*Proprietary Interests in Commercial Transactions* by Sarah Worthington (Clarendon Press: Oxford, 1996) pages i–xlviii, 1–245, bibliography 247–61, index 263–270. Price $100 (hardback). ISBN 0 19 826275 2.

Dr Worthington focuses on personal proprietary interests arising in commercial transactions[1] — an area littered with apparently disparate and undoubtedly difficult principles. Her aim is to clarify those principles and in the process demonstrate that the law here is not as fragmented as it first appears. Aside from the academic value of such a project, it gives the student or practitioner a framework in which to place the case law.

Yet a work of 250 pages covering reservation of title, *Quistclose* trusts,[2] floating charges, the *De Mattos v Gibson* principle,[3] common law and equitable 'tracing' of assets, constructive trusts and liens might seem likely either to get bogged down in explicating case law or to fly so high over the material that the reader loses sight of all familiar landmarks. This work does neither, and that is its first strength.

The exposition of case law is deftly handled, although that alone is not sufficient since these topics are not susceptible to a simple analysis on the basis of *stare decisis*. The cases need to be interpreted; the concepts which underpin the judgments enunciated. Dr Worthington gives concise accounts of competing interpretations and draws them together at the end of each relevant section to demonstrate a certain coherence between topics.

The work originates from the author's doctorate of philosophy at Cambridge. Although a doctoral thesis has been through a number of stages of formal review (supervisors, examiners, publisher's referees) by the time it reaches the bookshop shelves, publication is usually only a secondary motivation for the work. Often then the quality and refinement of thoughts and arguments are only readily accessible to readers who are willing to follow the thesis through page by page, from beginning to end. This work eschews that stereotype, which is its second strength.

The text is well sign-posted. It is separated into parts, chapters, sections and various layers of sub-sections in a way which is not disruptive, perhaps because time is taken to explain why the discussion is being divided up in the way it is. Concluding sections and recapitulations at the beginning of new sections provide guidance within the text itself. Importantly, there are copious cross references to other parts of the text. All this makes it possible to dip into the text and find easy directions to other relevant sections. The detailed index and contents page are

[1] Sarah Worthington, *Proprietary Interests in Commercial Transactions* (1996).

[2] Classically, a *Quistclose* trust is a loan of money for a specific purpose in circumstances where the money is held on trust for the beneficiaries of that purpose unless and until the purpose can no longer be fulfilled, at which stage it is held on trust for the lender: *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

[3] The principle (not at all clearly established) that a person, who obtains contractual rights to use property of another, can restrain a third party not privy to the contract (but who has notice of the first person's contractual rights) from using the property in a manner inconsistent with those contractual rights: *De Mattos v Gibson* (1858) 4 De G & J 276.

almost redundant.

Consequently the work can be recommended as an introductory text (on the assumption that junior undergraduates are likely to want or need to be introduced to these complex areas). It would be a good starting point for the more advanced undergraduate, the graduate student of equity or commercial proprietary interests, or the practitioner who needs an understanding of any of these complicated areas.

Finally, despite its compact size, the work is a great source-book since it is comprehensively footnoted.[4] The footnotes fulfil the purposes of providing the reader with immediate access to further arguments or asides which would otherwise disrupt the flow of the main text, and also of providing references to cases, articles and other texts which take the discussion further. Notably, the selection of references seems to have been driven less by a CD-ROM or on-line search engine than by a desire to selectively illustrate different aspects of the relevant issues (which is helped by the frequent addition of a few words indicating how a particular reference fits in with preceding references and with the text).[5] There is also a bibliography which brings together all of the articles and texts referred to in the footnotes. Incidentally, the book is almost entirely free from typographical errors.

Personal property law is an area which has received much attention recently,[6] despite having a rather neglected past.[7] As Dr Worthington notes, 'the time is ripe for a critical reappraisal of the current state of personal property law.'[8] The remainder of this review will look at three aspects of Dr Worthington's reappraisal. First, the order in which the material is presented; secondly, some of the notable substantive points made; and thirdly, a few concluding comments on the scope of the project.

Dr Worthington divides the discussion into two main parts: proprietary interests arising by agreement (retention of title; *Quistclose* trusts; floating charges; the *De Mattos v Gibson* principle); and proprietary interests arising by operation of law (legal and equitable 'tracing' as a result of void, voidable or incomplete contracts, no consideration or theft; constructive trusts; equitable liens).[9]

The discussion of tracing in the second part is itself divided into separate chapters on the position at common law and in equity. This aspect of the exposi-

[4] It should be noted, however, that the book deals with the law as at February 1996.

[5] See, eg, Worthington, above n 1, 104. Despite her 'antipodean' background, Dr Worthington resists the temptation to give a disproportionate number of comparative references to Australian law. But there has perhaps been some over-compensation: when discussing criticisms of the bar to recovery for mistakes of law, one would expect to see a reference to *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353: Worthington, above n 1, 160 n 98.

[6] See the extent of recent material in the bibliography. See also Robert Chambers, *Resulting Trusts* (1997); Lionel Smith, *The Law of Tracing* (1997) (forthcoming).

[7] This is evidenced by the fact that, traditionally, undergraduate law courses have not regarded personal property law as a discrete subject, or even as a discrete part of a property law course. Rather it has been divided between areas such as trusts/equity and tort, and more specific areas such as sale of goods.

[8] Worthington, above n 1, 243.

[9] Cf ibid 243: contracts are also essential to understanding proprietary interests arising by operation of law.

tion is somewhat problematic since, as Dr Worthington herself notes, one must recognise the 'necessary and intimate integration of law and equity. It is no longer possible to describe legal outcomes by reference solely to contract law, property law, or equity.'[10] Maintaining that division between common law and equity, while possibly justifiable on pedagogical grounds — it makes the material more digestible for the newcomer — results in the discussion having to be prematurely curtailed when equitable or legal proprietary rights arise in the wrong chapter.[11]

The only other matter of presentation to regret is that, when analysing cases in chapter four to show the appropriateness of her preferred explanation of how floating charges 'float', Dr Worthington does not offer a side-by-side comparison of how the alternative explanations of floating charges would cope with those authorities.

The recent attention of academic literature in this area has been mirrored by, and perhaps to an extent has influenced,[12] a rapid development of the law by courts, particularly in England. That is particularly evident in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[13] the test case arising out of *ultra vires*[14] interest rate swap transactions entered into by many local councils in the United Kingdom in the 1980s. The House of Lords' decision in *Westdeutsche* was handed down after Dr Worthington's book had been edited. She did, however, have the opportunity to comment on the decision in an addendum which (in keeping with the style elsewhere) is sufficiently well cross-referenced to the main argument that the unfortunate timing does not ultimately matter.

Turning to substantive points of note, it is good to see strong reaffirmation of the fact that a trustee of resulting and constructive trusts is not necessarily fixed with the full ambit of fiduciary duties which may rest with an express trustee.[15]

Also worthy of note is Dr Worthington's emphasis on intention as the basis of both *Quistclose* trusts and retention of title.[16] As a consequence, she argues, it should be possible for a seller of goods to obtain, through a 'retention' of title clause, title in manufactured products made using those goods, and to obtain title to proceeds from the sub-sale of those goods.[17] It should also, she argues, be possible to construct a *Quistclose* trust in respect of assets other than loan funds[18] — for example, in respect of proceeds from the sub-sale of goods subject to a retention of title clause.[19]

[10] Ibid.
[11] See, eg, ibid 126.
[12] See, eg, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 689–90, 702–3 ('*Westdeutsche*').
[13] [1996] AC 669.
[14] See generally *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1.
[15] Worthington, above n 1, xiv, xvi, 25.
[16] Ibid 25–6, 70. Note the restraining influence of giving priority to substance over form: ibid x, 22, 76 n 40. Cf 'motivation': ibid xii, 152.
[17] Ibid 42.
[18] Ibid 65. Cf above n 2.
[19] Ibid 70.

The *De Mattos v Gibson* principle[20] is explained as giving the plaintiff (that is, the contracting party who has the ability to restrain use of property by a third party which conflicts with its contractual rights) a right akin to that of a potential beneficiary under a discretionary trust. In other words, the third party has a power to use the property in any way which does not conflict with those rights, a power which is equivalent to a 'trust power'.[21] Although Dr Worthington considers that this analysis does not require the creation of any new type of interest,[22] it could amount to the recognition of a new category: a discretionary constructive trust.[23]

Perhaps the most interesting points are made in discussing the remedies that are available to plaintiffs seeking to enforce common law and equitable property rights. In order to better protect third party takers of goods[24] from a thief, or from a purchaser under certain[25] void contracts, Dr Worthington suggests that common law title to goods should in fact transfer upon delivery,[26] although the title will be able to be challenged in equity. This would ameliorate the odd situation where a plaintiff who has only an equitable proprietary interest can obtain a better remedy (return of property *in specie*) than a legal owner (conversion).[27]

Dr Worthington is also concerned, however, to ensure that the original owner retains their right to sue in conversion, which of course requires proof of a right to immediate possession. Therefore she suggests separating transfer of legal title (at least when that legal title is 'assailable') from the transfer of the right to possession, so that the original owner can still have that possessory right.[28] While the resulting position may accord with the lay perception of the effect of theft,[29] it does make the legal notion of a right to possession even more removed from lay conceptions: it would not be unreasonable to assume that if full legal title has passed, the right to possession has passed *a fortiori*.

The last substantive points to note relate to Dr Worthington's treatment of the doctrine of tracing. As she states, 'the current views of the tracing process' are that the traditional tracing rules merely concern the issue of identification and say 'nothing of the rights — personal or proprietary — which might eventually

20 See generally above n 3.

21 Worthington, above n 1, 112. Beneficiaries under a *Quistclose* primary trust are possibly in the same position: Worthington, above n 1, 114 fn 81.

22 Ibid 115.

23 At one point, Dr Worthington notes that the courts' aim in protecting the plaintiff in these cases 'seems to be to deny the defendant any unjust enrichment', although she does not then address the various elements which make up the restitutionary action for unjust enrichment: ibid 103.

24 As Dr Worthington notes, money will almost always lose its identity in the hands of the purchaser/thief (and therefore common law title to it will pass from the original 'seller'); similarly, common law title to shares and realty will usually have been transferred from the seller pursuant to a collateral conveyance accompanying the void contract of sale: ibid 125.

25 Ibid 124.

26 Ibid 125, 128.

27 Dr Worthington notes also that a plaintiff seeking to recover property transferred by them under a voidable contract will be in a better practical position if in fact strict *restitutio in integrum* is impossible, since then equity's remedies, rather than those of the common law, will be relevant: ibid 131–2.

28 Ibid 132, 144.

29 Ibid 128–9.

be asserted'.[30] However, Dr Worthington considers that there is no room for restricting a tracer merely to a personal claim against a defendant[31] since:

> there is not a single example of a situation where equity imposes an obligation to account or an obligation to transfer or restore property, *and* the asset in question is identifiable *and yet* the holder of the asset is not considered to hold it on trust.[32]

She recognises that the type of interest which a tracer can assert over traced property may differ depending on the circumstances,[33] but it must be a proprietary interest of some sort. It is nevertheless important to maintain the distinction between rules of identification and rules governing what rights a tracer may assert in the traced property, yet Dr Worthington does not always observe this distinction.[34]

Dr Worthington observes that a person with a right to trace only has a mere power, or power *in rem*, which can then be 'crystallised' in respect of the traced property.[35] This is borne out by those cases which consider priority disputes between a tracer and a person who obtains a proprietary interest in property before the tracer asserts any rights to it.[36] It also fits interestingly with her analysis of goods transferred pursuant to a contract voidable in equity. Dr Worthington identifies the original owner's right prior to actually avoiding such a contract as a mere equity, which is then crystallised over the goods once the contract is avoided.[37] If, before then, the purchaser has exchanged the goods for other property, the analysis suggests that the original owner's mere equity can (subject to the rules of identification) be crystallised in respect of those exchange-products.[38] In other words, the law relating to avoiding contracts is possibly part of the same body of law that governs what interest a tracer may crystallise in respect of traced property.

A cohesive body of the law of personal property seems much further off than (and perhaps depends on there being) a cohesive law of restitution. As Professor Burrows has commented, '[t]he single greatest problem facing the English law of restitution is that, unfortunately, ... illogicality appears to be embedded in the law and continues to be embraced by both judges and academics'.[39]

Dr Worthington's project is to provide 'a better understanding of existing

[30] Ibid 166, 166 fn 128.

[31] Cf Peter Birks, *Introduction to the Law of Restitution* (1989) 394–401; but see Andrew Burrows, *The Law of Restitution* (1993) 374.

[32] Worthington, above n 1, xix.

[33] Ibid 179, 180.

[34] Ibid 173.

[35] Ibid 175. An analogy might be drawn with floating charges, although perhaps not on Dr Worthington's preferred view of how floating charges 'float': ibid 80–1, 99.

[36] *Re French's Estate* (1887) 21 LR Ir 283, 312; *Bourke v Lee* [1904] 1 IR 280, 283; *Scott v Scott and Provincial Bank of Ireland* [1924] 1 IR 141, 150–1. Cf *Cave v Cave* (1880) 15 Ch D 639, 649.

[37] Worthington, above n 1, 165.

[38] Ibid 166.

[39] Andrew Burrows, 'Swaps and the Friction between Common Law and Equity' [1995] *Restitution Law Review* 15, 25.

complied with the policy. Forcible sterilisation was *de rigueur* after the birth of the first child unless one opted for voluntary sterilisation.[93]

In an important finding of fact, the Tribunal rejected the applicant's claim of persecution on the ground of political opinion:

> While there was much evidence before the Tribunal on the penalties and conditions placed on people in terms of their reproduction, none of these were couched in political terms nor do infringements of the laws and regulations governing family planning attract political penalties or penalties under overtly political laws ... The Applicant expressed no political, religious or ideological reason for his belief in the rights of parents to decide on the number of children they will have. He acknowledged the need for China to stabilise its population numbers and stated that he would be happy with just two children. It was stated as a preference but he linked it with a claim that the method of determining the limit of one's family ought never to be forced sterilisation. ... The Tribunal does not find that the Applicant has an unqualified right to have as many children as he wishes. The question at hand is that manner in which any limitation on his reproductive capacity will be [achieved].[94]

The RRT member did find for the applicant on the ground of 'particular social group', however. The Tribunal found that although the policy itself was general, it created different groups in society liable to differential treatment.

> The Tribunal believes that parents of one child form a social group in China. There is an historical beginning to the defining of this group, with the establishment of a national policy to constrain the growth of the population, a policy which, by laws and regulations, throughout the 1970s and the 1980s produced sub-categories of people such as 'people with one child', 'people with more than one child', 'the floating population who are parents', 'rural people with children', 'minority nationality couples with children'. For the purposes of national goals, regional and local regulations define parents of one child among other categories of people with children. Therefore the group is defined by the government itself.
>
> This group may be sub-divided. For the purposes of the matter before the Tribunal two sub-groups are identifiable, those who win the approval of the government by having only one child and who voluntarily choose from the selection of birth control methods placed before them by officials and those who, having only one child, either do not accept the limitations placed on them or who are coerced or forced into being sterilised by the officials of their area of local government.[95]

In relation to the woman applicant's case, the Tribunal member also stated that the 'group' was not defined primarily by persecution since there were also rewards for complying with the policy.[96]

In the Federal Court, Sackville J accepted that no error of law had been made. He commented that there was no circularity in the RRT member's finding that

[93] Ibid 11.
[94] Ibid 12.
[95] Ibid 11.
[96] RRT Decision N94/3006 (20 May 1994) 15.

government policies meant that parents with more than one child wishing to have more children became an identifiable social group:

> The very interaction which causes a group to become identifiable (or 'cognisable') may include arbitrary, repressive conduct by government or its agencies. ... Accordingly, in my opinion, there is nothing circular about a particular social group within a society being identified, in part, by conduct that might also amount to persecution.[97]

He interpreted the RRT member's finding that the relevant group consisted of those who did not accept the limitations placed on them as referring to those who want to have more than one child, in contrast to those who voluntarily decide to have only one child.[98] He found that this group should not be required to give up their wish to have more than one child. Such a 'choice' for this group would be dictated by fear of human rights violations.[99] Sackville J did not require a voluntary association among the members of the group.[100]

The Full Court, after outlining all relevant authorities, found in a brief concluding passage, that the appellants were not members of a 'particular social group' as the policy regulated the conduct of individuals.[101]

## VII IN THE HIGH COURT

In the High Court, a number of concessions were made by the Minister and the issue was narrowed down to the question of whether the persecution was feared for reasons of membership of a particular social group. The facts were not disputed by the Minister. It was also conceded by the Minister that forced sterilisation could amount to persecution and that the required nexus to the state was present since the central authorities did not, or could not, do anything to prevent it from occurring. The crucial issue was whether sterilisation was inflicted for reasons of membership of a particular social group.

The Court was divided three to two in the Minister's favour: Dawson, McHugh and Gummow JJ in the majority; Brennan CJ and Kirby J dissenting. Each judge delivered a separate opinion.

The decision will be analysed under the following headings. First, the general approach to treaty interpretation is examined. Some interesting findings were made on the question of interpretation of Australian legislation which implements a treaty, and the approach adopted by each judge hints at his answer to the specific question of interpreting the terms 'particular social group'. Then the analysis will turn to the heading of 'particular social group'. A summary of my reading of the judgments is offered first. Then, the response offered to the question of 'particular social group' is examined by reference to the majority's

97 *Minister for Immigration and Ethnic Affairs v Respondent A* (1994) 127 ALR 383, 404.
98 Ibid 405.
99 Ibid 406.
100 Ibid 394, 407.
101 *Minister for Immigration and Ethnic Affairs v Respondent A* (1995) 130 ALR 48, 61–2 (Beaumont, Hill and Heerey JJ).

approach on three major points: firstly, the need for a 'unifying' characteristic; secondly, the dichotomy between who someone is and what they do; and thirdly, the definition of a group by reference to a common attempt to exercise a human right. The minority's approach, which either focuses on the third issue or the irrelevance of the second, and either denies the need for, or pursues a different interpretation of the first, is then examined.

### A *Principles of Treaty Interpretation*

All judges made reference to the principles of interpretation contained in the Vienna Convention on the Law of Treaties[102] as necessary or permissible in the construction of Australian legislation which implements a treaty. These principles, set out in articles 31 and 32 of the Vienna Convention, place primary emphasis on the 'ordinary meaning' of the text, in light of its context, and the object and purpose of the treaty. Extrinsic sources, namely the *travaux préparatoires*, may be relied on as a supplementary source of treaty interpretation. Articles 31 and 32 appear to draw on all three major schools of treaty interpretation: the textual approach, focussing on the normal meaning of the words; the 'founding fathers' approach which looks to the intent of the drafters; and the teleological approach, which emphasises the object and purposes of the treaty. There is vigorous debate as to what order of priority is to be placed on the elements of article 31 (text, context, object and purposes) as well as the correctness of the priority accorded to primary over secondary means of interpretation. Martii Koskenniemi has concluded that the task of treaty interpretation is hopelessly circular.[103]

Most of the judges adopted a 'holistic' approach. However, what follows from this differs from judge to judge. McHugh J, who expressly adopted the holistic approach,[104] stated that this required that primacy be given to the text, although the context, object and purpose must also be examined.[105] Gummow J recorded his agreement with McHugh J that primacy must be given to the text.[106] However, in making reference to the entire text of the Convention[107] as context for the provision to be construed (a valid approach under the Vienna Convention),[108] he appears to look to the text as confirmation of the framers' desire to restrict the entry of refugees. Brennan CJ agreed with McHugh J that a holistic approach should be adopted, but he interpreted this as including reference to extrinsic

[102] Vienna Convention on the Law of Treaties, 23 May 1969, (1969) 8 ILM 679 (entered into force 27 January 1980) ('Vienna Convention').

[103] Martii Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (1989) 291–9.

[104] *Chinese One Child Policy Case* (1997) 142 ALR 331, 347.

[105] Ibid 349–52.

[106] Ibid 370.

[107] Ibid 366–71.

[108] Article 31(2) provides that the context includes the entire text of the treaty, the preamble and the annexes: Vienna Convention, above n 102, art 31(2).

sources, such as the *travaux préparatoires*.[109] Ultimately, he is swayed by the objects and purposes of the Refugee Convention, which he saw reflected in the preamble, as protection of human rights.[110] Dawson J concluded that '[a]rticle 31 plainly precludes the adoption of a literal construction which would defeat the object or purpose of a treaty and be inconsistent with the context in which the words being construed appear.'[111] Kirby J found that as the reference to particular social group is ambiguous it is legitimate, perhaps essential, to look to the *travaux préparatoires*.[112]

Interestingly, none of the judges expressly referred to the possibility of construing the Refugee Convention by subsequent state practice,[113] being the decisions of municipal courts and tribunals regarding social group, although all of them referred to jurisprudence from Canada and the United States. This could be because the state practice was considered too diverse to indicate 'agreement'[114] as to how the Refugee Convention is to be interpreted. Accordingly, it may be that the judges were referring to judicial decisions from other jurisdictions in much the same way as they would on any issue of domestic law.

