognise that they will learn from experience and find new ways to seek and exploit power for private benefit. And they, too, are organised into what might usefully be seen as 'corruption systems'. This is not just true for national and sub-national levels of government but also regional, sectoral, or international levels.

We need action at all these levels. We need to recognise the innovations found within corruption systems and the innovations within integrity systems to both respond to, and get ahead of, the corrupt. There is a particular need for us to do so at the national level. The Commonwealth was an integrity innovator in the 1970s and 1980s with electoral and administrative law reform. But some of those elements have been attacked, eroded

and all but defunded. And the innovations in Queensland and other states have not been taken up. It does not matter whether this is part of a deliberate plan, a series of responses to 'annoying' integrity institutions or merely random. As I emphasised, we need to recognise the risk and seek to minimise it.

Corruption thrives when vigilance diminishes and reform falters.

APPENDIX: GLOSSARY OF TERMS

Individuals and institutions

Despite Western emphasis on individuals, we live our lives largely in, and through, the institutions in which we work, play, and procreate. Even when we try to act like 'individuals', our lives are played out in an environment characterised by powerful institutions. Institutions and their governance are generally part of our most pressing problems (including those relating to national research priorities). Institutions are also almost invariably a key part of solutions to those problems — whether the institutions are NGOs, corporations, industry groups, regulators, government agencies, regional bodies, or international agencies.

Governance disciplines

The importance of good institutional governance is recognised by many disciplines which might contribute to institutional governance and reform. The problem is not that it is ignored: the problem is that each discipline has a strongly theorised but limited conception of institutions, which colours and structures their view of the nature of institutional problems and the best means for addressing them. For example, lawyers look at institutions and see sets of formal norms, ethicists see informal norms and the values the institution claims to further, economists see incentives and disincentives, political scientists see power relations, social psychologists see complex webs of interpersonal and group relationships, and management theorists see structures and systems. Accordingly, the problems are seen in the deficiency of laws, ethical standards, incentives etc. and the solutions are seen as lying in remedying those deficiencies. All these partial insights into institutions and their problems are important and any solution that ignores them is likely to fail. However, as proffered solutions tend to be developed from only one disciplinary perspective, they are necessarily limited, perhaps over-emphasising legislative solutions or the impact of economic incentives.

Governance

There are many different definitions of governance. However, at their base, they refer to the way that decisions are made within an organisation — whether a particular corporation, NGO, or government agency or within government.

Good governance

A narrow definition might see good governance in terms of institutional integrity (see above). However, I would prefer to see it as governance subject to *good governance values.* Such values include integrity and accountability but are not confined to these values. For governments such values would include:

- democracy
- respect for human rights and liberties
- adherence to the rule of law
- citizenship
- respect for the environment.

For corporations, good governance values would include:

- adherence to the rule of law
- adherence to the corporation's own constitution
- respect for customers, consumers, and members of the communities in which it operates.

The above values are stated in English and in Western terms. In saying that, I seek to avoid cultural relativism and claims to universal values. Values are universal only when stated in their most general terms. Good governance values (and bad governance values) can be found in all cultures and traditions. The good governance values are 'congruent' rather than 'identical' and arise historical and social circumstances that provide important nuances that can be 'lost in translation'. I argue that:

- All long-standing cultures deal with major social issues and provide a range of answers reflecting different interpretations of its ideals.
- During the 20th century, Western culture produced a range of interpretations ranging from Nazism to the inclusive, tolerant versions of liberal democracy.
- Other cultures are likely to generate a similar range of answers from the vicious to the sublime.
- Most cultures will include values that are very similar to Western liberal-democratic values.
- However, those values will not be identical to Western values but will be nuanced and influenced by the context in which they arose.

- Much can be learnt from comparing the rich and nuanced variations.
- Governance reforms should be based on the local versions of good governance for three reasons:
    1. It avoids giving a 'free hit' to the opponents of reform who would otherwise portray governance reform as a western import when in fact it is grounded in local culture.
    2. Good governance will take a firmer root if based on local versions of good governance.
    3. The good governance values will be more easily recognisable by the relevant population.

National integrity systems

While it is now fashionable to see national integrity systems as the answer to corruption, this is a relatively recent development. When corruption scandals strike, one of three responses results — tougher laws, ethical standard setting, or institutional reform. Each response has its weaknesses and strengths but is unlikely to be effective by itself. If a new law, ethical code, or new institution is successful, it is because it supports or is supported by other measures already in place. Nevertheless, the apparent success of a particular measure in one jurisdiction may lead some to see a panacea or 'silver bullet'. During the 1980s, the most common response to corruption was the creation of a single, very powerful, anti-corruption agency along the lines of the Hong Kong ICAC. However, this model was criticised for placing too much reliance on a dangerously powerful, single institution. The NIS does not see the answer to corruption in a single institution, let alone a single law, but rather in the institutionalisation of integrity through several agencies, laws, practices, and ethical codes.

This approach has been given various names including an 'ethics regime'[31], an 'integrity system',[32] and an 'ethics infrastructure'.[33] However, the term with the widest currency is TI's "national integrity system".[34]

[31] Charles Sampford (n 15).
[32] Jeremy Pope (n 20).
[33] *Ethics in the Public Sector* (n 18).
[34] Jeremy Pope (n 20)

Based on this, a national integrity system is a term that encapsulates the interconnecting institutions, laws, procedures, practices, and attitudes that promote integrity and reduce the likelihood of corruption in public life.