All members of the majority took the view that the interpretation of 'particular social group' could not be stretched by reference to the humanitarian aims of the Refugee Convention.[115] The Convention has numerous restrictions built into the definition of a refugee. Had the framers wanted to protect all sufferers of human rights abuse, they would not have included the five Convention grounds at all.

The minority judges differed amongst themselves on this point. Kirby J also accepted that the human rights function of the Refugee Convention could not be permitted to make reference to the grounds of persecution redundant.[116] Brennan CJ expressly stated that the human rights function of the Convention works in favour of the ground of social group operating as a catch-all for any group whose rights are violated.[117] He did refer to the need for the human rights violation to be for a reason which distinguished those persecuted from the rest of society. However, this may in fact be circular. Those suffering the human rights violations may be distinguished from the rest of society solely by virtue of the fact of the violation, or by fear of future violations because the asylum-seekers will not comply with the one child policy.

The approaches taken by Brennan CJ and Gummow J seem to fall at opposite ends of the spectrum, while the other three judges occupy shared middle ground.

109 *Chinese One Child Policy Case* (1997) 142 ALR 331, 332–3.
110 Ibid 333.
111 Ibid 340.
112 Ibid 387.
113 This is permitted pursuant to the Vienna Convention, above n 102, art 31(3).
114 As required by the Vienna Convention, above n 102, art 31(3).
115 *Chinese One Child Policy Case* (1997) 142 ALR 331, 344–5 (Dawson J), 355–6 (McHugh J), 374 (Gummow J).
116 Ibid 383–4.
117 Ibid 337.

Brennan CJ appears to adopt an expansive teleological approach to assure the protection of human rights regardless of the express textual limitations on this aim contained in the Refugee Convention. However, there is an alternative construction of his opinion which is that he is simply appealing to the idea of non-discrimination between groups which is a legitimate, and I would argue the preferable, way of looking at the issue of social group. If the first reading of his opinion is more accurate, it has to be acknowledged that, sadly, the object and purpose of the Convention is not the protection of all those whose human rights are abused.

Gummow J came closest to adopting the 'founding fathers' approach. His approach to the question of 'particular social group', which may be somewhat narrower than that of the two other majority judges,[118] appears to be guided by the framers' concern to protect state sovereignty. This concern is manifested in the absence of a guarantee of admission for refugees outside state territory, and Gummow J stated that this tempers the references to humanitarian principles in the Convention.[119] In my opinion, this gives too much weight to the intentions of the drafters and too little weight to the ordinary words of the Convention and its humanitarian purposes. It is true that the Convention omits any reference to admission or to asylum, and that the humanitarian purposes of the Convention are not pursued in an unlimited fashion. However, most jurists accept that the better view, confirmed by state practice, is that the practical requirements of the principle of *non-refoulement*, which is expressly included in the Convention and to which no reservations are permitted, mean that the protection of the Convention extends to asylum-seekers at the border. Accordingly, the decision in *Sale v Haitian Centers Council*[120] in which the United States Supreme Court held that interdiction of Haitian asylum-seekers on the high seas was legitimate and which Gummow J referred to as supporting a restrictive reading of the Convention as regards admission to state territory, has been much criticised. It is simply not good enough for a state to declare that it has no obligation to grant asylum or admission and then actively to ensure that asylum-seekers are returned to a place of persecution in violation of the norm of *non-refoulement*, by sending its coast-guard out on the high seas. The state has exercised its jurisdiction extra-territorially to ensure that the principle of *non-refoulement* is violated. Concern for immigration control should not be permitted to render the obligation of *non-refoulement* entirely meaningless by permitting states to engage in activities such as interdiction of asylum-seekers on the high seas.[121] Equally, while it may be impermissible to read the Convention definition so as to protect all sufferers of human rights abuse, concern for immigration control should not encourage an overly restrictive reading of the term 'particular social group'.

118 See below Part VII(B)(1).

119 *Chinese One Child Policy Case* (1997) 142 ALR 331, 366–7.

120 125 LEd 2nd 128 (1993).

121 See generally Penelope Mathew, 'Sovereignty and the Right to Seek Asylum: the Case of Cambodian Asylum-Seekers in Australia' (1994) 15 *Australian Year Book of International Law* 35.

### B *'Particular Social Group'*

Each of the majority judges found that the definition of 'particular social group' relied on by the RRT member is impermissibly circular. The majority also required a social group to be 'united' by some common element or characteristic so that there is a 'cognisable' group within, and perceived by, society. *Societal* perception that the group is distinct appears essential. While there was acknowledgment that external perceptions of the group are important, rather than internal perceptions, it was found that the perceptions of the persecutors in this case were related to activities of the appellants in violation of a generally applicable policy, rather than any belief structure on the part of the appellants which distinguished them, and others like them, as members of a particular social group. The persecution occurred *despite* rather than *for reason of* any such beliefs. The purpose of the policy, which the majority viewed as legitimate, was only to limit population growth, not to oppress a particular social group.

By contrast, the minority accepted the RRT member's view that the one child policy had created a particular social group liable to forcible sterilisation. They arrived at this conclusion by different routes. Kirby J emphasised that there need not be an associational membership of the putative group, that knowledge of the identity of other group members is not required, and that self-identification or consciousness as a member of the group is unnecessary. He also made reference to the link between imputed political opinion and membership of a particular social group. Brennan CJ focused on the reasons for persecution, distinguishing the appellants, and others like them, from the rest of society, the reasons being their refusal to adopt contraceptive measures. The attitude to the legitimacy of the policy *per se*, as opposed to the sometimes brutal methods of its enforcement, was somewhat ambiguous. Brennan CJ did not explicitly address this point. Kirby J, on the other hand, offered a disclaimer at the beginning of his judgment to the effect that it was not the role of the High Court to comment on the legitimacy of the policy itself in light of the pressing problem presented by population growth.[122] However, towards the end of his judgment, he indicated that the means of enforcement affect the legitimacy of the policy so that the policy goes beyond the bounds of what is acceptable.[123]

In my view, both approaches have their merits, in technical legal terms. The one child policy is one of the most controversial issues in refugee law because it presents some old chestnuts, in a new context, that are not easily resolved even in more familiar contexts. Problems specific to refugee law include the impact of a law of general application, the question of what is political in any given context, and the question of whether decision-makers' assessments should focus on the perspective of the persecutor, the victim, or adopt a shifting interplay between both perspectives. Another issue familiar to human rights lawyers and feminists is the question of what counts as equality and what constitutes invidi-

[122] *Chinese One Child Policy Case* (1997) 142 ALR 331, 385.
[123] Ibid 395.

ous discrimination. In the course of analysing and critiquing the judgments, I will suggest that while the majority approach is logical, the minority approach is also plausible. This analysis is further elaborated in Part VIII, following the analysis of the judgments.

In policy terms, I think that the arguments favour the minority view. The majority focused on the Convention's purpose as being to protect only select groups of victims of human rights abuse. This limited purpose was the result of the framers' desire to protect the general right of states to restrict immigration and control entry to their territory. However, it may be possible to distinguish people fleeing the extreme measures of enforcement under the one child policy from persons fleeing prosecution under reasonable criminal laws and other general policies. It is also important to give shelter to people fleeing forcible sterilisation. Moreover, there is no evidence that granting refugee status to those fleeing enforcement of the one child policy is going to open the floodgates to millions of Chinese. These policy issues were admirably addressed by Kirby J. Refugee status requires proof of a well-founded fear of human rights violation; brutal measures of enforcement of the policy are limited to specific regions of China; it is difficult for persons fearing human rights violations to leave their countries in the first place; and countries which have recognised Chinese asylum-seekers fleeing enforcement of the one child policy as refugees have not experienced a break-down in immigration control.[124] Furthermore, the framers encouraged application of the Refugee Convention to those who did not necessarily meet the strict terms of the definition in recommendation E of the final conference of plenipotentiaries.

1 *'Unifying Characteristics'*

All three majority judges required that a particular social group be 'unified' by some common characteristic which makes the group cognisable in society. Dawson J referred to the need for a 'characteristic or element' which unites the members of the group and 'enables them to be set apart from society at large'.[125] McHugh J referred to the requirement of a common 'characteristic, attribute, activity, belief, interest or goal' which unites the group.[126] Gummow J spoke of a 'common unifying element'.[127]

The way in which a common characteristic is transformed from a simple 'demographic statistic' into a characteristic which 'unifies' the group in the eyes of society, appears to attract slightly different treatment by different members of the majority. Both Dawson and McHugh JJ made it clear that the reasoning in *Sanchez-Trujillo* requiring a 'voluntary association' among members of the group was not to be followed in Australia.[128] Gummow J, on the other hand, said

[124] Ibid 385–6 (Kirby J).
[125] Ibid 341.
[126] Ibid 359.
[127] Ibid 375–6, citing *Ram* (1995) 130 ALR 314.
[128] *Chinese One Child Policy Case* (1997) 142 ALR 331, 341 (Dawson J), 356 (McHugh J).

that he approved of the United States authorities, including *Sanchez-Trujillo,* indicating that not every segment of the population defined by broad characteristics, such as youth or gender, without more, was a particular social group.[129] This could be taken by implication to indicate that he requires a voluntary association among members of the group. On the other hand, he referred to the assessment in *Ram* that it is by virtue of being condemned along with others sharing the common characteristic that a person is persecuted for reasons of membership of a particular social group.[130] Thus his reasoning seems simply to refer to his belief that the persecution in this case is not suffered as a result of who the appellants are, as opposed to what they may do in contravention of a generally applicable policy.[131] His reference to the fact that members of a race, religion or nationality could be said to be members of a particular social group could be taken as confirming this interpretation.[132]

McHugh and Dawson JJ also made it clear that the group may be identified by external, rather than internal, perceptions of the group, or by characteristics attributed to the group.[133] McHugh J gave the example of witches, who 'were a particular social group in the society of their day, notwithstanding that the attributes that identified them as a group were often based on the fantasies of others and a general community belief in witchcraft.'[134]

McHugh and Dawson JJ also acknowledged that the large size of the group is irrelevant. Dawson J found that there is no need for particular social groups to be confined to large or small groups.[135] McHugh J found that the term 'particular social group' was probably intended to cover only a relatively large group of people, owing to its inclusion with other large groups such as race, religion, and nationality.[136]

McHugh J was clear that the fact that the group is otherwise disparate, apart from at least one unifying common characteristic, is not fatal to the conclusion that a particular social group exists. He noted in this regard that the groups contemplated by the framers of the Convention, *kulaks* or landowners in communist countries, were disparate in character, but that this did not matter providing that there was 'a common attribute and a societal perception that they [stood] apart'.[137]

He did not require the group to have a public face. All that is necessary is that the public was aware of the characteristics that unite the group. He gave the example of early Christians who were forced to practice their religion in the catacombs. He also gave the example of homosexual members of a particular

[129] Ibid 372.
[130] Ibid.
[131] Ibid.
[132] Ibid 375.
[133] Ibid 341 (Dawson J), 359–60 (McHugh J).
[134] Ibid 360.
[135] Ibid 341.
[136] Ibid 360–1.
[137] Ibid 360.

society if 'perceived in that society to have characteristics or attributes that unite them as a group and distinguish them from society as a whole'.[138]

McHugh J also acknowledged that it was possible for persecution to assist in the creation of a cognisable group in society. Here, he stated that left-handedness could become the defining characteristic of a group if left-handers were persecuted, as they would soon become cognisable as a particular social group. But he noted that it is the characteristic of being left-handed, not the persecutory acts, which would be the identifying characteristic of the group.[139]

This statement by McHugh J recognises the basic fact acknowledged by both the RRT member and Sackville J in the lower decisions, that the policies or ideologies of the *persecutors can and usually do* define particular social groups. It is odd, therefore, that he still seemed to persist with the idea that the group must become cognisable by society as a whole before persecution of group members will entitle them to refugee status. If the persecutors see left-handedness as the mark of the devil (as Christians once did) and this perception drives their acts, it is difficult to see why the perceptions of the rest of the society are at all relevant. The person is attacked for what they are perceived to be. Thus Savitri Taylor has criticised the reasoning in *Morato* because its emphasis on societal perception leads to unreasonable results whereby groups persecuted for some characteristic are unprotected until they attain some social significance.[140] She gives the example of the Khmer Rouge who divided the population into old people (those who had lived in areas controlled by the Khmer Rouge during the revolution) and new people (those who had moved to the areas controlled by Lon Nol), groups which had *no* social significance before the Khmer Rouge adopted their policies.[141]

This flaw in otherwise good reasoning may be driven by the fear that it may be difficult, once it is accepted that the persecutors' perceptions are what counts, to distinguish between the persecuted left-handers and those who suffer forcible sterilisation under the one child policy. Frankly, it is also difficult to see why, in the context of the intense government and general public scrutiny of childbirth in China, people in the appellants' position could not be viewed as having a unifying characteristic, being the desire to have more than one child, pursuant to the broad test offered by the majority. However, the answers in relation to the one child policy rest on an assessment of whether there is a characteristic, apart from the persecutory conduct of forcible sterilisation itself, which attracts the attention of the persecutors; whether persecution is *for reason of* this characteristic or some other motivation; and whether the spotlight should be on the motivation of the persecutors or the belief of, or effect on, the victim. The RRT member and Sackville J found that the relevant characteristic was defined by the

[138] Ibid.

[139] Ibid 359.

[140] See generally Savitri Taylor, 'The Meaning of "Social Group": The Federal Court's Failure to Think Beyond Social Significance' (1993) 19 *Monash University Law Review* 307.

[141] Ibid 319–20.

one child policy itself: the characteristic was being a parent with one child who wanted more than one. There was also a reference in the definition of the group itself to the forcible sterilisation. The majority of the High Court found that the issue of whether the appellants and people like them were members of a particular social group is governed by the fact that they bring themselves within the terms of a generally applicable policy: what they do, rather than who they are, is targeted.

### 2 *To Be or To Do? Insertion of Persecution Occurring Under a Policy of General Application into the Relevant Social Group*

Each of the majority judges found that the persecution feared in this case was not by virtue of a unifying characteristic, but by virtue of individual conduct which is prohibited by a general law or policy. The persecutors were not *motivated* by perceptions of the appellants as belonging to a group of like-minded people, but by the individual *conduct* of the appellants and others.

Gummow J found that couples wanting to have children without governmental constraint were simply a demographic statistical group at risk of the application of a general law of conduct.[142] He also noted a 'further' fundamental objection to the definition of 'particular social group' relied upon by the RRT member, being the insertion of the form of persecution into the definition.[143]

Dawson J stated that an 'important limitation' is that 'the characteristic or element which unite[s] the group cannot be a common fear of persecution'.[144] McHugh J made the same finding and for very similar reasons.[145] He also offered, in *obiter*, his opinion that because it is impermissible to insert a reference to the persecution feared into the group, the finding by a Canadian Court that 'Trinidadian women subject to wife abuse'[146] were a social group, proceeded on an incorrect interpretation of the Convention. This comment is returned to in Part IX, where it is argued that nevertheless, women fleeing domestic violence may be refugees, even under the test adopted by the majority.

According to Dawson J, without the prohibition on persecution defining the group, the definition of a social group was 'circular'[147] and amounted to a reversal of the requirement that persecution be for reasons of membership of a social group.[148] To ignore this limitation was to ignore the 'common thread' between the elements of the definition identified by Burchett J in *Ram*.[149] It would also render the enumeration of at least three of the Convention grounds (race, religion and nationality) superfluous,[150] and would render the ground of

142 *Chinese One Child Policy Case* (1997) 142 ALR 331, 375–6.
143 Ibid 376.
144 Ibid 341.
145 Ibid 358–9.
146 Ibid 358.
147 Ibid 341.
148 Ibid.
149 Ibid, citing *Ram* (1995) 130 ALR 314.
150 *Chinese One Child Policy Case* (1997) 142 ALR 331, 341.

social group an all-encompassing safety net.[151] Dawson J noted the limitations of the dichotomy between who someone is and what someone does, but stated that it was a useful dichotomy in cases of a generally applicable law which applied to all persons, *regardless of who they were*: '[w]here a persecutory law or practice applies to all members of society, it cannot create a particular social group consisting of all those who bring themselves within its terms.'[152] Thus, referring back to the need for a 'unifying element' among the putative group, he assessed a number of common characteristics put forward by the appellants and concluded that these characteristics did not unite the group: fear of persecution was the *sole* uniting factor.[153] These characteristics included the fact that the appellants were members of the Han majority; the fact that they were a couple of reproductive age; the fact that the policy applied economic and other sanctions short of persecution; and the fact that measures such as forcible sterilisation applied only in particular regions.[154] Thus Dawson J concluded that:

> [i]n this case, the reason the appellants fear persecution is not that they belong to any group, since there is no evidence that being the parents of one child and not accepting the limitations imposed by government policy is a characteristic which, because it is shared with others, unites a collection of persons and sets them apart from society at large. It is not an accurate response to say that the government itself perceives such persons to be a group and persecutes individuals because they belong to it. Rather the persecution is carried out in the enforcement of a policy which applies generally. The persecution feared by the appellants is a result of the fact that, by their actions, they have brought themselves within its terms. The only recognisable group to which they can sensibly be said to belong is the group comprising those who fear persecution pursuant to the one child policy. For the reasons I have given, that cannot be regarded as a particular social group for the purposes of the Convention.[155]

McHugh J also pointed out that if the group in this case was defined broadly, as parents with one child, the persecution was not feared for reasons of membership of that group. Alternatively, if the group was defined narrowly by 'hedging' the group with qualifications to relate it to the persecution feared, then the definition of the group was circular.[156] In addition, he took the view that not all people obey the policy because they believe that they should only have one child since they simply accept the rewards the government gives people who obey the policy.[157] Nor, despite the ambiguities in the evidence presented about the situation in the appellant's region, did he accept that people with one child are sterilised as a matter of course.[158]

151 Ibid 341–2.
152 Ibid 342.
153 Ibid 347.
154 Ibid.
155 Ibid 342.
156 Ibid 353.
157 Ibid.
158 Ibid.

While the reasoning of Dawson and McHugh JJ appears logical, it has been demonstrated earlier that even in relation to generally applicable laws, the distinction between who people are and what they do is not always helpful. What the appellants and others like them do clearly is driven by who they are and what they believe in. The fact that some people with these beliefs nevertheless abandon them should not prevent those who do stand by their beliefs from constituting a social group. Moreover, the ambiguities in the evidence could indicate that in the appellant's region, whatever happened elsewhere, he was a member of a social group — people having one child — which was something he could not change and which led inevitably to forcible sterilisation. The fact that people in his position would not be viewed as a social group in other regions in China does not seem terribly relevant, if the focus is on the persecutor, which I think it should be, rather than society, or even society in that region.

It has already been pointed out that there are examples like criminalisation of gay sex which muddy the waters. While the criminalisation of gay sex is a relatively easy case to bring within the terms of the Refugee Convention as an inherently persecutory law, there is another example which is not so easy and yet may provide the basis for successful claims to refugee status, at least in theory. This is the case of *Republikflucht*. As with criminalisation of gay sex, characterisation of the ultimate objective of the law is more important than the act which the law targets, as is the context in which the law operates, and the effect on the victim. It may be possible to draw analogies between *Republikflucht* and the one child policy. Goodwin-Gill's analysis of *Republikflucht* is helpful:

> Totalitarian states severely restrict travel abroad by their nationals. Passports are difficult to obtain, while illegal border-crossing and absence abroad beyond the validity of an exit permit can attract heavy penalties. The question is, whether fear of prosecution and punishment under such laws can be equated with a well-founded fear of persecution on grounds of political opinion, especially where the claim to refugee status is based on nothing more than the anticipation of such prosecution and punishment. It may be argued that the individual in question, if returned, would be subject merely to prosecution for breach of a law of general application; he or she would not be 'singled out' for treatment amounting to persecution. Alternatively, more weight might be accorded to the object and purpose of such laws, and a context in which the fact of leaving or staying abroad is seen as a *political act*. It may reflect an actual and sufficient political opinion on the part of the individual, or dissident political opinion may be attributed to the individual by the authorities of the state of origin; in practice, however, many states are wary of recognising refugee status in such cases, for fear of attracting asylum seekers motivated by purely economic considerations.[159]

[159] Goodwin-Gill, above n 89, 53. See also Hathaway, *The Law of Refugee Status*, above n 17, 172–3 where he describes the case of *Republikflucht*, along with the criminalisation of freedom of political expression, as an example of an 'absolute political offence', where it is 'unreasonable to accept at face value the state of origin's characterization of the exercise of a core human right not only as illegitimate, but as just cause for punishment'.

In the case of the one child policy, it may be appropriate, as some authority in the United States indicates,[160] to view enforcement of the policy as involving the suppression of political dissent on the basis that to disobey the policy is to manifest opposition to it. It is arguable that in the context of an authoritarian state any disagreement with government policy is viewed as a threat to government itself, or as involving disloyalty to government, and that *this* is what drives the harsh enforcement measures pursuant to the policy. This may be so even where the central authorities do not actively condone what is done by local officials: it is the general climate towards dissent which matters. The fact that the one child policy involves childbirth, rather than some more usual political activity such as political speech, should not necessarily matter if the context in which it occurs indicates that the activity is politicised.[161] While the ultimate objective of the policy is to limit population growth, the means by which this goal is pursued, both through the express limitation of individual choice in size of family — rather than encouragement to make a responsible choice — and the brutal nature of some of the enforcement measures which seek to remove the person's very capacity to make her own choice, may mean that the policy persecutes people for what they are.[162] These factors may transform the policy from one which simply seeks to control population growth to one which attacks those disobeying the policy because of the fact that they dare to dissent: a policy which targets people for who they are rather than what they do.

McHugh J's comments that persecution is not defined by the 'nature of the conduct'[163] but by whether it discriminates against a person for one of the Convention grounds[164] are similar to the comments made by Dawson J concerning people who, by their actions, bring themselves within the terms of a generally applicable policy. McHugh J stated that conduct would not constitute persecution if 'appropriate and adapted to achieving some legitimate object of the country of the refugee' such as the general welfare of the state and its citizens.[165] He added that 'enforcement of laws designed to protect the general welfare of the state [or its people] are not ordinarily persecutory even though the laws may place additional burdens on the members of a particular race, religion or nationality or social group'.[166] He commented, however, that where a law implements sanctions against a particular group which are not applicable to the

160 *Guo v Carroll*, 842 FSupp 858 (EDVa 1994).

161 For a particularly useful examination of the dichotomy between political and private, see Thomas Spijkerboer, *Women and Refugee Status: Beyond the Public–Private Distinction*, Study Commissioned by the Hague Emancipation Council (1994) 45–6, 57–8.

162 Cf Sharon Hom who writes that the patriarchs of China have adopted the one child policy to address the latest threat to the state: women's bodies: Sharon Hom, 'Female Infanticide in China: the Human Rights Specter and Thoughts Towards (An)other Vision' (1991) 23 *Columbia Human Rights Law Review* 249.

163 *Chinese One Child Policy Case* (1997) 142 ALR 331, 354.

164 Ibid.

165 Ibid.

166 Ibid.

rest of society, such laws attract 'close' or strict scrutiny.[167] While he gave an odd illustration of this point, being a law to detain members of a particular race engaged in a civil war,[168] the basic point seems sound. Even if, for example, a law creates problems for someone who has particular religious beliefs, it may be that as the aim is not purposefully to inflict harm on members of that religion and applies to all members of the community, there is no issue of discrimination. A law which required all people not to have a religion would be inherently persecutory, but there are other laws which conflict only indirectly with the right to freedom of conscience.

Once again, however, while the basic point appears sound, it needs to be pushed further, and there are complications. First, it should be possible to catch cases of indirect discrimination through the concept of strict scrutiny. For example, safety regulations which require workers to be of a certain weight may exclude most women from particular occupations. If the weight requirement is really irrelevant to performing the task, then it is discriminatory.[169] Second, it is increasingly accepted that where a generally applicable law impacts more heavily, perhaps only, on those with strong religious or cultural beliefs or political opinions there may be scope for granting refugee status on the basis of a conscientious objector exception, particularly in the case of compulsory military service. The focus shifts from consideration of the motivation of the persecutor, which is not necessarily what the phrase 'for reasons of' connotes,[170] to the perspective of the victims and the effect on them.

The question with conscientious objection to military service is whether there is a sincere belief for reasons of religion or conscience, perhaps relating to the particular war being waged such as whether it suppresses the right to self-determination, that it is wrong to fight. The conscientious objection may also stem from a citizen's belief that the state should not have the right to call up or draft its citizens in the first place. As both Goodwin-Gill and Hathaway argue, there is growing acceptance of the concept of conscientious objection in such cases. This is despite the fact that it could be said that military service is only persecutory from the viewpoint of the conscientious objector, and that the state is not motivated by Convention reasons (unless military service clearly discriminates between particular races or other groups) but by the purpose of waging the war.[171]

If a conscientious objection paradigm is adopted in relation to the one child policy, a question may arise as to what should count as a good reason to disobey the policy. It might require a distinction between those acting on a sincere belief as to the illegitimacy of government setting an absolute limit, and who will make

[167] Ibid 355.
[168] Ibid.
[169] For an examination of these issues, see Rosemary Hunter, *Indirect Discrimination in the Workplace* (1992).
[170] Goodwin-Gill, above n 89, 51.
[171] Ibid 54–9; Hathaway, *The Law of Refugee Status*, above n 17, 179–85.

responsible decisions (to have two children, for example), as opposed to those who simply desire to have more than one child. (Forcible sterilisation of members of either group would be objectionable, though.) And what is to be made of those who choose to have large families on religious grounds or on the basis of traditional cultural beliefs regarding family size: as stated previously, it is not necessarily inappropriate to *encourage* change of such beliefs since they are often not integral to the particular culture or religion at all.[172] (Though it is thoroughly objectionable to change them by force, especially by forcible sterilisation.) In relation to the cultural reasons for the belief, while as a feminist I am concerned by the disproportionate impact of the one child policy on women, what of the fact that more than one child may be desired because of son preference?

Goodwin-Gill addresses the problem of conscientious objection as follows:

> It is increasingly accepted in a variety of different contexts that it may be unconscionable to require the individual to change, or to exercise their freedom of choice differently. The question is, how to distinguish between those opponents of state authority who do, and those who do not, require international protection. For sincerely held reasons of conscience may motivate the individual who refuses to pay such proportion of income tax as is destined for military expenditures; or the shop-keeper who wishes to trade on Sundays; or the parents who, on grounds of religious conviction, refuse to send their children to public schools.[173]

He distinguishes the reluctant taxpayer from the conscientious objector to military service on the basis that the taxpayer is not asked to engage in active complicity with the aims of the war.[174] In the case of the one child policy, it might be argued that limits on the size of family are not as unreasonable as forcing people to fight against their consciences and to risk their own lives. However, the right to found a family constitutes a particularly strong prohibition on governmental interference with the right to procreation.[175] While article 23(2) of the ICCPR (which protects the right) is not listed as a non-derogable right, there are no limitations expressly included in the article. Thus while there is no mention of unlimited family size, this is because the matter is left to the choice of the couple involved. Given that the right is one which may be exercised differently by different people (some might want no children, others many) the one child policy could be regarded as a policy which discriminates against those who want to exercise the right in such a way as to have more than one child. Furthermore, Goodwin-Gill also suggests that proportionality is a balancing factor in cases of conscientious objection to military service (suggesting a need for alternative service, for example).[176] It could be argued that the disproportionate measures of enforcement utilised in some areas of China mean that refugee

[172] See generally above n 91 and accompanying text.
[173] Goodwin-Gill, above n 89, 56.
[174] Ibid 57.
[175] Manfred Nowak, *UN Covenant on Civil and Political Rights* (1993) 413–4.
[176] Goodwin-Gill, above n 89, 58.

status should be granted to those likely to be subjected to them, who of course are precisely those with beliefs that they should be able to determine the size of their family or who have cultural or religious beliefs about family size.

Ultimately, answers to these questions require not only an assessment of the legitimacy of the measures inflicted pursuant to the policy itself, because it might be reasonable to *ask* people to have only one child, but the legitimacy of the policy itself in that it sets an absolute limit, one which will be coercively enforced if the incentives to meet the limit do not work, rather than stopping at the point where people are merely encouraged to adhere to the quota. No member of the High Court was prepared to assess the legitimacy of the policy itself, a question which is returned to in Part VIII.

It may also be necessary to provide some basis for distinguishing between those who refuse to comply with the one child policy and those who do not believe that they should be subject to legitimate constraints of the criminal law, such as the law against murder, or policies such as progressive taxation which seek to redistribute wealth. This is necessary because of the circularity problem (anyone disobeying a policy is persecuted because of membership of a particular social group); and because disobedience of such laws may involve philosophical issues, or questions about the scope of governmental authority, rather than merely factual points of distinction or problems of proof. By factual points of distinction, I am referring to the fact that it is unusual for murderers to have a philosophical commitment to killing: they usually have a motive for murder which is very specific to their victim. In the case of tax avoiders, the motivation may be greed, pure and simple, rather than a philosophical disagreement with the law which is disobeyed. However, sometimes objection to paying tax does raise philosophical questions about the extent of government involvement in individuals' lives. In Part VIII, some answers to these questions are provided which demonstrate that the law against murder and taxation policy do not involve violations of human rights and are philosophically justified, at least within liberal political theory.

Adopting a conscientious objection paradigm could mean that the appellants are viewed as members of a social group involved in a common attempt to assert a right. However, the attempts of counsel to bring the appellants into such a group were rejected by both McHugh and Dawson JJ.

### 3 *A Common Attempt to Assert a Human Right: McHugh and Dawson JJ*

Dawson J cast doubt on the idea that there is a right to a family of unlimited size.[177] However, the question is not whether there is a right to a family of unlimited size, but whether government has the right to set a compulsory limit on the number of children or whether the final choice is left to the individuals involved. He also commented on the belief-structure of the male appellant, as noted by the RRT member in her finding that persecution was not for reasons of

[177] *Chinese One Child Policy Case* (1997) 142 ALR 331, 343.

political opinion:[178] '[w]hat the appellants in truth object to is not the one child policy *per se*, but its enforcement by officials in their area by forcible sterilisation.'[179] Although Dawson J accepted that forcible sterilisation was a violation of personal security, he found that this merely established that the couple had a well-founded fear of persecution, not that the persecution was because of membership in a particular social group.[180] This was because it is in the nature of human rights that *all* people hold them. Thus something more is required in order for common assertion of a right to be the unifying characteristic of a group of people. This 'something more' would be either a voluntary association among people attempting to exercise the right or a societal perception that such people were members of a group because of their wish to exercise the right.[181] Referring to the interpretation of voluntary association by the minority in the Canadian decision of *Chan*,[182] his Honour could not see that parents from 'disparate' walks of life could be viewed as having 'associational qualities' if the *only* thing uniting them is the fact that they do not want to be prevented from having more children.[183]

McHugh J analysed the two limbs of the definition of 'particular social group' relied upon by the RRT member, 'those who ... do not accept the limitations placed on them [or] who are coerced or forced into being sterilised'.[184] He held that the second attribute, being forced into sterilisation, refers to the fear of persecution and is impermissibly circular.[185] In relation to the first attribute, not accepting the limitations placed on them, he held that there was no evidence before the Tribunal indicating that it was this attribute which attracted persecution.[186] Such evidence could include a public demonstration by persons opposing the one child policy, which, if this fact led to persecution, would mean that these persons could be said to be persecuted on the basis of both membership of a particular social group and political opinion.[187] Otherwise, the putative group were simply a 'disparate' collection of people who want to have more than one child.[188] Similarly, although this point was not made contemporaneously with his examination of this issue, McHugh J found that the Tribunal had acknowledged that 'those who complied with the government's policy — *whatever their own wishes about having more than one child* — were rewarded, not punished'.[189]

178 RRT Decision N94/3000 (20 May 1994) 11.
179 *Chinese One Child Policy Case* (1997) 142 ALR 331, 343.
180 Ibid.
181 Ibid 345.
182 [1995] 3 SCR 593, 644–6 (La Forest J).
183 *Chinese One Child Policy Case* (1997) 142 ALR 331, 344.
184 Ibid 363.
185 Ibid.
186 Ibid 363–4.
187 Ibid 363.
188 Ibid.
189 Ibid 353 (emphasis added).

Both judges appeared to treat the issue of a social group comprised of people making a common attempt to assert a right to have more than one child as a problem of proof or lack of evidence as to the motivation of the persecutors. Both may also have perceived a problem of proof relating to the belief structure of the appellants, that is whether they genuinely believed that they should be entitled to have more children and that the state should be excluded from this decision, or whether they simply 'wanted' more children. In these matters, they appeared constrained by the findings of fact by the RRT member regarding persecution for reasons of political opinion.[190]

In relation to the question of proof regarding the appellants' beliefs, by my reading of the male appellant's comment, he was indicating that he disagreed with the particular limit set by the government,[191] which may also indicate a view that it should be left to the individual to decide the limit responsibly. Again, what the appellant was likely to do was clearly an indication of what he thought about the policy. It seems unfair, and perhaps contradictory to the idea that human rights inhere in all persons, to require the appellant to articulate his views in the precise terms of the relevant international instruments, that is, in terms of his 'right to found a family'.[192] Moreover, it is not immediately apparent why an examination of the appellants' belief structure is at all necessary unless one adopts a conscientious objection paradigm in relation to the one child policy, as examined above. Then, as argued above, the nature of the right affected may mean that the policy is inherently political and discriminatory against those who want to exercise their rights in a particular way. If the question in fact revolves around a consideration of what the persecutors' motivation is, rather than the victim's, then the inquiry is completely misplaced.

In relation to the question of proof regarding the persecutors' motivation, it is also well accepted that there is no need for overt political activity such as a public demonstration or a voluntary association in order to make a finding of persecution on the basis of political opinion. It is now accepted that a political opinion may be attributed to, or implied from, conduct.[193] The question is whether, similar to the case of *Republikflucht*,[194] disobedience of the one child policy would be viewed by the authorities as a political act. In the context of an authoritarian state which puts an absolute limit on the number of children a person may have, as opposed to merely encouraging people to make responsible decisions, this is not an unreasonable proposition.

Moreover, on the earlier reasoning of both Dawson and McHugh JJ in relation to the dichotomy between what someone does and is, it would still be difficult to prove that the persecution feared, forcible sterilisation, was inflicted as a result of the group's expression of their desire to exercise a right to have more chil-

190 RRT Decision N94/3000 (20 May 1994) 11.
191 He seemed to indicate that two children would be an appropriate limit.
192 See, eg, ICCPR, above n 23, art 23(2).
193 Hathaway, *The Law of Refugee Status*, above n 17, 152.
194 See above n 159 and accompanying text.

dren, through a public demonstration, as opposed to the fear by the authorities that particular individuals would engage in conduct violating the one child policy (which applies to all). Perhaps additional findings of fact, such as those commented on by the minority in the Canadian decision in *Chan*, to the effect that the appellant in that case had been labelled 'an enemy of the class' and that he had made life difficult for those responsible for administering the childbirth quota,[195] would have sufficed as proof. In these instances, the persecution would be directed against the person for reasons of political opinion, and the dissident identity constructed in relation to objectors to the one child policy, rather than mere disobedience of the policy itself. Certainly, Dawson J's comment on the need for *either* a voluntary association or proof regarding societal perceptions indicates that he wants more sociological evidence about the way in which objectors to the one child policy are perceived, and that he is constrained by findings of fact by the RRT member. On the other hand, perhaps there is a failure to work with, and theorise about, such evidence as is available in light of the overall political context in China. Certainly, the evidence adduced in *Chan* may demonstrate how fine, perhaps non-existent, the line is between what someone does and what someone is perceived to be as a result of what he or she may wish to do.

Dawson J's point that human rights are held by all is an important one. However, where a right may be exercised in different ways, it seems a legitimate approach to view persons who want to exercise their rights in a particular way as 'voluntarily associated' with that right or status as held by the minority in the Canadian decision of *Chan*[196] and by Sackville J.[197] Accordingly, the appellants, and others like them, fear persecution for reasons of membership of a particular social group.

### C *'Particular Social Group': The Minority*

#### 1 *Brennan CJ*

According to Brennan CJ, forced sterilisation violated the right to security of the person and destroyed a person's reproductive capacity.[198] The nexus with the five Convention grounds necessitated an element of discrimination.[199] Non-discriminatory punishment for contravention of a criminal law of general application was excluded from the reach of the Convention definition of a refugee.[200] Brennan CJ held that according to the ordinary words used, a particular social group is identified by any characteristic distinguishing the

195 *Chan* [1995] 3 SCR 593, 647–8.
196 [1995] 3 SCR 593.
197 *Minister for Immigration and Ethnic Affairs v Respondent A* (1994) 127 ALR 383.
198 *Chinese One Child Policy Case* (1997) 142 ALR 331, 334.
199 Ibid.
200 Ibid 334–5.

members from society at large.[201] Thus the key to refugee status must be that the well-founded fear of human rights violation is for a 'reason that distinguishes the victims as a group from society at large'.[202] He rejected the reasoning in *Ward* that the term 'particular social group' was not a safety net for anyone persecuted but who did not fall within the other four grounds.[203] Brennan CJ approved of the RRT member's construction of a 'particular social group' and stated that:

> [t]he characteristic of being the parent of a child and not having voluntarily adopted an approved birth-preventing mechanism distinguishes the appellants as members of a social group that shares that characteristic. It is their membership of that group that makes them liable to sterilisation if they return to Bang Hu.[204]

It is difficult initially to see why Brennan CJ took the view that he was construing 'particular social group' in a manner which created a 'safety net' for any group subjected to a human rights violation, given his stated requirement that there be some discrimination in the reasons for persecution. The point of difference between his opinion and that of the majority seems to be that the majority took the view that the characteristic of not voluntarily accepting birth control mechanisms was not what attracts measures such as forcible sterilisation. According to the majority, this was not a feature which 'united' or defined the group in the eyes of society and therefore attracted persecution. It was simply an indication that members of the putative group would act in violation of the policy, and this is what attracted persecution. Brennan CJ did not require that the common characteristic for the purposes of a social group 'unite' individuals as a group in the eyes of society, as the majority did. All that he required was that people be persecuted for a reason which distinguished them from other people in society. However, as perceived by the majority, the *reason* for the persecution, in one sense, is to ensure that population growth is limited, and the appellants have brought themselves within the terms of a generally applicable policy by virtue of their conduct. Accordingly, Brennan CJ's construction of the persecuted group could be viewed as circular. There may not be anything to distinguish the persecuted group from the rest of society at all, apart from the fact that these individuals are prepared to violate the policy. The reason for their preparedness to do so is irrelevant.

This may explain why he did not require a characteristic to unite members of the group in the eyes of society and why he viewed his own approach as a safety net. He may implicitly be admitting that the reason for the persecution was the appellants' reaction to a generally applicable policy. This is circular, but it certainly involves a reason for persecution which distinguishes the appellants from the rest of society: the appellants were not prepared to obey the policy, while the rest of society was. This could also explain why he felt it necessary to

[201] Ibid 335.
[202] Ibid 336.
[203] Ibid.
[204] Ibid 338.

make an appeal to the humanitarian aims of the Convention[205] and why he seemed to ignore the often stated, but doctrinally controversial, order of treaty interpretation which proceeds by intrinsic means first and then extrinsic means, as a backup.[206] Brennan CJ may believe that the framers of the Convention had no idea what they meant when they added the words 'particular social group', and accordingly all that the Convention grounds were meant to add to the concept of persecution was a notion of distinguishing among members of society on some basis. This is not a totally unreasonable interpretation.

An alternative construction of Brennan CJ's opinion is that he is simply appealing to the idea of non-discrimination which should indeed be the focus for interpretation of the Refugee Convention. What Brennan CJ may be articulating is that for those who do hold strong beliefs, whether religious beliefs connected to procreation (such as those connected with the Catholic faith), or more general political beliefs related to the proper extent of government interference in individual decision-making regarding procreation, or traditional Chinese cultural beliefs that larger families are a good thing, the policy itself will be *felt* as persecutory. It is also more likely that such persons will be the ones resisting and violating the policy. Others in society may well believe that the policy is a good thing and comply with it *voluntarily*, particularly given the incentives to do so. Of course, the disincentives may mean that some people's beliefs change or that they comply with the policy regardless of their beliefs. However, that should not exclude those who do act on their beliefs from being viewed as a particular social group. Thus, although the policy is seemingly neutral, it actually discriminates against those who cannot agree that they should only have one child, or that the state should make decisions about family size for them. Carping about the difference between what one wants to do as opposed to who one is seems beside the point. Again, the situation may be somewhat akin to that of conscientious objection to military service. However, as explained previously, there are issues of proof concerning the sincere beliefs of the conscientious objector, before conscientious objection may lead to refugee status. In relation to the one child policy, there is the rather large preliminary question of whether it is legitimate to resist the policy, which cannot be answered unless the legitimacy of the policy itself, as well as the manner in which it is pursued, is addressed.