Given that integrity is the opposite of corruption, one may wonder whether it matters whether it is called an integrity system or an anti-corruption system. However, the distinction is an important one. Integrity systems are not built around the negative goal of limiting corruption but the positive goal of maximising integrity. The negative goal is necessarily implied by the positive one — if power is to be used in officially sanctioned ways, it should not be abused by being diverted to other ends. It is not enough to avoid government corruption (if that were our only goal, it would be achieved by abolishing government!). Institutions need to achieve the goals set for them by the people's representatives.

In placing power in the hands of individuals or groups, human communities are taking a risk — that the benefits to be gained from use for the justified purposes of the institution outweigh the risks of its abuse. Integrity systems are designed to increase the likelihood of the benefit of the intended use of power and reduce the risk of the abuse.

Integrity and corruption

It is interesting that the OECD's preferred term is not 'anti-corruption infrastructure' and TI, despite its central and fundamental focus, does not call it an 'anti-corruption system'. This raises the question of what is meant by 'integrity'.

Integrity and corruption are conceptually linked terms — with one the obverse of the other. TI defines corruption as the 'misuse of entrusted power for private gain'.[35] By contrast, I see 'integrity' as 'the *use* of public power for officially endorsed and publicly justified purposes'. The latter definition is primary because you cannot know what an abuse is if you do not know what the correct 'use' is. The form of official endorsement will vary from system to system but, in a democracy, the officially endorsed uses of public power are those set by the elected government and legislature. Indeed, democratic

[35] Transparency International, *What is Corruption?* (Web Page) <https://www.transparency.org/en/what-is-corruption>.

competition is about differing views as to how public power should be used for the benefit of citizens.

Accountability

Officials are accountable if they are required to demonstrate that they have acted within the power entrusted in them for purposes that are publicly justified and officially approved. In national integrity systems, it is common for agencies to be 'mutually accountable' rather than hierarchically accountable.

Institutional integrity

Where organisations use their power for publicly stated and officially authorised purposes they exhibit 'institutional integrity'. This is analogous to individual integrity. An individual has integrity if they are true to their principles and do what they say they will. Institutions have integrity if they operate to further the goals that are publicly set by democratically elected governments.

Individual and institutional ethics

This is consistent with, and is underpinned by, our approach to ethics. We see ethics acting as the coordinating force because it asks fundamental values questions. For many ethicists, the fundamental ethical question that individuals face is: *how should I lead my life*? For me, ethics is about asking hard questions about your values, giving honest and public answers, and living by them. If we do, we have *integrity*. This is as true of institutions as it is of individuals.

As I see it, members of institutions face similar questions:

- How should we lead our lives together?
- What is the institution for?
- On what basis can we justify the power and authority that we are given even though there is, as in all concentrations of power, a risk of abuse?
- What values does it further and should we further to justify the power and authority given to us and/or tolerated by the community we claim to serve?

Transparency

Transparency is a key process value in the practice of ethics and the achievement of integrity (and hence countering corruption), good governance, integrity systems and necessary for accountability.

Transparency involves publicly stating the values we claim to further in both general and specific terms, the means we are taking to achieve them and the extent to which they have been achieved. This is critical to personal ethics and allows us to be true to ourselves. It is particularly important in institutional ethics to ensure that organisations think about where they are going, how they are going to get there and what progress they are making. Transparency is an essential part of the operation of integrity systems — both agencies and institutions monitored and the agencies and institutions undertaking the monitoring.

This might appear to be an imperialistic statement about one governance value. However, similar stories can, and often are, told about other values. At times 'liberty', 'human rights', 'the rule of law', 'democracy' and, nowadays, 'sustainability'. What the statement above actually sets out is the interconnectedness of governance values in theory as well as in the practice of national integrity systems.

Transparency does not mean that all information is provided to everybody about everything. The revelation of some information would totally compromise institutional integrity and the ability of institutions to do their jobs as well as compromising important human rights. Public revelation of those suspected of corruption would both tarnish the innocent and protect the guilty. Revelation of whistle-blowers can put lives at risk as well. The details of what information particular kinds of institutions provide to their members and to those they affect may need to be carefully worked out, balancing, and respecting a range of important values. However, the above schema provides a clear guide. The focus of transparency demands and the information that is scrutinised should concentrate on claims about values an institution seeks to further, its means for achieving them, the risks of non-achievement especially through the abuse of power and the extent to which those values are being achieved.

However, there is a broader argument for transparency. Where institutions are established to serve a particular community (governments to serve citizens and joint stock companies to their ultimate owners), the presumption must be that the information belongs to the citizens and stockholders and that the information should be readily

available to any one of those who want it. It is up to the government or corporation to justify to its citizens/owners that it is in their interests that such information is not available. Such arguments can be made based on national security or competitive advantage. However, that case must be made and accepted by the citizens and ultimate owners respectively.

Where an organisation's claim to benefit a wider group than its members is a key part of its pitch for the privileges that it enjoys (e.g., the claim that the privileges of incorporation further broader societal goals such as prosperity, diversity, and liberty), transparency as to those values, means, risks and achievements is also justified.

How does globalisation affect these values?

Some governance values need major work in a globalised world — especially citizenship and democracy, terms which migrated from the city states of antiquity to much larger entities in the modern era. The competing meanings of *equality* become even more perplexing when they move outside the nation state to a globalised world.

Values such as the rule of law, liberty, human rights, and transparency do not need much development, but their application is wider and the institutions and integrity systems that will achieve them will look very different.

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