2 *Kirby J*

In the course of outlining his general approach to the appeal and a number of matters which he did not regard as being in issue, Kirby J tackled the argument that the appellants and others like them did not fall within a particular social group until the introduction of the one child policy by acknowledging that membership of a group may be imputed. He said that self-identity as a member of the group was not necessary. The persecutors' imputation of membership of the group was the key issue. To illustrate this point, his Honour used the

[205] Ibid 333.
[206] Ibid 332.

example of German citizens of Jewish ethnicity who did not self-identify as Jewish, but rather as German, who were nevertheless persecuted as Jews by the Nazi regime.[207] He noted that there was no association, society or club to represent the interests of the social group asserted to exist by the appellants but said that this was 'hardly surprising given the nature of the society described in the evidence'.[208]

He then moved to a detailed consideration of the category of particular social group. Referring to the word 'particular', Kirby J said that this distinguished social groups from 'a crowd or section of the population lacking sufficient common identifiers or experience'.[209] In relation to the word 'group', he said that while this did not require a voluntary association, which he expressly rejected as a prerequisite,[210] it did require that the members of the group are recognisable: '[t]hey must be definable by reference to common pre-existing features'.[211] However, it was not required that members be known to be members of the group, even by each other, 'because the very persecution which helps to define or reinforce the 'group' may, in some cases, make such identification dangerous.'[212]

Kirby J then referred to the relationship between imputed political opinion and membership of a particular social group.[213] He related this passage to the situation at hand:

> As revealed in the evidence, the policies of the government of the PRC concerning the 'one child' family limitation are promoted both by inducements and rewards and by more drastic means such as compulsory sterilisation and abortion. Clearly enough, such policies would be seriously impeded if a sufficient number of persons in the suggested 'group' resisted the imposition of that policy. The very existence of a 'group' of persons, inclined to oppose, evade and flee the imposition of such a policy, would suggest a strain upon the loyalty of group members to the Government of the PRC. It would postulate the potential willingness of such group members to resist the imposition of that country's law and policies. The actual loyalty of such a 'group' to the government might be different from the government's perception of that loyalty. A potential danger of the group lies in the perceived risk of alienation from the government which, in turn, could give rise to a governmental response and to a well-founded fear of persecution.[214]

Kirby J rejected the tests adopted in Canada and the United States.[215] He also commented on the artificiality of the distinction between what a person does and who he or she is, stating that oppressors target what people do as this is evidence

[207] Ibid 384.
[208] Ibid 386.
[209] Ibid 389.
[210] Ibid 388.
[211] Ibid 389.
[212] Ibid. See also Kirby J's summary of conclusions: 394–6.
[213] Ibid, citing *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, UN Doc HCR/IP/4/Eng/REV 1 (1979).
[214] *Chinese One Child Policy Case* (1997) 142 ALR 331, 389–90.
[215] Ibid 393.

of what they believe.[216] An element of intuition on the part of decision-makers was accepted as being necessary in recognising a particular social group.[217] Kirby J distinguished between the situation of the appellants and the situation of persons like Morato who face criminal prosecution or 'retaliation from erstwhile compatriots',[218] stating that the law and policy relating to the one child policy goes beyond the acceptable limits of the criminal law as it is incompatible with human rights.[219]

For the reasons given earlier, Kirby J's approach, which focuses on the inferences which may be drawn from the conduct of the appellants and others like them, is a more reasonable one than that adopted by McHugh and Dawson JJ who require proof of persecution for organisation around a particular right, or refusal to accept the limitations on the appellants, by evidence such as a public demonstration or a voluntary association.[220] However, the majority judges think that the persecutors are not motivated to suppress a particular identity or belief-structure but simply to control population growth. This, it is agreed by Kirby J, is a legitimate aim, indeed it is agreed by the entire bench that the problem with the policy is that it is enforced through measures like forcible sterilisation. Essentially, Kirby J addressed the question of whether the policy seeks to suppress identity or is merely aimed at acts which threaten population quotas, by pointing out that in an authoritarian state like China, there may be a pronounced sense of loyalty required from citizens in the sense of conforming to particular political views and the programs adopted by the government. This is demonstrated by the evidence presented in *Chan* that the applicant was called a class enemy.[221] It is in the nature of authoritarian regimes that any dissidence is seen as a threat to the regime itself.

Whether this argument suffices to demonstrate that people disobeying the one child policy are punished for what they are perceived to be (class enemies, for example) may depend on whether the measures which follow, forcible sterilisation, job loss and so on, are characterised as enforcement of the policy or punishment for having this identity. Like Kirby J, I think that this may be a very difficult line to draw. While the majority clearly views the measures as enforcement of the policy, it is difficult to accept that these measures are proportionate to their aims. While it is possible to accept that forcible sterilisation aims in a very practical manner to prevent any future violation of the one child policy, it is a brutal operation and must be viewed in the context of job loss and the denial of benefits to any children apart from the first child. How is denial of employment really relevant to preventing *future* births, unless it is thought to deter potential future parents since they may feel unable to fill extra mouths? These measures

216 Ibid.
217 Ibid 394.
218 Ibid 395.
219 Ibid.
220 See above Part VII(B)(3).
221 *Chan* [1995] 3 SCR 593, 647–8.

*may* have been adopted as deterrents to future likely offenders, but their extreme nature may mean that they can conceivably be construed as punishments not merely for the act of disobedience[222] but the very attempt to be disobedient: to be a 'dissenter'. Thus there may well be an element of political targeting, of suppressing an aspect of identity here. There are other contexts in which punishments are disproportionate to the crime (the death penalty, for example) that are not accepted as providing the basis for a claim to refugee status. However, in these cases, the criminal laws themselves do not necessarily discriminate between particular groups of people, nor are they necessarily aimed at activities protected by international human rights law, such as the right to found a family.[223]

Implicitly, Kirby J may accept that many people in China do choose to have one child, as he notes the economic inducements used to pursue the policy. This is a feature of the policy which is not emphasised by the majority and could be crucial to a decision that there is in fact invidious discrimination among different groups within society. This is turned to in the next section, where the legitimacy of the policy itself is addressed.

## VIII LEGITIMACY OF THE ONE CHILD POLICY

The question at stake in the case of the one child policy is whether there is an element of *invidious* discrimination among different sectors of the population, or whether the appellants in this case feared sanctions that would apply to any person who violated the one child policy.

The focus on discrimination or lack of equality is appropriate because the other four grounds of the Refugee Convention all centre on a notion of discrimination against groups for being different when they are not, or for not assimilating when they are entitled to be different. Racial discrimination, for example, may result in the denial of rights on the basis of equality with others, such as the right to work, on the false premise that people of a particular race are inferior

222 In *Chan*, Desjardins JA of the penultimate court of appeal found that sterilisation in some instances was not a preventative, but a punitive measure. See the analysis of this opinion by La Forest J in the decision of the final court of appeal, the Canadian Supreme Court: ibid 610.

223 There are some other situations in which criminal laws of general application pose interesting questions concerning the scope of the Convention. There may be situations where punishments have a disproportionate impact on groups of people because they, of necessity, are driven to commit certain crimes — for example, crimes of poverty. Hathaway argues that the poor may be viewed as a particular social group: Hathaway, *The Law of Refugee Status*, above n 17, 167. While stealing is not an activity protected by international human rights law, it may be justified if the state is failing in its obligations to fulfil economic, social and cultural rights. An examination of the British criminal justice system at the time of British colonisation of Australia suggests that the criminal law was used as a tool to punish people for being poor: a case of persecution for reasons of membership of a particular social group. In other situations the criminal law may be applied in a discriminatory fashion, in which case Hathaway argues that what is otherwise prosecution may be considered persecution: Hathaway, *The Law of Refugee Status*, above n 17, 167–9. In Australia, for example, the criminal law is sometimes used as a tool for harassment of Aborigines, whereby trivial offences are punished in a context where non-Aboriginal Australians would be unlikely to be punished, because Aborigines are viewed as posing a threat to police authority. See, eg, Greta Bird, 'The "Civilising Mission": Race and the Construction of Crime' (1987) 4 *Contemporary Legal Issues* 29.

workers. Alternatively, it may deny members of a particular race the exercise of rights to their own culture, pursuant to the prejudicial belief that this culture is inferior to others. Even political opinion, which at first may seem to be the 'odd one out', fits this analysis. The point about persecution for political opinion, is that it should be open for people to hold unpopular opinions or opinions which differ from those of the government. Naturally, however, only those who disagree with totalitarian governments will be persecuted. People holding opinions that are the same as governmental opinions or supportive of governmental policies or views will be encouraged to speak their mind and to act on their opinions.

The answer as to whether there is discrimination among groups within society on the basis of the one child policy depends on the way in which the policy is pursued and on how people's reactions to the methods of enforcing the policy are characterised. This context affects the way in which the notion of equality or discrimination is construed. Is it the case that no couple in China chooses whether to have one child or more: everyone is limited in their choices (unless, perhaps, they decide to have no children)? If so, there is no element of discrimination among sectors of the population. Alternatively, do some couples actively choose to have only one child as a result of the economic incentives offered pursuant to the policy, or because they agree that population limitation is important, meaning that only those couples who choose to have more than one child are subjected to measures such as forcible sterilisation? If so, it is possible to view the policy as discriminating between different sectors of the population. The policy discriminates between those who are able to agree that decisions regarding size of family should be left to government or that the limit of one child chosen by the government is appropriate, on the one hand, and, on the other hand, those who persist in the belief that they should be able to decide how many children they should have, or that they should be able to choose to have more than one child, or to adhere to the traditional Chinese cultural belief that a family of large size is best. Only the latter group is in danger of being subjected to measures like forcible sterilisation.

Is it true that in an authoritarian state like China, people never make choices about their behaviour? This question is avoided by the majority of the High Court, because of the fact that the policy baldly requires that all couples may have only one child. There is no discrimination, the policy applies to everyone. However, the policy is only going to create problems for people who cannot agree with it, and it is possible that those complying with the policy do agree with it. Indeed, the RRT member put the evidence demonstrating popular support for the policy to the male applicant for refugee status.[224] A negative answer to the question as to whether people ever make choices about their behaviour in China overestimates the competence of the Chinese authorities to successfully bend their citizens to governmental edicts. There is evidence that

[224] RRT Decision N94/3000 (20 May 1994) 12, referring to a cable from the Department of Foreign Affairs and Trade, Commonwealth of Australia, Cable 0.SH8898, 18 October 1993.

Chinese citizens do make choices about their behaviour even when the government requires conformity: political dissent does occur.

In my view, the majority of the High Court has not given convincing reasons why those who do act on their beliefs are not perceived by society or the persecutors as a social group organising around the right to have more than one child or to freely and responsibly decide the number, timing and spacing of their children. As stated previously, this may be partly due to lack of evidence, but it also seems to stem from a failure to push some of the issues as far as they can be pushed in the abstract. The fact that some persons may agree with the dissenters but choose not to express, or act on, dissenting views does not mean that those who do are persecuted for their individual activity rather than what they believe or are as people. Would superficial conversions from Christianity by some early Christians to avoid persecution have meant that other early Christians were not an easily cognisable group because of their beliefs and persecuted for their membership in that group? The idea that these people are not perceived as united by their belief does not ring true in all respects. The point that the persecution may not be motivated by the fact of membership of that particular social group sharing that belief is accurate in some respects. The real issue is whether persecution is *for reasons of* membership of that particular social group or despite membership of a particular social group. If the terms *for reasons of* are not read as 'because' (which Goodwin-Gill suggests gives a different emphasis to the words),[225] the fact that the policy, and its sometimes brutal enforcement measures, only impacts on those who disagree with it means that grant of refugee status in these circumstances could be a plausible reading of the Refugee Convention.

It may also be that an adaptation of the conscientious objection exception to the one child policy or recourse to the idea of attributed political opinion is able to transform the persecution suffered into persecution for a Convention reason. Imputed political opinion is not unreasonable given the nature of the Chinese government, but more evidence about the manner in which the policy is applied might be necessary to convince a tribunal or Court of this. It may be, on a closer scrutiny of the way in which the one child policy is pursued, that although it is for a legitimate aim (control of population growth), the propaganda for the policy focuses on delegitimising the practice of having larger families by naming those who persist with this cultural practice as class enemies or something similar. Accordingly, the distinction between what someone does and is has been rendered non-existent by the persecutors. It must be acknowledged, however, that there appeared to be no evidence of this before the RRT member.[226] Conscientious objection involves some difficulty in that it may require an examination of the legitimacy of the state setting a limit on childbirth, not simply examination of the measures for enforcing the policy. Both approaches raise

[225] Goodwin-Gill, above n 89, 51.
[226] RRT Decision N94/3000 (20 May 1994).

questions as to whether the enforcement of any generally applicable government policy at all could be challenged under these rubrics.

As to whether it matters if society did not recognise the persecuted group before the policy itself was implemented, the answer is clearly that it does not. Moreover, if what is at stake is a traditional cultural understanding of families which says that many children are best, it is difficult to argue that the policy does not attack a pre-existing feature. Indeed, the policy is trying to surmount these attitudes. As the RRT member perceived, there are those who win the approval of the government by changing their belief structure, and those who persist in the old ways. This demonstrates that it may be possible that there is an element of suppressing a particular identity, even if the ultimate aim of the policy is the legitimate one of controlling population growth. The question is whether the persecution is therefore *for reasons of* membership in this group, or simply based on the fact that the couples concerned will violate the policy, and whether these two things are really different. It is certainly arguable that what someone does may be perceived as an indication of who someone is in this context. The question then becomes whether it is legitimate to attempt coercively to change *who* the person is.

Ultimately then, the answer to the riddle of the one child policy depends on an assessment of the validity of the one child policy itself. Accepting for the purposes of argument that the policy does encourage people to agree to have one child and that generally Chinese citizens agree with the policy, as opposed to having it forced upon them, is the discrimination between those who agree to have one child and those who want to have more children invidious because it infringes the right to choose the size of one's family in equality with those who voluntarily choose to have one child, or because it infringes a right to adhere to traditional cultural ways? Is there a right to have a family of the size you choose, or the size which culture has traditionally dictated is good, just as there is a right to have a different sexual orientation or preference to that of heterosexuality? Or may limitations be placed on this right? Does it matter that the reason you may desire to have more than one child is because of son preference, or is it more egregious that in forcing people to obey the policy women suffer most?

If it is true that limitations may be placed on the right to found a family through restrictions on the permissible size of the family, then the fact that the policy is in some instances enforced by measures such as forced sterilisation means that only one element of the definition of a refugee is met, the element of human rights violation. There is no element of invidious discrimination among groups within society that results in the selection of these rights-violative measures for particular people.

Is it legitimate to limit a couple's choice about family size in order to control population growth? The answer given so far by the international community to this question is negative. It is acknowledged that control of population growth is essential. However, it is also acknowledged that coercive control may not be successful, because repression of a practice, as opposed to reasoned discussion

of why it is harmful, does not really change people. This might be particularly true in China, where ideas about size of family may still be culturally embedded (and indeed, there is evidence that in rural areas, the policy is not so strictly enforced). The terms of article 16(1) of the Universal Declaration of Human Rights[227] and article 23(2) of the ICCPR[228] constitute a strict prohibition on governmental interference. The Human Rights Committee has stated that family planning is permissible, *but must not be coercive*.[229] Setting a compulsory limit is surely coercive in and of itself. At the Cairo Conference on Population and Development, the importance of gaining free and informed participation, particularly of women, in family planning programs was acknowledged. The right to found a family was expressed in terms of the right of individuals 'freely and responsibly' to take decisions regarding childbirth, the same language as that used in article 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women.[230] While there is a tension between 'freely' and 'responsibly', this suggests that government may encourage citizens to aspire to small families, but that a compulsory limit cannot be set and pursued with coercive measures, whether they be imprisonment or measures such as sterilisation. The conference platform specifically stated that quotas should not be set.[231] The final decision as to family size must be left with the individuals involved. Responsible decisions are best encouraged by empowering education (as opposed to classic 're-education') as to the benefits of having smaller families, in a context where government ensures that it provides properly for the economic welfare of its citizens, removing the economic need for many children.

Finally, it is necessary to deal with the issue of opposition to other policies. Is regulation of family size less like criminalisation of gay sex, and more like criminalisation of murder or laws for progressive taxation? The law against murder is a law which applies to conduct of individuals. It could be construed as a law which divides society into two groups of people: killers and non-killers, a criminal class as opposed to a criminal act. However, even if that analysis is accepted, it is an unrealistic characterisation of the aims of the law. The law legitimately aims to protect the equal right to life of all citizens, by constraining the liberty of all citizens to kill others. In liberal philosophical terms, there is no invidious discrimination because a reasonable balance is struck between the liberty of some and equality for all. In terms of positive law, the right to life is a non-derogable right that one may only be deprived of through due process of law.[232] Progressive taxation laws may also be characterised as discriminating

[227] Universal Declaration of Human Rights, 10 December 1948, GA Res 217A, 3 UN GAOR (1948), UN Doc A/180, 71, art 16(1).

[228] ICCPR, above n 23, art 23(2).

[229] *Human Rights Committee's General Comment on ICCPR Article 23*, above n 25.

[230] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, (1980) 19 ILM 33 (entered into force 3 September 1981); see also *Report of the International Conference on Population and Development*, above n 22, [7.3].

[231] *Report of the International Conference on Population and Development*, above n 22, [7.12].

[232] ICCPR, above n 23, art 6.

between different groups in society, rich and poor, in this case against the rich and for the poor. However, unless one takes the libertarian view that the rich have earned their wealth and progressive taxation is an undue restriction on the liberty of individuals,[233] one accepts progressive taxation as a reasonable limitation on liberty and the right to property in favour of real equality. As Dworkin argues, there are some liberties which amount to no more than 'the right to eat vanilla icecream', or 'to drive up town on Lexington Avenue'[234] because of the need to ensure real equality for others. Again, in terms of positive law, there is no absolute right to property, and indeed a right to property is not even mentioned in the ICCPR.

What are the consequences of this analysis for refugee law? If brutal enforcement measures such as forcible sterilisation occur, it could be considered appropriate to grant refugee status. However, this may be perceived as difficult by domestic tribunals in potential countries of asylum if it involves an assessment of whether other population limitation measures should be adopted, even though decisions regarding refugee status always involve some condemnation of the country of origin for human rights violation. Moreover, there will be a fear of floodgates. However, not only is it clear that the floodgates will not be opened (as Kirby J acknowledged) but this merely heightens the need for governments to work to reduce the root causes of asylum-seekers' flight by offering views on alternative methods of controlling population growth, and technical and financial assistance towards this aim. Unfortunately, however, not only do countries like Australia dislike criticising foreign governments over their human rights records, but the populations of Western developed countries may be happy to permit the brunt of population limitation to be borne by the Chinese. We do not demonstrate much commitment to limiting other factors which may make life on this planet unsustainable, such as restraining our conspicuous consumption which is not prohibited in any human rights instrument. (The International Covenant on Economic, Social and Cultural Rights[235] refers to an 'adequate standard of living' and 'continuously improving living conditions', neither of which are incompatible with the idea of *sustainable* development.) Indeed, Australia has recently threatened to withdraw from the Framework Convention on Climate Change because of 'special circumstances' related to its economy.[236]

This leads to the final point which should be made about assessing the legitimacy of the policy. There are many aspects of the problem which privilege the state's perspective regarding particular issues. The Chinese authorities' assessment of how to go about family planning is paid undue deference, while the problem of refugee status raises the question of an exception to Australia's

[233] See, eg, Robert Nozick, *Anarchy, State and Utopia* (1974).

[234] Ronald Dworkin, 'Liberalism' in Stuart Hampshire (ed), *Public and Private Morality* (1978) 113, 124.

[235] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

[236] See, eg, Craig Skehan, 'Threat to Quit UN Greenhouse Pact', *The Sydney Morning Herald* (Sydney) 30 April 1997, 3.

otherwise plenary power to control immigration. Limitation of population growth is raised in two ways: birth control by an authoritarian state; and immigration restriction by a rich, developed state. It appears that the West is content to exclude people fleeing enforcement of a policy which seeks to address a problem to which we all contribute in many ways.

## IX FUTURE DIRECTIONS: GENDER-BASED PERSECUTION AND A POSSIBLE EXECUTIVE RESPONSE

The majority judges said much about their view that the appellants on the facts of this case were not persecuted for reasons of membership of a particular social group, however both the majority and the minority refrained from laying down anything other than very broad guidelines for the ascertainment of a social group. In the case of the majority this guidance consisted of the finding that the group must be cognisable by the rest of society because of some common characteristic which 'unites' them. There are many indications in the majority judgments that the questions relating to particular social group depend heavily on the factual context. Thus the onus is on decision-makers to engage with the broad pronouncements of general principle by the Court and apply them: no magic formulae will be forthcoming.

The High Court did not adopt the requirement of a voluntary association as suggested by United States authority.[237] This approach would have seriously restricted the application of the Refugee Convention to gender-based social groups. Not all women associate, whether voluntarily or not. By contrast, if the *ejusdem generis* approach is adopted, sex or gender could be the characteristic that defines the group, without more. The High Court did not expressly adopt the *ejusdem generis* approach, but many of the judges showed an appreciation of the insights gained from that approach. For example, the acknowledgment by McHugh J that a group may be disparate apart from one characteristic common to the group, and the understanding that perceptions of those outside the group are more important than the perceptions of the members of the group, are both insights that may be gained from the *ejusdem generis* approach.

The test adopted by the majority was the requirement of a 'unifying characteristic'. The question is what this means. Goodwin-Gill points out that the term 'linking' characteristic may be a preferable term.[238] The term 'unites' suggests something more than a common characteristic, as Dawson J notes.[239] However, in my opinion, there is scope, and good reason, to interpret the High Court's ruling on particular social groups to encompass gender-based groups. There is no general problem with circularity in relation to women or other gender-based groups, as there is with the one child policy. There is clearly a pre-existing

[237] *Sanchez-Trujillo*, 801 F2nd 1571, 1576 (9th Cir, 1986).
[238] Goodwin-Gill, above n 89, 47.
[239] *Chinese One Child Policy Case* (1997) 142 ALR 331, 341.

characteristic that identifies the group and attracts persecution. The group is not defined solely by the persecution feared. In many ways, it is an externally perceived or imputed characteristic, but both Dawson and McHugh JJ acknowledge that external, rather than internal, perceptions may be important.[240] That characteristic is sex or gender.

That sex or gender may 'unify' women (and indeed men) in the eyes of society, as required by the majority, is clear. Certain characteristics may be ascribed to members of each sex and roles allotted accordingly, without regard to who these people are as individuals. Gender discrimination is group-based discrimination. It is invidious because it denies equality. It may deny women benefits of society such as education, work, and political participation. Thus gender operates as a characteristic that unites people in the eyes of society, enabling them to be set apart from society for certain purposes. If gender is not such a 'uniting' characteristic, then I have to confess that I do not understand what such a characteristic would be, unless what is required is actually a voluntary association.

The fact of gender discrimination has resulted in many efforts to combat sex stereotypes, including the Convention on the Elimination of All Forms of Discrimination Against Women.[241] Of course, gender is simply one characteristic of any woman, and there may be intersections with other characteristics that define the experiences of particular women, such as race, or living in a developing country. However, this does not deny the role that gender may play the in persecution of women. McHugh J acknowledges that such disparities in experience are not fatal to the perception that a particular social group is constructed around one characteristic.[242] There is a worrying reference by Dawson J to the 'disparate' nature of people who simply want more than one child,[243] particularly given the context of China where such characteristics are highly relevant and closely monitored. A similar comment is made by McHugh J.[244] However, these comments may be better read in light of the majority's primary concern, being the insertion of the reference to persecution pursuant to a generally applicable policy into the putative group. Furthermore, as Audrey Macklin writes in her sensitive article on the problematic nature of categorising women's experiences for the purposes of refugee law, there is no need to choose one particular ground or to define a group solely by one characteristic if the societal context indicates that several combined characteristics attract persecution.[245] Nor is there any need to prove that all women face exactly the same risks, any more

[240] Ibid 359–60 (McHugh J).

[241] Convention on the Elimination of All Forms of Discrimination Against Women, above n 230.

[242] *Chinese One Child Policy Case* (1997) 142 ALR 331, 360 (McHugh J).

[243] Ibid 344.

[244] Ibid 363.

[245] Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 *Human Rights Quarterly* 213, 255. She gives the example of Nada who fled Saudi Arabia and notes that characterising Nada's experiences as persecution for reasons of gender or for religion may mischaracterise the refugee's own experiences of persecution: if it is the state, rather than the religion, with which Nada disagees, then the ground of political opinion is preferable.

than it is necessary to show that all members of a race face the same risk of persecution. Clearly, some members of persecuted groups may be safe from persecution because of factors personal to them, such as political connections, or wealth. However, such factors are not always a guarantee of protection, and may even work against some people, particularly women who often fear rights violations occurring in the private sphere of the home. In any event, the ability of some members of persecuted groups to access protection merely indicates that those people would not be able to prove a well-founded fear of persecution. In my view, the acknowledgment in the Department of Immigration's Gender Guidelines[246] that women may suffer persecution because they are women and that gender may define particular social groups is confirmed by the High Court's decision in the *Chinese One Child Policy Case*. The lesson for practitioners is to keep doing what they already do in relation to presentation of asylum-seekers' claims — that is, to produce plenty of evidence as to the treatment of women, or specific groups of women, in the particular society from which they come.

Reading Dawson and McHugh JJ together as giving support to the idea of gender-based social groups and combining them with Brennan CJ and Kirby J, whose approaches would also suggest that they might accept gender-based groups (Brennan CJ simply requires some form of discrimination, Kirby J's broad approach to political opinion would lend support to the arguments that women who violate social mores fall within the category of political opinion),[247] there is a fair indication that the High Court may be sympathetic to gender-based social groups. Gummow J's comment that members of a race may also constitute a particular social group, indicates that he might consider gender-based groups as particular social groups in a specific context.

One further point needs to be made about the *obiter* from McHugh J concerning Trinidadian women fleeing domestic violence. In a footnote, he stated:

> The Canadian Court of Appeal upheld a finding that a Trinidadian woman who had been abused by her husband for many years was a refugee because she was a member of a particular social group. The decision must surely be wrong even if the definition of a refugee is given a very liberal interpretation. It is difficult to see how the designated group was a particular social group for Convention purposes. However, it seems to have been common ground between the parties that the relevant group was 'Trinidadian women subject to wife abuse'. Nevertheless, it does not follow that the applicant was abused because of her *membership* of that group.[248]

While the insertion of the persecution feared into the particular social group may be inappropriate, and indeed the judgment has been criticized by Macklin on this basis,[249] this does not mean that women fleeing domestic violence may

[246] Commonwealth of Australia, Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996).

[247] See, eg, Spijkerboer, above n 161.

[248] *Chinese One Child Policy Case* (1997) 142 ALR 331, 358.

[249] Macklin, '*Canada (Attorney-General) v Ward*: A Review Essay', above n 42, 376–7.

not be refugees. Nor is a particularly liberal construction of the Convention required unless it is thought that domestic violence is an individualised problem specific to a couple, rather than a gendered problem (where the partners are heterosexual) or a problem of patriarchal attitudes to families (where the victims of abuse include children of both sexes). The key to analysis of domestic violence may be whether the attitude of the state to these problems is driven by such concerns, to the point that it fails to offer adequate protection. Domestic violence is often thought of as an isolated, individuated incident of violence. However, much research has shown that it is gendered. This is not simply because women are predominantly the victims, but in terms of the *attitudes* about the way in which wives or women partners are supposed to behave, both on the part of the abusive male partner, and on the part of many states who reinforce these attitudes by express laws and policies, or by failure to act. Gender plays the role of a uniting characteristic again, driving the experiences of these women. If the state fails to act and prevent or punish such violence — for example, by providing shelters for battered women — on the basis that domestic violence is a private matter and that it is women's lot in life to endure such violence, then women fleeing domestic violence may well be refugees. The Minister's concession in the *Chinese One Child Policy Case* regarding the nexus with the state illustrates the fact that direct involvement of the state in the original persecution is not required. What is relevant is the state's failure to offer protection from it. There is some doubt as to whether the Refugee Convention requires the traditional elements of state responsibility to be met. The rules of state responsibility may require some element of adoption or approval of the individual's activities.[250] In any event, however, the state *may* be proved complicit in the individual's activities[251] or to have violated its own duty to respect and *ensure*[252] rights *for reasons of* the gender of the victim (and therefore membership of a particular social group).

Of course, domestic violence cases are uncomfortable because they inevitably raise comparisons with the potential country of refuge. Thus Macklin writes:

> Finding a principled basis for admitting women who flee gender persecution requires a reevaluation of what refuge means. It also requires Western feminists to ask themselves searching questions about the shifting significance of the categories 'woman' and 'refugee' in local versus transnational contexts. What distinguishes the refugee claimant who flees Trinidad for Canada to escape an abusive husband from the Canadian citizen who flees Toronto for Swift Current for the same reason?[253]

[250] See the analysis of the International Court of Justice: *Case Concerning United States Diplomatic and Consular Staff in Teheran (United States of America v Iran) (Merits)* [1980] ICJ Rep 3 [58]–[59], [69]–[71]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 [114]–[115].

[251] For an analysis of the concepts of state responsibility in relation to violations of women's rights, see Celina Romany, 'State Responsibility goes Private' in Rebecca Cook (ed), *The Human Rights of Women: National and International Perspectives* (1994) 85.

[252] ICCPR, above n 23, art 2.

[253] Macklin, 'Refugee Women and the Imperative of Categories', above n 245, 277.

However, these broader questions should not mean that refugee status decision-makers should deny refugee status when faced with an individual asylum-seeker who made the assessment that she had to leave the home country, and *now*, even if the future elsewhere may be uncertain. The decision-maker's brief is solely to decide whether the asylum-seeker has a well-founded fear of persecution, regardless of whether the decision-maker's own country has a better, worse or similar record in relation to human rights. If the answer is positive, the asylum-seeker is not to be returned. Moreover, given governments' notorious reluctance to redress their own human rights violations or to question the records of other governments, refugee status offers at least a temporary refuge for those who have decided that staying in the country of origin is intolerable for now. As Hathaway writes, the very nature of refugee status is that a person has made an autonomous decision to disconnect him or herself from the state of origin, because he or she has no faith in that state's ability to offer protection.[254] It is both supremely arrogant and callous to deny what protection *is* available in these circumstances.

These questions are complex and there is insufficient space for a complete examination of them here. In order for administrative decision-makers properly to address these questions, it is vital that they be permitted to do so unfettered by threats from the executive concerning decisions that do not meet with its approval. DIMA officials, being placed within the general immigration scheme with its focus on immigration control, and directly within the administrative branch of government, may, depending on the culture of the Department, find this a tall order. The second level of decision-makers, the RRT members, are theoretically free of interference. Unfortunately, however, the Minister for Immigration and Multicultural Affairs has made statements that have been interpreted as ominous warnings to the effect that decision-makers who 'stretch' the Convention should be concerned about job security.[255]

Two points need to be made here. First, if the Minister believes that refugee status decision-makers are stretching the Convention, he should seriously consider the possibility that this is because there are situations where the definition does not apply but there is a need to respond to the plight of the asylum-seeker. If this is the case, the onus is on the executive to provide for humanitarian categories for immigration. Australia does not provide well for humanitarian status in relation to 'onshore applicants' for asylum (that is, those arriving on Australian soil and claiming asylum, rather than those applying from refugee camps offshore). Humanitarian status is a discretionary afterthought to the refugee status determination system, whereby the Minister may grant a stay

254 James Hathaway, 'Labelling the "Boat People": The Failure of the Human Rights Mandate of the Comprehensive Plan of Action for Indochinese Refugees' (1993) 15 *Human Rights Quarterly* 686, 687.

255 Editorial, 'Ruddock's Threats to Refugee Body', *The Canberra Times* (Canberra), 27 December 1996, 14. The Minister subsequently stated that law-makers are entitled to have a view on the legal issues: Mike Steketee, 'Tribunal Defends Violence Refugees' Status', *The Australian* (Sydney), 6 February 1997, 2.

on humanitarian grounds after the applicant has unsuccessfully applied for refugee status.[256] Moreover, the Minister has announced that a 'post application' fee of $1,000 will apply to applicants for refugee status who are unsuccessful at the RRT level.[257] This is inappropriate given that access to humanitarian status is only open after failure at the RRT, and appears to be a penalty adopted as a deterrence mechanism. The alternative is to do as many countries in Europe have done, that is to create a standing category of humanitarian or 'B' status for onshore asylum-seekers who do not meet the Convention definition of a refugee. Access to this category should not necessarily require prior application for refugee status, as the current system now does. Second, given the difficulties inherent in the concept of particular social group, as evidenced by the near even division of opinion in the High Court, the Minister cannot reasonably believe that decisions which do not match the government's views are the result of incompetence. Rather, his statements concerning the decision-makers who 'stretch' the Convention, together with his announced move to ensure that the Federal Court is not able to review refugee status decisions,[258] indicate a worrying disregard for the *raison d'être* of independent decision-making, which is that the executive branch of government has to listen to opinions other than its own. This may prove a greater obstacle to women asylum-seekers than the wording of the Refugee Convention and the High Court's interpretation of it in the *Chinese One Child Policy Case*.

PENELOPE MATHEW*

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## POSTSCRIPT

On 13 June 1997, the High Court handed down another decision concerning asylum-seekers fleeing, among other things, enforcement of the one child policy. In *Minister for Immigration and Ethnic Affairs v Guo Wei Rong*, the full bench of the High Court found that the Full Federal Court had erred in its finding of

256 Migration Act 1958 (Cth) s 417. In some instances, there are also mechanisms such as extensions of visas for persons caught up in conflicts, like the war in the territory of the former Yugoslavia.

257 Minister for Immigration and Multicultural Affairs, Commonwealth of Australia, *Sweeping Changes to Refugee and Immigration Decision Making*, Press Release, MPS 28/97 (20 March 1997).

258 Minister for Immigration and Multicultural Affairs, Commonwealth of Australia, *Government to Limit Refugee and Immigration Litigation* Press Release, MPS 32/97 (25 March 1997).

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legal error on the part of the RRT.† Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ handed down a joint opinion and Kirby J gave a separate opinion. On the issue of the one child policy and membership of a particular social group, the RRT had found that Mr Guo's evidence regarding his claim that he would be forcibly sterilised was not credible. The RRT also determined that fines for breach of the policy did not amount to persecution, being disciplinary measures applicable to the entire population.‡ In consideration of the Tribunal's findings on this point, the joint opinion reads as follows:

> [T]his claim was rejected by the Tribunal. But in any event, the claim, based, as it is, on membership of a social group consisting of 'parents of one child in the PRC' is answered by the Court's recent decision in *Applicant A v Minister for Immigration and Ethnic Affairs*, which held by majority that, for the purposes of the Convention, such persons were not a particular social group and that persecutory conduct cannot define 'a particular social group'.**

Kirby J commented on similar claims made by Mr Guo's wife, Ms Pan Run Juan, that '[n]othing said by this Court in the decision (given since the hearing of these appeals) about cases concerning the Chinese "one child policy" affords any ground for re-opening the ... determinations affecting Ms Pan'.††

It appears that the issue is settled.

† *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (High Court of Australia, Full Bench, Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ, 13 June 1997).

‡ This description of the Tribunal's findings is drawn from the summary made in the joint judgment by Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ: ibid 5–7.

** Ibid 8.

†† Ibid 14.

# R v ELLIOTT*

Few, if any, exercises of judicial discretion have been as widely reported or publicly discussed as Vincent J's exclusion of virtually the entire prosecution case in the recent Supreme Court trial of John Elliott, Peter Scanlon and Kenneth Biggins. In the main, however, interest in the case has focused on those aspects which gave the case its notoriety, rather than on the actual rulings and their significance for the law of evidence. This note attempts to fill this gap by examining two of Vincent J's rulings, both of which may have significant implications for the admissibility of statements made by accused persons in criminal proceedings and for the admissibility of unlawfully obtained evidence. The note begins, however, by setting out the background to these rulings, in particular the history of the investigation.

## I THE INVESTIGATION

### A *The National Crime Authority*

The National Crime Authority ('the NCA') was established by the National Crime Authority Act 1984 (Cth) ('the Act'). The Act arms the NCA with special investigative powers beyond those enjoyed by other criminal law enforcement bodies and, in particular, gives the NCA the power to compel a person to appear at a hearing before the Authority. Any such person can then be compelled to produce documents, take an oath or make an affirmation, and answer questions put to him or her.[1] These provisions of the Act effectively abolish the right of silence in hearings before the NCA.

The Act does, however, retain the privilege against self-incrimination in these hearings, allowing a person to refuse to answer questions or to produce documents on the grounds that the response might tend to incriminate him or her.[2] There are, of course, considerable differences between the privilege against self-incrimination and the right to silence. The former can only be claimed on a question by question basis, and only when the answer might tend to incriminate. The right to silence can be claimed globally and regardless of whether the answers to the questions might incriminate. A person being investigated by the NCA is, therefore, at a significant disadvantage in comparison to a person being investigated by a law enforcement body without the NCA's coercive powers.

Under the scheme created by the Act, however, the NCA's special coercive powers can only be used for the purposes of a 'special investigation'.[3] Such an investigation can only be conducted if a 'matter' has specifically been referred to

* (Supreme Court of Victoria, Vincent J, 6 May 1996 and 21 August 1996) ('*Elliott*').
1 National Crime Authority Act 1984 (Cth) ss 28–30.
2 Ibid s 30(4).
3 Ibid s 4(1).

the NCA by the Commonwealth Attorney-General, after consultation with his or her State and Territory counterparts.[4] Any notice referring a matter to the NCA must, among other things, 'describe the general nature of the circumstances or allegations constituting the relevant criminal activity'.[5] These limitations are placed on the NCA's coercive powers to prevent the NCA from being 'able to roam at will over the whole field of its jurisdiction, without having to justify its investigations to those politically accountable'.[6]

In short, the requirement of a reference is seen as one of the most important checks on the NCA's coercive powers; indeed, it was the narrowness of the reference in the *Elliott* case which ultimately brought the prosecution to an end. The Commonwealth legislation has been supplemented by equivalent legislation at the State level, empowering the NCA to investigate offences against the laws of a State when requested to do so by the relevant State minister.[7] In the *Elliott* case, for example, the NCA received references from the Commonwealth Attorney-General, but also from the Victorian and South Australian Attorneys-General to investigate possible offences under state legislation.

### B *Operation Albert*

The NCA's investigation into the affairs of Elders IXL was the result of an approach made by Mr Peter Faris QC, then Chairman of the NCA, to the National Companies and Securities Commission ('the NCSC') in November 1989. The NCA had decided to take on a small number of significant cases involving white collar or corporate crime, and to that end, sought the referral from the NCSC of one or more appropriate cases. The NCSC at that time had more such cases than it could cope with. Therefore, in a letter to Faris dated 16 November 1989, Mr Henry Bosch, then Chairman of the NCSC, suggested that the NCA might be interested in investigating 'the way in which some directors of Elders IXL have gained effective control of one of Australia's major companies'.[8] The NCA accepted the offer, code-naming their investigation 'Operation Albert'.

To be able to exercise its special investigative powers, the NCA sought — by means of a written submission dated 19 December 1989 — a reference from the Commonwealth Attorney-General. The submission provided the following 'Details of Relevant Criminal Activity':

> Allegations have been made to the Authority by the National Companies & Securities Commission that those directors of Elders IXL who are associated with Harlin Holdings Ltd may have committed offences under a number of Commonwealth and State Acts, and at common law.

[4] Ibid ss 4, 11(2) and 13(1).

[5] Ibid s 13(2)(a).

[6] Commonwealth, *Hansard*, House of Representatives, 7 June 1984, 3094 (Michael Duffy, Minister for Communications).

[7] See, eg, National Crime Authority (State Provisions) Act 1984 (Vic).

[8] The letter was tendered during the *voir dire* proceedings and was extracted in *Elliott*, Ruling 9, 6 May 1996, 23–4.

> Harlin Holdings Ltd (Harlin) is a company registered in the Australian Capital Territory controlled by a number of directors of Elders IXL (Elders). Majority control of Elders recently passed to Harlin, following a complex series of transactions involving not only those two companies but also other companies including the Broken Hill Proprietary Company Ltd, AFP Investments Corporation Ltd, SA Brewing Holdings Ltd and Goodman Fielder Wattie Ltd.
>
> The circumstances in which these transactions occurred imply that the Elders directors associated with Harlin (the associated Elders directors) may have committed offences under the Companies Act 1981, the Security Industry Act 1980, the Companies (Acquisition of Shares) Act 1980, the Secret Commissions Act 1905 (all Commonwealth), as well as the offence of conspiracy to defraud at common law. Associations or understandings are alleged to have existed between Harlin and other companies in relation to the control of Elders. It is alleged further that Elders tends to provide the minimum possible amount of information to shareholders, and that the personal shareholdings of Elders directors (including the associated Elders directors) continually increase as a result of the operation of 'incentive schemes'.[9]

The Attorney-General signed a draft reference on 21 December 1989. In describing 'the general nature of the circumstances or allegations constituting the relevant criminal activity' — as required by s 13(2)(a) of the Act — the reference referred back to the allegations contained in the Authority's submission set out above. The critical question in the *Elliott* case was whether this reference encompassed the transaction which became the subject of the charges: the so-called 'H fee'.

The 'H fee' was a complex series of foreign exchange transactions which netted Elders IXL a loss of $66 million, while delivering a gain of the same amount to companies associated with New Zealand entrepreneur Allan Hawkins. The transactions were secretive and contrived, thus arousing the suspicion of investigators on both sides of the Tasman. The NCA theory was that the transactions were a secret fee paid by Elders IXL to Hawkins for his role in helping to thwart the attempted takeover of Broken Hill Proprietary Company Ltd ('BHP') by Robert Holmes A'Court.[10] If the theory was correct, then payment of the fee represented a fraud against the shareholders of Elders IXL committed by those who had authorised the transactions.

The NCA used its special powers to question the four directors allegedly involved in the transactions: John Elliott, Peter Scanlon, Kenneth Biggins and Ken Jarrett. Each denied that the transactions were shams, and gave long and detailed accounts of why the transactions had been made. Elliott told the NCA that the transactions had been done with his knowledge, on his instructions and for a genuine reason. The others all told the same story. The NCA was not convinced and set out to prove that the stories told by the accused were false, using its special powers to compel testimony from other witnesses and to obtain copies of relevant documents.

This evidence tended to show that the transactions were a sham; indeed, by the

[9] Submission extracted in *Elliott*, Ruling 9, 6 May 1996, 30–1.
[10] Ibid 43–58.

end of the case the sham nature of the transactions was not even disputed by the accused. In a statement released on the day of his directed acquittal, for example, Scanlon admitted that in form the transactions were shams, but claimed that they had been used to discharge a debt genuinely and legitimately owed to Hawkins. Scanlon claimed that the choice of a sham vehicle for discharging the debt had been the work of Ken Jarrett and Ken Jarrett alone.

To the NCA, however, the fact that each of the accused had originally provided a false version of the circumstances relating to the transactions was evidence from which the accused's consciousness of guilt could be inferred. In other words, the sham nature of the transactions, together with the fact that the accused had lied on oath about them, suggested that the transactions had involved criminal wrongdoing on the part of the four directors.

## II RULING 9: LAWFULNESS AND VOLUNTARINESS

### A *The Lawfulness of the Investigation*

The defence challenged the admissibility of all of the evidence obtained by the NCA through the use of its special coercive powers. The foundation for this challenge was the claim that the 'H fee' fell outside the scope of the NCA's reference. If this claim was correct, then the NCA's special investigative powers had been improperly exercised and all of the evidence gathered through the use of the special powers could be objected to on the grounds that it had been unlawfully obtained. The problem for the NCA was that it was difficult to demonstrate any real connection between the 'H fee' and the original focus of the investigation ie 'the way in which directors of Elders IXL have gained effective control of one of Australia's largest companies'.[11] According to the NCA, the 'H fee' was payment for services rendered during the battle for control of BHP and, in the judge's view, if it did have any connection to the Harlin takeover of Elders IXL, it was at best historical.[12]

Vincent J rejected arguments that the reference authorised a much broader investigation into the affairs of Elders IXL, or that the investigators had perceived — correctly or not — that there was a connection between the 'H fee' and the matter which was the subject of the special investigation:

> It is painfully obvious that the Authority neither sought, nor was it granted, a general reference to investigate the affairs of Elders IXL Ltd, its directors, or associated companies or persons.
>
> It is equally clear that, whilst the unravelling of earlier cross shareholding arrangements between BHP and Elders IXL Ltd was perceived as providing a background to and a window of opportunity for, the impugned takeover to occur, and that some understanding of them may be required, those arrangements

[11] Ibid 23–4.
[12] Ibid 75.

were not themselves the subject of investigation.[13]

It is perhaps worth noting that several eminent lawyers, including the current Commonwealth Director of Public Prosecutions, did testify on oath that a nexus between the 'H fee' and the Harlin takeover of Elders had been perceived. However, Vincent J rejected their testimony, preferring to rely on the absence in contemporaneous NCA documents of any formulation of this nexus.[14] Accordingly, the judge concluded that:

> the ultimate effect of a combination of factors which included, a confused understanding on the part of some of those involved of the matter referred for special investigation, the nature and scope of the matter itself, excessive zeal in the pursuit of 'the targets', and the absence ... of a proper measure of control by the Authority of the conduct of Operation Albert, was a failure by those involved in the investigation and the Authority as an entity to address crucial questions upon the answers to which the lawful exercise of coercive power depended.[15]

In short, the hearings into the 'H fee' were unlawful.

### B *Statements by the Accused*

Ruling 9 was specifically concerned with the admissibility of the statements made by each of the accused in the course of special hearings conducted by the NCA. As already noted, the contents of these statements were not consistent in any way with the prosecution case; the accused did not confess their guilt in relation to the 'H fee', nor did they make any admissions about significant aspects of the prosecution case. The statements were not, therefore, offered to prove the truth of anything contained in them. Instead, the significance of the statements, according to the NCA, was that each of the accused had provided a false version of his knowledge of, and the circumstances relating to, the transactions which were the subjects of the charges. In short, the statements were said to be lies and — although this is not spelt out in the judgment — they were presumably being offered as evidence from which the accused's consciousness of guilt could be inferred.

### C *The Voluntariness of the Statements*

The objection made to the admissibility of these statements was that they were not made voluntarily. As Vincent J pointed out, however, this was an unusual context for questions of voluntariness to arise:

> All of the accused are experienced, intelligent, business men [*sic*]. Each had access, at the relevant times, to the support, services, and advice, of legal practitioners of eminence and matching competence.

The statements in question were made in the course of formally conducted

[13] Ibid 41.
[14] Ibid 41–58.
[15] Ibid 74–5.

> hearings. A transcript was made of each proceeding which was conducted before a member of senior counsel and no issue arises as to what actually occurred at the times that the statements were made. Prior to making the relevant impugned statements, each of the accused had his rights and obligations under the National Crime Authority Act drawn to his attention. Specifically, I am satisfied that each was aware, in general terms, of his right to refuse to answer questions put to him on the grounds of possible self-incrimination. Further, there was nothing in the form and manner of the questioning in response to which the various statements were made, which could be regarded as calculated to overbear the will of the individual concerned.[16]

The argument that the statements were involuntary was therefore constructed from wholly different material, the foundation of which was the proposition that, when the NCA used its special powers to investigate the foreign exchange transactions, the NCA was acting unlawfully. As we have seen, that argument was accepted by the judge. In addition to being unlawful, the NCA's 'deliberate policy of concealing its objectives and the actual subject matter under investigation'[17] made it impossible for the accused to know that the NCA was acting unlawfully; indeed, as the judge pointed out, the unlawfulness of the hearings only emerged on the *voir dire* into the admissibility of the statements. The significance of the hearings being unlawful, and the accused being unaware of this fact, was that the accused were:

> deprived each of them of [their] right to silence, that is, the ability to make a free choice to speak or to remain silent about the subject of inquiry. They were misled into believing that they were ... obliged to attend and to answer questions directed to the subject matter of the summons under proper compulsion of law.[18]

Had the hearings been lawful then the fact that the accused's answers were given under compulsion of law would have been beside the point; Parliament had authorised the NCA to conduct compulsory hearings and had removed the accused's choice to speak or to remain silent within them.[19] But Parliament had only removed the right to silence from lawful hearings; if the hearings were unlawful, as indeed they were, then the choice to speak or to remain silent remained for the accused. Not knowing this, however, the fact that the accused spoke cannot be attributed to them having freely chosen to speak. The statements were, therefore, involuntary.

In many ways, the approach of Vincent J is analogous to that taken by Coldrey J in *R v Li*.[20] In that case, his Honour ruled inadmissible a confession to murder made by a migrant from East Timor who was properly cautioned by the police but who clearly lacked any understanding of the fact that the right to silence entitled him to refuse to answer questions put by the police. What *Elliott* and *Li* have in common is that they reinforce the connection between voluntari-

16 Ibid 3–4.
17 Ibid 7.
18 Ibid.
19 National Crime Authority Act 1984 (Cth) ss 28–30.
20 [1993] 2 VR 580 ('*Li*')

ness and the right to silence: a statement is only voluntary if it is made in the exercise of a free and informed choice about whether to speak or remain silent.[21] The fact that neither oppressive conduct nor inducements were used to procure a confession does not itself prove that the confession was voluntary. The question must always be asked: did the accused know that they had the right to remain silent, and did they understand what that right entailed?

### D *Why was Voluntariness an Issue?*

The argument that the accused's statements were only admissible if voluntary was based on a premise which no one involved in the case appears to have questioned, but for which very little authority can be cited: that the requirement of voluntariness applies not only to confessions and admissions — which has never been doubted — but also to statements led on the basis that they are lies. There is no English or Australian authority directly on point, but the Supreme Court of Canada has held that the requirement of voluntariness does indeed apply to all statements by the accused, whether led on the basis that they are true or on the basis that they are false.[22] In the landmark case of *Miranda v Arizona*,[23] the United States Supreme Court took the same view, with Warren CJ arguing that:

> no distinction may be drawn between inculpatory statements and statements alleged to be merely exculpatory. If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word.[24]

As a matter of policy this approach makes sense. The requirement of voluntariness — at least on the view of it put forward in *Elliott* and *Li* — exists to uphold the right of silence. The rationale for the right to silence is to ensure that convictions are not wrung out of the mouths of offenders. If a suspect's statement is not the result of a free and informed choice to speak or remain silent, then the policy which requires its exclusion would appear to apply in equal force whether the statement be an admission or a demonstrably false denial.

From a technical viewpoint, however, the merits are all the other way. Confessions and admissions are prima facie inadmissible not because they are confessions and admissions but because they are hearsay. At common law, there is no independent rule of exclusion applying to confessions and admissions in criminal proceedings. There is only the hearsay rule and the exceptions to that rule, of which voluntary confessions and admissions in criminal proceedings is one.

[21] Cf *R v Azar* (1991) 56 A Crim R 414, where the New South Wales Court of Criminal Appeal held that lack of awareness of the right to silence would not, on its own, prevent a confession from being voluntary.

[22] *Piche v The Queen* (1970) 11 DLR (3d) 700.

[23] 384 US 436 (1996).

[24] Ibid 477.

Unlike confessions and admissions, false statements are not led to prove the truth of what they assert; their relevance lies in the fact that what they assert is untrue and can be proven to be untrue. Unless one is prepared to accept the absurd notion that by concealing the truth a suspect impliedly asserts his or her guilt, false statements are not hearsay and should not need to meet the requirements of an exception to the hearsay rule in order to be admissible.[25]

In hearsay terms, the fact that the requirement of voluntariness is an exception to the hearsay rule, and the false statements were not hearsay, means that there was no need for the judge in the *Elliott* case to apply the requirement of voluntariness to the accused's false statements. The fact that the judge did apply the requirement therefore suggests that voluntariness has grown from its origins in the hearsay rule into an independent rule of admissibility.[26]

## III RULING 13: PUBLIC POLICY

Ruling 13 dealt the final blow to the prosecution case. It concerned the admissibility of all of the evidence obtained through the use of the NCA's special powers other than the statements made by each of the accused. As with the exclusion of those statements, the foundation of Ruling 13 was the finding in Ruling 9 that the NCA had been acting unlawfully in using its special powers to gather evidence relating to the 'H fee'. The fact that the NCA had used its special powers almost as a matter of course meant that virtually the entire remaining prosecution case was open to exclusion. All that was really left after Ruling 13 was the testimony of Ken Jarrett who had pleaded guilty to a lesser charge and was prepared to testify for the prosecution. However, on its own, his evidence would have been unlikely to have resulted in conviction.

### A *The Public Policy Discretion*

Once the unlawfulness of the means by which the evidence was gathered had been established, it was open to the judge to exclude the evidence in the exercise of the public policy discretion. This discretion, sometimes referred to as the

[25] For a discussion of the scope of the hearsay rule in light of its extension to implied assertions, see especially Andrew Palmer, 'Hearsay: A Definition that Works' (1995) 14 *University of Tasmania Law Review* 29. For a specific ruling that lies are not hearsay, see *Mawaz Khan v The Queen* [1967] 1 AC 454, 462.

[26] This is consistent with the approach taken in the Evidence Act 1995 (Cth and NSW) ('the uniform evidence legislation'). This legislation has now been proposed for adoption in Victoria: Scrutiny of Acts and Regulations Committee (Victoria), *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries* (1996); Victoria, *Government Response to the Recommendations of the Scrutiny of Acts and Regulations Committee Report — Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries*, tabled in the Legislative Assembly of the Victorian Parliament on 8 April 1997. Under the legislation, the rules dealing with admissions and confessions in civil and criminal proceedings are placed in a separate and discrete part of the legislation, namely 'Part 3.4 — Admissions'. Among other changes, the legislation replaces the common law voluntariness rule with two other rules, the first of which renders inadmissible admissions influenced by violent, inhuman or degrading conduct, and the second of which excludes potentially unreliable admissions by the accused in criminal proceedings.

discretion in *Bunning v Cross,*[27] requires the judge to weigh the competing public policy considerations of, on the one hand, ensuring that the guilty are convicted and, on the other, ensuring that the law is obeyed by those entrusted with its enforcement. In exercising the discretion, Vincent J was careful to take into account all of the considerations identified in *Bunning v Cross* as being relevant to its exercise. It is, therefore, unlikely that the judge's use of his discretion could be successfully challenged.

As will be apparent from the following passages of his judgment, Vincent J gave great weight to the fact that the provisions breached by the NCA were part of a statutory scheme deliberately designed to protect citizens from the excessive use of coercive powers of investigation:

> Although I am not persuaded that there has been any deliberate abuse of those powers, I am satisfied that they were certainly employed in a regrettably casual fashion with little indication that any significant regard was had to important constraints set out in the Act under which the National Crime Authority was established.[28]
>
> The Authority chose, it would appear, to employ coercive powers wherever possible disregarding alternative methods of enquiry for securing evidence, for example, search warrants. The large amount of documentary material emanating from the Authority which I have read is notably and sadly deficient of any suggestion of awareness on the part of those involved in Operation Albert of the exceptional nature of the coercive powers with which the Authority had been entrusted.[29]
>
> As a consequence of the approach adopted, this Court is presented with a situation in which virtually every piece of significant evidence has been obtained in contravention of the requirements of a carefully constructed scheme, one of the objectives of which was to protect members of this community from unauthorised arbitrary intrusions into their lives and affairs.[30]
>
> The present case involves no single act of improper or unlawful behaviour nor simply the actions of some over zealous [*sic*] investigator but the exercise of coercive power by one of the most powerful agencies in this country. Those entrusted with such power must exercise it with a commensurate sense of responsibility. This, in a given case at minimum, requires that some measure of attention be given to the lawfulness of its exercise in the circumstances.[31]
>
> When the body concerned fails to honour its obligations in the substantial and continuing fashion that has been evident in this case, for the purpose of securing 'curial advantage' from its activities, the Court must consider whether as a matter of public policy the fruits of its unlawful activities should not be used as evidence. As I have already stated, that is the view which I have felt con-

[27] (1978) 141 CLR 54.
[28] *Elliott*, Ruling 13, 21 August 1996, 23.
[29] Ibid 24.
[30] Ibid 30.
[31] Ibid 30–1.

> strained to adopt in this present case.[32]

The effect of Vincent J's exercise of his discretion was, of course, more than usually devastating to the prosecution, in that it rendered inadmissible virtually the entire prosecution case. Nevertheless, the idea that evidence should be excluded if it was obtained through a deliberate or reckless breach of statutory provisions designed to safeguard the rights of citizens is entirely consistent with the approach taken by several members of the High Court in *Pollard v The Queen*.[33] Deane J, for example, in that case, referred to the 'extreme' situation where:

> the incriminating statement has been procured by a course of conduct on the part of the law enforcement officers which involved deliberate or reckless breach of a statutory requirement imposed by the legislature to regulate police conduct in the interests of the protection of the individual.[34]

Although the context was very different from *Elliott*, a similarly expansive view of the public policy discretion is evident in the even more recent High Court decision of *Ridgeway v The Queen*.[35] The reason why Vincent J's exercise of the discretion had such an enormous impact on the outcome of *Elliott* is not, therefore, due to his Honour being out of step with the approach suggested by the High Court, but rather due to the fact that almost all of the NCA's evidence had been unlawfully obtained.

### B *Fruits of the Poisonous Tree*

The use by Vincent J of the phrase 'fruits of its unlawful activities',[36] in the last of the paragraphs extracted above from *Elliott*, should not be taken as indicating the existence in Australia of a 'fruits of the poisonous tree' doctrine.[37] In the United States, evidence obtained through a breach of a suspect's constitutional rights is, in general, inadmissible.[38] This rule clearly gives primacy to the public policy of ensuring that those entrusted with enforcing the law do themselves obey it, at the expense of the public policy in favour of convicting the guilty. This contrasts with the situation in Australia, where unlawfully obtained evidence is prima facie admissible, subject to the judge's exercise of a discretion which recognises the claims of both public policies.

The mandatory rule of exclusion in the United States is supplemented by a doctrine which also renders inadmissible any evidence obtained through the use of the unlawfully obtained evidence. If, for example, a suspect confessed to murder in circumstances involving a breach of their constitutional rights and, as a result of the confession, the police discovered the murder weapon, then the

[32] Ibid 34.
[33] (1992) 176 CLR 177.
[34] Ibid 204.
[35] (1995) 184 CLR 19.
[36] *Elliott*, Ruling 13, 21 August 1996, 34.
[37] The phrase comes from *Nardone v US*, 308 US 338, 341 (1939) (Frankfurter J).
[38] This is, of course, a gross simplification: see generally Edward Cleary, *McCormick on Evidence* (3rd ed, 1984) ch 15.

weapon would be regarded as 'the fruits of the poisonous tree' and be ruled inadmissible. In Australia, on the other hand, the admissibility of the confession would be determined by a combination of the voluntariness rule and the fairness and public policy discretions; the murder weapon would be regarded as admissible, subject to the exercise of the public policy discretion. Nothing in *Elliott* changes this situation.

### C *The Uniform Evidence Legislation*

Section 138 of the uniform evidence legislation,[39] currently proposed for adoption in Victoria,[40] preserves the public policy discretion, but with one significant change. At present, it is for the party which seeks the exclusion of the evidence to show that this is required by the public interest. Under s 138, on the other hand, the onus is reversed, and the party seeking admission of illegally or improperly obtained evidence must satisfy the court that the balance of public interest favours its admission. This reform was justified by the Australian Law Reform Commission with the argument that:

> the policy considerations supporting non-admission of the evidence suggest that, once the misconduct is established, the burden should rest on the prosecution to persuade the court that the evidence should be admitted. After all, the evidence has been procured in breach of the law or some established standard of conduct. Those who infringe the law should be required to justify their actions and thus bear the onus of persuading the judge not to exclude the evidence so obtained.[41]

This reform may not, however, prove to be as significant as its architects intended. In most cases, the greatest difficulty facing a party wishing to challenge the admissibility of evidence on public policy grounds will not be in persuading the judge to exclude evidence which the judge accepts to have been unlawfully obtained. Rather, the greatest difficulty will usually be in persuading the judge that the evidence was indeed obtained unlawfully. This will often require the judge to prefer the testimony of a single accused to that of several investigators. Moreover, few defendants will be able to afford the resources devoted by the accused in the *Elliott* case to proving that the evidence was obtained unlawfully. Indeed, Vincent J commented in *Elliott* that it was only 'after weeks of argument'[42] that the true position emerged. The reversal of the onus of persuasion in the uniform evidence legislation does nothing to make proof of illegality any easier.

## IV CONCLUSION

It seems clear, then, that Vincent J's rulings in the *Elliott* case provide a couple of small, but arguably significant, pushes to the law of evidence. First, the

[39] Evidence Act 1995 (Cth and NSW).
[40] See discussion in above n 26.
[41] Australian Law Reform Commission, *Evidence,* Interim Report No 26 Vol 1 (1985) 536–7.
[42] *Elliott*, Ruling 9, 6 May 1996, 80.

judge's application in Ruling 9 of the requirement of voluntariness to allegedly false statements suggests that the requirement of voluntariness is in the process of growing from its origins in the hearsay rule into an independent rule of admissibility. Secondly, the judge's willingness to exclude the unlawfully obtained evidence which was the subject of Ruling 13 suggests — at least on the part of Vincent J — a strong judicial belief in the importance of the rule of law, and in the need for those who enforce the law to themselves obey it. The extent to which these philosophical preferences are shared by other judges remains to be seen, but what is made clear by the *Elliott* case is that the discretion in *Bunning v Cross* provides ample opportunity for such preferences to be indulged.

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# THE WIK PEOPLES v QUEENSLAND
# THE THAYORRE PEOPLE v QUEENSLAND*

## I INTRODUCTION

Since its landmark recognition of native title in *Mabo v Queensland [No 2]*,[1] the Full Bench of the High Court has turned its attention to the issue of native title on three further occasions. The first, *Western Australia v Commonwealth*[2] dealt largely with the validity of the Native Title Act 1993 (Cth) ('Native Title Act') and the conflicting Land (Titles and Traditional Usage) Act 1993 (WA), the extent of Commonwealth legislative power and the application of the Racial Discrimination Act 1975 (Cth) to dealings with native title. The second, *North Ganalanja Aboriginal Corporation (for and on behalf of the Waanyi People) v Queensland*,[3] dealt largely with procedural issues arising under s 63 of the Native Title Act 1993 (Cth) and the regulations made under that Act. The third, *Wik*, dealt with the limited but substantive issue of extinguishment of native title on certain categories of Queensland pastoral leases at common law. The decision unleashed an intense reaction, reminiscent of the reaction of state governments and industry groups following the *Mabo* decision, with suggestions that native title should be extinguished generally (or at least on pastoral leases) and replaced with statutory visitation rights similar to those proposed by the Western Australian government in its Land (Titles and Traditional Usage) Act 1993 (WA).[4]

The intensity of the reaction appears to have been generated in part by the belief of some that, on the basis of the *Mabo* decision and the Preamble to the Native Title Act,[5] the grant of a pastoral lease gave exclusive possession and thus extinguished native title,[6] although there has been continual discussion on the point since the *Mabo* decision.[7] In addition, there was perceived uncertainty in relation to the validity of activities carried out by pastoralists on pastoral leases since 1 January 1994 as a result of the interaction of the *Wik* decision with the 'future act' provisions of the Native Title Act 1993 (Cth).[8] This uncertainty

* (1996) 141 ALR 129 ('*Wik*').

1 (1992) 175 CLR 1 ('*Mabo*').

2 (1995) 183 CLR 373 ('*Native Title Act Case*').

3 (1996) 135 ALR 225 ('*Waanyi*').

4 Lenore Taylor, 'It's True — a Wik is a Long Time in Politics', *The Australian Financial Review* (Sydney), 24 January 1997, 33.

5 Native Title Act 1993 (Cth) Preamble.

6 David Russell, 'Dispossession Cuts Both Ways', *The Australian* (Sydney), 7 January 1997, 11

7 Henry Reynolds, 'Mabo and Pastoral Leases' (1992) 2 *Aboriginal Law Bulletin* 8; Henry Reynolds, 'The Mabo Judgment in the Light of Imperial Land Policy' (1993) 16 *University of New South Wales Law Journal* 27. In these articles Reynolds raised the possibility that native title could persist on pastoral lease land. A later article further developed the argument and was referred to in *Wik* (1996) 141 ALR 129, 171 (Toohey J), 197 (Gaudron J), 266 (Kirby J): Henry Reynolds and Jamie Dalziel, 'Aborigines and Pastoral Leases — Imperial and Colonial Policy 1826–1855' (1996) 19 *University of New South Wales Law Journal* 315.

8 Commonwealth Attorney-General's Department, *Legal Implications of the High Court Decision in* The Wik Peoples v Queensland, Advice to the Prime Minister (January 1997) 17 ('*Legal Implications of the High Court Decision*').

persisted despite the tenor of the *Wik* judgment,[9] which suggested that all pastoral activity is valid and lawful because it is authorised by the grant. On a similar basis there was a reasonably well founded concern about the validity of grants made since 1 January 1994, including mining titles and non-pastoral activities such as the erection of buildings in connection with the conduct of tourist activities.[10] In response to the decision, the perceived uncertainty it has created[11] and the political demands of the States,[12] the government has produced a ten point plan[13] said to be necessary to meet these perceived difficulties, but in reality going beyond the specific issues arising from the *Wik* decision.

The central issue for determination in *Wik* involved the characterisation of the rights and interests derived from pastoral leases granted pursuant to the Land Act 1910 (Qld) and the Land Act 1962 (Qld) and the consequences flowing from that characterisation for the native title rights of the plaintiffs. The court divided four–three[14] in deciding that the grants did not have the effect of extinguishing native title with the majority producing four separate judgments. Discerning a ratio from the majority judgments is not a simple undertaking. However, all the judgments, majority and minority, turned on the characterisation of the interest (or estate) assigned by the grant of a pastoral lease and largely agreed on the method which should be used to determine the issue: namely, interpreting the specific statute under which the grant was made as well as the terms of the grant itself.

The end result of *Wik* is a narrow decision, essentially confined to an interpretation of the specific Queensland legislation and the particular grants in issue. The scope of the decision was characterised in this way in the postscript to the judgment of Toohey J, written with the concurrence of Gaudron, Gummow and Kirby JJ.[15] The key elements of the postscript were that the titles of the grantees were valid but that the extent of the rights granted depended on the 'terms of the grant ... and upon the statute which authorised it'.[16] Such grants did not necessarily extinguish native title. 'Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established.'[17] Where there is an inconsistency between the rights granted

[9] The effect of the majority judgments in this regard is summarised in the postscript appearing in the judgment of Toohey J: *Wik* (1996) 141 ALR 129, 189–90.

[10] *Legal Implications of the High Court Decision*, above n 8, 11. See also Simon Williamson, 'Implications of the Wik Decision for the Minerals Industry' in Graham Hiley (ed), *The Wik Case: Issues and Implications* (1997) 45.

[11] Lenore Taylor and Paul Syvret, 'Industry Dismayed by Wik Ruling', *The Australian Financial Review* (Sydney), 24 December 1996, 1; Alan Moran, 'Wik Decision Settles Nothing for Miners', *The Australian* (Sydney), 24 December 1996, 13; Denis Burke, 'Judgment Adds to Delay and Expense', *The Australian* (Sydney), 7 January 1997, 11.

[12] Taylor and Syvret, above n 11; Burke, above n 11; Taylor, above n 4.

[13] Prime Minister, Commonwealth of Australia, *Amended* Wik *10 Point Plan*, Press Release (8 May 1997) ('*10 Point Plan*').

[14] Toohey, Gaudron, Gummow and Kirby JJ were in the majority, writing four separate judgments. Brennan CJ, with whom Dawson and McHugh JJ concurred, constituted the minority.

[15] *Wik* (1996) 141 ALR 129, 189–90.

[16] Ibid 190.

[17] Ibid.

and native title rights, the native title rights 'must yield, to that extent, to the rights of the grantees'.[18] The possibility of such concurrent enjoyment meant that there was no question as to the suspension of any native title rights. The case was consequently remitted to the Federal Court for determination of issues of fact in relation to the existence and content of the native title rights claimed.

Reaching a conclusion required the court to consider the applicability of English common law property principles to Australia. This issue provided the point of difference between the majority and the minority both in terms of the relevance of common law tenures in statutory interpretation as well as the 'utility'[19] of those principles in determining the nature of statutory tenures in Australia. The majority's decision involved an exploration of the doctrine of extinguishment enunciated in *Mabo*. Some shape to the boundaries of that doctrine can now be discerned. It is the court's consideration of these broader issues that makes the case significant.

The court also addressed two issues outside the question of extinguishment by the grant of a pastoral lease. The first involved the impact on the plaintiffs' native title of the grant of certain mining leases to Commonwealth Aluminium Corporation Pty Ltd ('Comalco') and Aluminium Pechiney Holdings Pty Ltd ('Pechiney'). The second related issue involved consideration of whether the Crown owed a fiduciary duty to native title holders in its dealings with the land. The court found that the mining leases were valid and that no fiduciary duty was owed in the circumstances of this case, although not all judgments dealt with these issues.

## II FACTUAL BACKGROUND

The plaintiffs in the case were two Aboriginal groups — the Wik Peoples and the Thayorre Peoples — both of whom claimed interests in land on Cape York. The claims derived from and were based on the doctrine of Aboriginal title or native title.[20] Parts of the claims of the two groups overlapped. The proceedings were commenced in the Federal Court prior to the passage of the Native Title Act 1993 (Cth). Alternative claims were subsequently lodged with the National Native Title Tribunal pursuant to the Native Title Act 1993 (Cth). Those claims under the Native Title Act 1993 (Cth) were not the subject of the appeal before the High Court, although they could well be affected by the outcome of the proceedings before the Court.

The land claimed included two areas — the Mitchellton Pastoral Leases and the Holroyd River Holding — over which pastoral leases had been granted. The Mitchellton Pastoral Leases, covering an area of 535 square miles, had been granted in 1915 and 1919 respectively to non-Aboriginal lessees under the Land

[18] Ibid.

[19] Ibid 226 (Gummow J).

[20] Toohey J placed some emphasis on the precise wording of the pleadings, drawing a distinction between Aboriginal title in the Wik pleadings and native title in the Thayorre pleadings. His Honour focused on the substance of the rights and interests claimed, rather than the language used, but acknowledged that the language could produce significantly different outcomes: ibid 165–6.

Act 1910 (Qld). The relevant provisions of the Land Act 1910 (Qld) included reference to the Crown's power to 'demise for a term of years, any Crown land',[21] and the declaration that '[t]he ... lease shall ... be valid and effectual to convey to and vest in the person therein named the land therein described for the estate or interest therein stated.'[22] The instrument stated that the person named was 'entitled to a Lease of the Land described ... for the term and at the yearly rent hereinafter mentioned',[23] subject to various reservations contained in the instrument. The leases were expressed to be limited 'to pastoral purposes only'. The first lease was forfeited for non-payment of rent in 1918 and the second was surrendered in 1921. The lessee did not take possession under either lease. In 1922 the land was reserved for the benefit of Aboriginal people.

The Holroyd lease, covering an area of 1,119 square miles, was first granted in 1945 under the Land Act 1910 (Qld). This lease was surrendered in 1973 and a further lease granted in 1974 under the provisions of the Land Act 1962 (Qld). These leases did not contain the limitation of use 'for pastoral purposes only' but, as Brennan CJ indicated, they were otherwise in similar terms to the Mitchellton leases save that the leases required the erection of specific improvements on the leased land.[24]

Both the Mitchellton and Holroyd leases contained various reservations in relation to the Crown's mineral and petroleum rights and the rights of entry for third parties specified in the leases or the Act or authorised by the Crown for specific purposes.[25] Neither of the leases contained any reservations in favour of Aboriginal people.

Various mining tenements were also granted over the land. Pursuant to the Commonwealth Aluminium Corporation Pty Ltd Agreement Act 1957 (Qld), which sets out an agreement between Comalco and the Queensland government, a Special Bauxite Mining Lease for a term of 84 years was granted to Comalco in 1965. Pursuant to the Aurukun Associates Agreement Act 1975 (Qld), a further Special Bauxite Mining Lease for a term of 42 years was granted to Pechiney. The Aurukun Associates Agreement Act 1975 (Qld) authorised entry into a franchise agreement between Pechiney and the Queensland government. A schedule to that agreement contained an access agreement between the Director of Aboriginal and Islanders Advancement of Queensland and Pechiney (among others).

This history reflected non-Aboriginal land use. On the other hand, the plaintiffs claimed continued associations and connections with the land sufficient to establish native title at common law or under the provisions of the Native Title Act.

## III THE FEDERAL COURT DECISION

In the proceedings in the Federal Court, before Drummond J, the plaintiffs

21 Land Act 1910 (Qld) s 6(1).
22 Ibid s 6(2).
23 *Wik* (1996) 141 ALR 129, 139.
24 Ibid.
25 Ibid.

sought a declaration that they had 'certain native title rights over a large area of land in North Queensland. They also sought damages and other relief, if it be found that their native title rights have been extinguished.'[26] His Honour did not proceed to hear evidence on the issue of the existence of native title, but rather proceeded to determine certain preliminary issues in relation to the effect of the grant of pastoral leases on the extinguishment of native title, the effect of the mining leases granted to Comalco and Pechiney, whether the Crown had any fiduciary duty towards the purported native title holders and if so whether that duty had been breached, and whether the rules of natural justice applied to the Crown's activities in granting the mining leases. It is these five preliminary issues and his Honour's answers that were the subject of the appeal to the High Court.

The questions and their answers may be briefly summarised as the substance of the answers emerges in the various High Court judgments. First, if Aboriginal title (or possessory title) existed at the material times when the various pastoral leases were granted, were the pastoral leases subject to any reservation in favour of the Wik people (and the Thayorre people)? The answer to this question was no. Second, did the pastoral leases grant exclusive possession to the lessees? The answer to this question was yes. The third question was whether the rights granted by the pastoral leases were wholly inconsistent with the continued enjoyment of any rights and interests under either Aboriginal or possessory title. His Honour found they were. As a result, the answer to the fourth question — did the grant of the pastoral leases necessarily extinguish any Aboriginal or possessory title? — was also yes. On the final issue — whether there had been a breach of fiduciary duty and a failure to accord natural justice to the Wik and Thayorre peoples in relation to the various mining leases and agreements — his Honour found that there had been no such breach or failure.

The plaintiffs appealed to the Full Court of the Federal Court but the matter was transferred to the High Court pursuant to s 40 of the Judiciary Act 1903 (Cth).

## IV THE HIGH COURT DECISION

The court granted leave to intervene to a number of parties, including State and Territory governments, and Aboriginal and Torres Strait Islander organisations (including the Aboriginal and Torres Strait Islander Commission). However, as Toohey J made clear, the court confined itself to considering the questions raised in the notice of appeal.[27] Thus, even though the issues raised may have wide ramifications, the court confined its considerations to the specific questions answered by Drummond J. Various arguments were put by both the plaintiffs and some of the interveners.

The plaintiffs' arguments and the judgments in the case revolved around three basic issues concerning: firstly, the nature and status of the interest granted under statute; secondly, whether or not the grant involved a grant of exclusive posses-

[26] *The Wik Peoples v Queensland* (1996) 134 ALR 637, 641.
[27] *Wik* (1996) 141 ALR 129, 167.

sion; thirdly, the consequences of the grant for the continued enjoyment, or alternatively the consequences of the extinguishment, of native title. The validity of the pastoral leases was not in question and was accepted by the plaintiffs.

### A *The Nature of the Grant*

The first and most significant issue for the court's consideration was the characterisation of the interest granted or the extent of the rights granted under the pastoral leases. It was consideration of this issue which lay at the heart of the decision and ultimately divided the court. All the judges concurred in their approach to this issue, namely that the issue of exclusive possession is to be determined by reference to the language of the statute authorising the grant and the instrument by which the grant was made.[28] However, a significant point of departure between the majority and minority was not only the conclusions reached on this issue, but also the relevant considerations in interpreting the statute.

Brennan CJ, in the minority, took the view that the language of the statute and the grant conferred a right of exclusive possession on the pastoral lessee.[29] His Honour reasoned that although there was no express grant of exclusive possession, such a grant could be implied. There were three main elements supporting this view. Firstly, the language of the statute and the instrument itself suggested a grant of exclusive possession because there were specific reservations for the Crown to permit entry by certain persons, to authorise access to pastoral lease land and to remove people who were on the land without authority.[30] His Honour relied on the common law principle that the nature of an interest granted is to be determined by the substance of the grant[31] and in the case of a lease, the grant of exclusive possession.[32] This is so notwithstanding the inclusion of reservations in the lease.[33] Secondly, his Honour placed emphasis on the nature of the language used in the statute and the instrument — 'demise for a term of years', 'to vest the "estate or interest"' and 'on forfeiture, the land reverted to His Majesty'.[34] This, his Honour concluded, 'is the language of lease'[35] and 'in the absence of any contrary indication, the use in a statute of a term that has acquired a technical meaning is taken prima facie to have that meaning.'[36] His Honour then spent considerable time discussing a range of authorities[37] leading to the conclusion that statutory leases should be characterised in the same way as

[28] Ibid 141 (Brennan CJ), 170 (Toohey J), 206 (Gaudron J), 226, 232 (Gummow J), 267–8 (Kirby J, by implication).
[29] Ibid 151.
[30] Ibid 142–3.
[31] Ibid 144.
[32] *Radaich v Smith* (1959) 101 CLR 209.
[33] *Wik* (1996) 141 ALR 129, 144.
[34] Ibid 145.
[35] Ibid.
[36] Ibid.
[37] Ibid 146–8. See also *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199; *Re Brady* [1947] VLR 347; *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687; *Davies v Littlejohn* (1923) 34 CLR 174; *O'Keefe v Williams* (1907) 5 CLR 217.

common law leases rather than merely as a set of statutory rights,[38] even though the extent of the Crown's powers is limited by the enabling statute.[39] Finally, Brennan CJ suggested that, as a matter of interpretation, there is a distinction in the statute between leases and licences and had there been no legislative intent to create different interests, 'there would have been little point in distinguishing between leases and licences which share many statutory features'.[40]

Thus the primary conclusion of Brennan CJ was that, as a matter of interpretation and construction of the statute and the instrument granting the pastoral lease, there was a grant of exclusive possession which meant that a pastoral lease had the character of a leasehold estate at common law. The effect of this grant of an estate in land carrying with it the character of exclusive possession is that 'the right of exclusive possession prevailed and the rights of the holders of native title were extinguished'.[41]

Although there were four separate judgments constituting the majority, it is possible to discern a number of similarities in approach to the issue of the nature of grant. The major focus for Toohey J was interpretation of both the statute and the instrument making the grant.[42] His Honour indicated that this issue did not arise 'in an historical vacuum'[43] and that the history of the relationship between the Crown and pastoralists was crucial to understanding the legislation before the court.[44] This history reveals the development of a range of statutory tenures, unknown to the common law:

> designed to meet a situation that was unknown to England, namely, the occupation of large tracts of land unsuitable for residential but suitable for pastoral purposes. Not surprisingly the regime diverged significantly from that which had been inherited from England. It resulted in 'new forms of tenure'.[45] Regard must be had to the extraordinary complexity of tenures in Australia, perhaps most of all in Queensland.[46]

Thus while Toohey J reiterated the view that 'Australia inherited the English law of tenure',[47] he observed that there had been substantial change and adjustment to that law since the reception of the common law[48] with the result that the 'pastoral leases are creatures of statute and the rights and obligations that accompany them derive from statute'.[49] In considering the relationship between this view and the broadly expressed common law view about the relationship between exclusive possession and leases, his Honour did not disagree with the conclusion of Brennan CJ that the substance of a grant and whether it includes

38 *Wik* (1996) 141 ALR 129, 148.
39 *Cudgen Rutile (No 2) Ltd v Chalk* [1975] AC 520.
40 *Wik* (1996) 141 ALR 129, 148.
41 Ibid 154. This issue of extinguishment is further explored below.
42 Ibid 170.
43 Ibid.
44 Ibid 170–1.
45 T P Fry, 'Land Tenures in Australian Law' (1946–1947) 3 *Res Judicatae* 158, 160–1.
46 *Wik* (1996) 141 ALR 129, 172.
47 Ibid.
48 Ibid 173.
49 Ibid 174.

the right of exclusive possession, is the determinant of a lease.[50] However, such a conclusion did not mean that 'exclusive possession is in truth an incident of every arrangement which bears the title of lease'.[51] Those authorities that suggested the use of terminology in statutes indicating common law tenures should be interpreted with reference to common law tenures and principles[52] should be confined to their contexts, involving commercial transactions, and 'cannot be transposed so as to throw light on the position of native title rights'.[53]

Toohey J then considered the specific pastoral leases before the court and concluded that they did not carry with them a right of exclusive possession, but rather possession for pastoral purposes. Such possession does not exclude Indigenous people.[54] 'It was unlikely that the intention of the legislature in authorising the grant of pastoral leases was to confer possession on the lessees to the exclusion of Aboriginal people even for their traditional rights of hunting and gathering.'[55] His Honour confined those authorities[56] that appeared to support a contrary view[57] to their facts and the specific statutes considered. Having reached this particular conclusion about the nature of the interest granted, it was not surprising that his Honour concluded that '[t]he continuance of native title rights of some sort is consistent with the disposition of land through the pastoral leases.'[58]

The other majority judgments took a similar, although not identical, approach to determining this issue. Gaudron J took the view that there was nothing in the relevant legislation to suggest the nature of the estate or interest granted except the use of the word 'lease'.[59] However, the question of whether a pastoral lease is a 'true lease'[60] was held to depend upon the terms of the statute in which they arise.[61] Referring to the cases mentioned by Toohey J, her Honour concluded that no guidance could be obtained from those cases because they dealt with different statutory provisions. Thus her Honour turned her attention to the substance of the legislation. In that regard, she considered two factors that suggested a 'true lease' might have been granted. The first was the use of language such as 'lease' and 'demise' and derivatives of the word 'lease'.[62] The second was the use of the word 'licence' in the statute and the distinction drawn in the statute between a lease and a licence. In the latter instance, the distinction seemed to be explicable

50 Ibid 177.
51 Ibid 178.
52 *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677; *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199.
53 *Wik* (1996) 141 ALR 129, 179.
54 Ibid 181.
55 Ibid 180.
56 *Macdonald v Tully* [1870] 2 QSCR 99; *Yandama Pastoral Co v Mundi Mundi Pastoral Co Ltd* (1925) 36 CLR 340.
57 *Wik* (1996) 141 ALR 129, 180–1.
58 Ibid 182.
59 Ibid 199.
60 Ibid.
61 Ibid 206.
62 Ibid 205.

based on the difference in the term of each grant.[63] Generally, her Honour considered that it was not appropriate to attribute the features of 'common law leases to the holdings described as "pastoral leases"'.[64] Firstly, there was a distinction between common law leases, pastoral leases and the impact of entry into possession.[65] This meant there was no reason evident within the statute to assume that the term 'lease' was to be given the same meaning as in the common law. This was especially so as there was 'no basis for thinking that pastoral leases owe anything to common law concepts',[66] particularly because of the geographical and historical locations of pastoral leases. Finally, the statute referred to tenures unknown at common law such as leases in perpetuity, a term that 'cannot possibly take its meaning from'[67] the common law. In addition her Honour found significant indication that there were rights of entry for a number of people including Indigenous people.[68]

Gummow J took the view that the matter could only be considered as a matter of statutory interpretation for a number of reasons. The major factor supporting this view was the development of a range of tenures that may have used the language of common law tenures but which were teeming with 'proverbial incongruities'.[69] As a result, the common law was unhelpful. For example, common law tenures are based upon the assumption that all tenures derive from the Crown and yet native title is an allodial tenure.[70] The issue in this case concerned *sui generis* statutory rights[71] and thus the issue was to be determined by statutory determination.[72] Therefore there was no reason to conclude that the general exclusionary provisions in the statute applied to Indigenous people[73] nor were the general provisions of the statute coincident with the general provisions of leases and licences.[74] His Honour concluded that the grant was not one of exclusive possession amounting to a common law lease, but that it was a statutory grant and therefore did not necessarily extinguish native title.

As with the other majority judgments, Kirby J considered that the pastoral leases took their form and character from the statutes under which they were granted and these statutes created *sui generis* rights not directly related to common law tenures.[75] His Honour also reviewed the historical antecedents of pastoral lease legislation in Australia[76] and relied on the work of Dr T P Fry[77] to

63 Ibid 206.
64 Ibid 207.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid 208.
69 *Stewart v Williams* (1914) 18 CLR 381, 406 quoted in *Wik* (1996) 141 ALR 129, 224.
70 *Wik* (1996) 141 ALR 129, 224.
71 Ibid.
72 Ibid 232.
73 Ibid 237.
74 Ibid 240.
75 Ibid 279.
76 Ibid 265–9.
77 Ibid 279–80.

support both this view of pastoral leases and the view that the rights granted did not result in the exclusion of Indigenous people.[78] Having reached that conclusion about the interest, his Honour further concluded that there was no extinguishment of native title.[79]

None of the judgments found any major or significant distinctions between the Mitchellton and Holroyd leases.

The major distinction between the reasoning of the majority and the minority — that the grant of a set of statutory rights amounted to less than a grant of exclusive possession, as opposed to a grant of exclusive possession amounting to the grant of a common law lease — may well have been sufficient to dispose of the major issue in dispute. The main issue remaining for determination was the effect of these findings on both the continued enjoyment of native title and the status of the statutory rights granted under the name of a pastoral lease. These consequences are discussed further below. However, the central focus of both the majority and the minority was a consideration of the doctrines of tenure and estates and the Crown's radical title in the context of the findings of the case.

### *B The Doctrines of Tenure and Estates — Radical Title, Reversion and* Plenum Dominium

In the end, consideration of these issues was probably not a necessary part of either the majority or minority judgments. However, the manner in which these issues were considered in the judgments provides an insight into the court's intention to develop a unique approach to the interpretation of property law in Australia and may well have implications for future native title issues that come before the court.

Brennan CJ expanded upon the view expressed in *Mabo* in relation to the sardine factory leases on the islands of Dauer and Waier, namely that if such leases were validly granted, they had the effect of extinguishing native title, notwithstanding that there were reservations in respect of the Meriam people.[80] Extinguishment occurred because 'by granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease'.[81] In *Wik* his Honour further considered the issue of the Crown's reversion.[82] He concluded that once the doctrine of tenure is brought into play, the Crown has beneficial ownership of all that is not granted. In this case, the Crown has the reversion expectant or a legal reversionary interest in the land.[83] Such a consequence flows from the exercise of the Crown's power 'to alienate an estate in land'.[84] The Crown's exercise of its powers to grant land extinguishes native title at the time of the grant. Such a conclusion arises from the fact that the Crown has granted a (leasehold) estate in

[78] Ibid 280.
[79] Ibid 284–5.
[80] *Mabo* (1992) 175 CLR 1, 72–3.
[81] Ibid 73.
[82] *Wik* (1996) 141 ALR 129, 154–9.
[83] Ibid 157.
[84] Ibid 156.

land. Thus native title is extinguished both because of the grant of an interest amounting to exclusive possession and the engagement of the Crown's reversion. His Honour concluded by again suggesting that it was 'too late now to develop a new theory of land law that would throw the whole structure of land titles based on Crown grants into confusion'.[85]

A further element of his Honour's view is that the Parliaments that passed both the Land Act 1910 (Qld) and Land Act 1962 (Qld) could not have intended that anyone other than the Crown have any reversionary interest in the land, least of all native title holders, who had not been recognised at that time.[86] This final view was referred to by Gummow J who acknowledged that the interpretation of statutes and Parliament's intention pre-*Mabo* created some methodological problems, but considered that since *Mabo* now reflected the state of the law, statutes must be interpreted in light of that decision.[87]

The majority, in their separate judgments, did not find the same doctrinal difficulty as the Chief Justice on this point. Gummow J addressed the point at length. His Honour confirmed that the Crown's radical title provided the link between the constitutional power of the Crown and the system for creating private interests in land,[88] but that it was the subsequent exercise by the Crown of its authority to grant interests in land that produced a *plenum dominium* or absolute beneficial title in the Crown.[89] However, having concluded that the Crown's powers and the nature of the grant derive from the statute rather than the common law doctrines, the conclusion that the Crown had a common law reversion expectant must flow from the statute. No such conclusion could be drawn from the language of the statutes in this case.

Gaudron J took the view that the matter was concluded by a finding that the grant was not a 'real lease', therefore there was no vesting of a leasehold estate. As a reversionary interest only arose upon the vesting of a leasehold estate, the Crown could not be said to have expanded its radical title and acquired full beneficial ownership upon reversion. In the case of the pastoral leases, the land reverted to the Crown and became Crown land under the statutes.[90] However, it does appear from her Honour's consideration of the issue that had the lease been a 'real lease' — that is, a common law lease — the doctrine may well have applied.

In referring to the comments of Brennan J (as he then was) in *Mabo*[91] concerning the Crown's reversion, Toohey J questioned the appropriateness and relevance of the *plenum dominium* doctrine to the Crown's exercise of its authority under its radical title.[92] Rather, his Honour suggested that the reversionary doctrine deriving from the doctrine of estates is a 'feudal concept in

[85] Ibid 158.
[86] Ibid 159.
[87] Ibid 232.
[88] Ibid 234.
[89] Ibid.
[90] Ibid 209.
[91] (1992) 175 CLR 1, 68.
[92] *Wik* (1996) 141 ALR 129, 186.

order to explain the interests of those who held from the Crown, not the title of the Crown itself'.[93] Thus the doctrine properly related to the holder of a fee simple who carved out a lesser estate. To apply this doctrine to the Crown was 'to apply the concept of reversion to an unintended end'.[94] His Honour was at pains to emphasise that this view in no way derogated from the Crown's capacity to exercise its authority under its radical title to grant interests in land.

While Kirby J considered the issue of the Crown's reversion,[95] his Honour did not provide any clear conclusion on the point. Rather, the narrowness of the final decision in *Mabo*[96] was emphasised (a view also expressed by Toohey J)[97] and the need for caution in applying the doctrine in order to achieve extinguishment.[98]

The discussions in the majority judgments of this issue varied in their scope and content. However, unlike the judgment of Brennan CJ, the judgments were characterised by a concern to limit the operation of the principle rather than concern about throwing the system of land titles into confusion.[99] The majority was consistent with accepted principle, since it did not view the interest granted under the statutes as a common law leasehold estate.

### C *Extinguishment of Native Title — the Postscript and the Judgments*

The second major issue emerging from the case was the discussion about extinguishment. There was no consistent view expressed by the majority on this point other than the joint view expressed in the postscript to the judgment of Toohey J.[100] The postscript made it clear that the pastoral leases were valid and that no necessary extinguishment of native title rights followed by reason of the grant of the pastoral leases. The rights and interests of both the pastoral lessees and the native title holders must be established and where there is inconsistency, the native title rights must yield to the extent of the inconsistency.[101] The language of the postscript does not seem to be the language of extinguishment. It raises the possibility of subjugation or suppression of native title rights for the term of the grant rather than extinguishment. Native title rights may be unenforceable during the life of the grant. The separate judgments provide little, if any, clarification on the point.

Toohey J appeared to take the view that extinguishment could only occur where there was a clear and plain intention to extinguish or where the extinguishment was implicit, ie where it was not possible for native title and the other relevant interests to coexist.[102] The matter is to be determined by reference to the

[93] Ibid.
[94] Ibid.
[95] Ibid 263–4, 272–3.
[96] (1992) 175 CLR 1, 68.
[97] *Wik* (1996) 141 ALR 129, 186.
[98] Ibid 172.
[99] Ibid 158.
[100] Ibid 189–90.
[101] Ibid 190.
[102] Ibid 184.

grant and the incidents of native title.[103] On this basis, it appears that where the grant itself is not inconsistent with the continued enjoyment of native title but there is some inconsistency between the exercise of some rights under the grant and the exercise of native title rights, the latter rights cannot be exercised but may not be extinguished.[104] This view is confirmed by his Honour's reference to the lessees' non-entry onto the Mitchellton leases, namely that the interest vested upon the grant and entry was not necessary to give effect to the grant.[105] Not only does this view reinforce the distinction between the statutory rights granted and a common law lease (vesting of which was dependent upon entry), but it also suggests that specifics of the grant, rather than details of use, may result in extinguishment.

Such a view is consistent with the approaches taken by the other majority judges. Although Gaudron J did not address the issue directly, her Honour did suggest that any questions of extinguishment or impairment were questions of fact to be determined by the Federal Court in its investigation of the detail of the native title claimed.[106] The use of the term impairment is suggestive of something less than extinguishment resulting from inconsistency.

Gummow J appeared to be very careful in emphasising the extent of his decision — that none of the grants necessarily extinguished all the incidents of native title. As a result, his Honour said nothing on the issue of suspension of native title.[107] Thus, the emphasis in decision-making was on the substance of the grant, suggesting that it is those elements that will result in extinguishment.

Finally, Kirby J was very clear in his view that it is the grant of an inconsistent interest in land that will extinguish native title.[108] 'Only if there is inconsistency between the legal interests of the lessees (as defined in the instrument of lease and the legislation under which it was granted) and native title ... will such native title to the extent of the inconsistency be extinguished.'[109] Again, this view, together with the lack of emphasis placed upon the non-entry into occupation of the Mitchellton lease suggests that it is the grant itself, rather than use of the land, that will extinguish native title.

An important point of distinction between the judgment of Toohey J and the other majority judges was in their treatment of 'true leases'. Both Gaudron J, by implication, and Gummow J indicated that a true lease, that is a common law lease, will extinguish native title.[110] On the other hand, Toohey J[111] goes to some lengths to clarify this and limit the views expressed by the court in *Mabo* and correct the view of that decision expressed in the Preamble of the Native Title Act in relation to leases. His Honour first reaffirmed 'the need for a clarity of

[103] Ibid.
[104] Ibid 185.
[105] Ibid 187.
[106] Ibid 218.
[107] Ibid 248.
[108] Ibid 272.
[109] Ibid 279.
[110] Ibid 209 (Gaudron J), 226 (Gummow J).
[111] Ibid 183–4.

intention' to extinguish native title[112] and then went on to suggest that too much weight had been placed upon those parts of the judgments of Brennan J[113] and Deane and Gaudron JJ[114] in *Mabo* which suggest that leasehold estates would extinguish native title. 'At their highest, the references are obiter.'[115] Such a comment was not necessary as the case was essentially decided on the basis that the interest in question was not a leasehold estate. However, as with the discussion of the existence and effect of the Crown's reversion, this view further contributes to the notion that leasehold estates may not in fact extinguish native title.

Brennan CJ was also of the view that the grant extinguishes native title, either because it is a grant of exclusive possession or because of the Crown's reversion. The notion of suspension of native title is inconsistent with the operation of the doctrines of tenure and estates.[116]

There is a clear majority indicating that a fee simple grant will always extinguish native title.[117] However in relation to leases, either leasehold estates or statutory grants called leases, the situation is not as clear. The possibility of suspending native title has been raised. However, the parameters of extinguishment remain uncertain.

### D *The Comalco and Pechiney Leases*

The Federal Court decision on validity of the bauxite mining leases and a claim to any benefits arising thereunder was confirmed by all seven justices. The reasoning of Brennan CJ was that any irregularity in the negotiation of the agreements upon which the grant of interests were based, either as a result of a breach of fiduciary duty or the rules of natural justice, was overridden by the legislation authorising the grant of the interests.[118] Kirby J, with whom the majority agreed on these points, also confirmed the validity of the grants in both cases, relying on the force of the State Agreement Acts which provided a specific statutory framework for the agreements in question and the grants made pursuant to those agreements.[119] While this result cannot be said to determine the issue of the possibility of a fiduciary duty owed by the Crown to Indigenous people, first raised by Toohey J in *Mabo,*[120] it is clear that any such claim can now be met with an argument based upon statutory authorisation, provided the statute clearly permitted the action to be done in the manner in which it was done.

112 Ibid 183.
113 *Mabo* (1992) 175 CLR 1, 68 (Brennan J).
114 Ibid 110 (Deane and Gaudron JJ).
115 *Wik* (1996) 141 ALR 129, 183.
116 Ibid 159–60.
117 Ibid 157 (Brennan CJ, by implication), 184 (Toohey J), 209 (Gaudron J, by implication), 226 (Gummow J), 272 (Kirby J).
118 Ibid 163.
119 Ibid 290–1.
120 (1992) 175 CLR 1, 199–205.

## V COMMENT

The immediate outcome of *Wik* was a return of the matter to the Federal Court for determination of the facts including whether native title exists and if so the incidents of native title claimed. This determination will form the basis of inquiry about the capacity of native title and pastoral interests to coexist and the extent of any factual inconsistency. In relation to other cases, the consequence is that each native title claim and each grant of an interest under pastoral lease legislation must be considered case by case.[121] The case also raised significant issues about the coexistence of interests and the on-going relationship between native title holders and pastoralists, the validity of acts taken and grants of interests made in relation to pastoral lease land since the commencement of the Native Title Act on 1 January 1994 and the consequences for future acts on pastoral lease land.

The case by case approach has provided the basis for major criticism both because of the delay involved and the uncertainty surrounding the definition of precise native title and pastoralist rights.[122] The response of state governments and industry organisations has been to call for legislation to override native title rights in order to create certainty both in relation to coexisting rights and management of pastoral activities as well as the conduct of future, non-pastoral activities on pastoral leases such as mining.[123] At present such activities are governed by the code for future activity established in the Native Title Act,[124] the validity of which was confirmed in the *Native Title Case.*[125] Validating legislation was also sought in relation to actions taken since the Native Title Act came into operation on 1 January 1994 which had not complied with the future act requirements of the Act.[126] The response of Indigenous people has been to suggest the development of regional land use agreements as the basis for shared use of and coexistence on land.[127]

The Government has released a ten point plan setting out its proposed response to the decision.[128] The plan incorporates both aspects of *Wik* and broader elements of amendments to the Native Title Act already introduced into Federal Parliament.[129] While an extensive consideration of the proposals is not appropriate here, and their fate both in their drafting and in the Senate is uncertain, the

121 *Legal Implications of the High Court Decision*, above n 8, 9.

122 Taylor and Syvret, above n 11.

123 Lenore Taylor, 'Advice Warns of Need for Consent', *The Australian Financial Review* (Sydney), 4 January 1997, 5.

124 Native Title Act 1993 (Cth) ss 21–44.

125 (1995) 183 CLR 373.

126 *Legal Implications of the High Court Decision*, above n 8, 17.

127 Peter Gill, 'Push for Regional Agreements', *The Australian Financial Review* (Sydney), 24 January 1997, 5; The National Indigenous Working Group on Native Title, *Coexistence — Negotiation and Certainty: Indigenous Position in Response to the Wik Decision and the Government's Proposed Amendments to the Native Title Act 1993* (April 1997).

128 *10 Point Plan*, above n 13.

129 Native Title (Amendment) Bill 1996 (Cth). See also Parliamentary Secretary to the Prime Minister, Commonwealth of Australia, *Exposure Draft of Proposed Amendments to the Native Title (Amendment) Bill 1996* (October 1996).

effect of the *Wik* related amendments can be shortly stated: 'validation of acts/grants between 1/1/94 and 23/12/96';[130] extinguishment of native title rights inconsistent with a pastoralist's activities which will be upgraded and permitted in accordance with the definition of primary production in the Income Tax Assessment Act 1936 (Cth); statutory access rights for registered native title claimants where there is 'current physical access to pastoral lease land';[131] the capacity for States and Territories to diminish native title holders' rights to negotiate over future activities on pastoral lease land. While these proposed amendments reflect acceptance of *Wik,* namely that exclusive possession is not necessarily an incident of a pastoral lease, the diminution of native title rights on pastoral leases by statute may effectively diminish the impact of the decision.[132]

The political furore provoked by the decision has clouded some of the major issues that emerge from it. Although there has been a focus on the detail of the resolution of the specific issues and their practical implications, some longer term implications also strongly emerge from the judgments. The exploration of the boundaries and rationales of extinguishment of native title have been referred to above. These considerations were characterised by a willingness of the majority to reassess the relevance of English common law principles to a very different social, political and geographical environment. The historical explorations in the majority judgments suggested a new and different environment driven by the imperatives of a settler community grappling with Indigenous peoples asserting themselves in their country and with the institutions through which land use and management might be controlled and regulated. This process continues to resonate in the political and legal discourses of contemporary Australia. The court's willingness to reassess the shape and form that should be accorded to English common law concepts in this environment raises new possibilities for the development of an inherently Australian land law regime — a view aptly captured by Gummow J:

> Traditional concepts of English land law, although radically affected in their country of origin by the Law of Property Act 1925 (UK), may still exert in this country a fascination beyond their utility in instruction for the task at hand. ... The task at hand involves an appreciation of the significance of the unique developments, not only in the common law, but also in statute, which mark the law of real property in Australia, with particular reference to Queensland. I have referred above to some of these developments. There also is the need to adjust ingrained habits of thought and understanding to what, since 1992, must be accepted as the common law of Australia.[133]

MAUREEN TEHAN*

130 *10 Point Plan*, above n 13, 2.

131 Ibid.

132 See generally, The National Indigenous Working Group on Native Title, above n 127; Hiley, above n 10; and Bryan Horrigan and Simon Young (eds), *Commercial Implications of Native Title* (1997) for a discussion of the practical impacts of both the decision and proposed responses for Indigenous people, government and industry.

133 *Wik* (1996) 141 ALR 129, 226–7.

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# BOOK REVIEWS

*The Principles of Unemployment Law* by Rohan Price (Sydney: LBC Information Services, 1996) pages i–xxv, 1–157, bibliography and index 158-68. Price $35 (softback). ISBN 0 455 21433 6.

Structural unemployment has been a feature of western capitalist countries for over two decades, yet books on unemployment law remain less common than those on employment law. It is tempting to welcome Rohan Price's *The Principles of Unemployment Law*[1] for this reason alone. I would like to be able to say that Price's book could become the core text for students and teachers wishing to explore this relatively neglected field, yet his approach is so haphazard that, despite his good intentions, he hardly does justice to his subject. It is, sadly, an opportunity missed, for even Price's cursory treatment reveals the host of important policy, legal and theoretical issues surrounding this area, some of which I will go on to explore.

At around 150 pages, *The Principles of Unemployment Law* attempts to cover a startling amount of ground. Chapter one gives some historical and policy background to Australia's current unemployment law. Chapter two examines what were, at the time of Price's writing (March 1996), the two main benefits for the unemployed, the Jobsearch Allowance ('JSA') and the Newstart Allowance ('NSA'). The focus here is on testing the search for work, the principal substantive issue in determining eligibility. The merits review process that claimants for unemployment benefits may invoke is also introduced. This is further explored in chapter three, where Price considers whether the Administrative Appeals Tribunal has actually developed any principles of administrative equity in this area or, conversely, whether it sees itself as merely the 'guardian of public money'.[2] Chapter four provides a valuable introduction to the case management program for the long-term unemployed put in place by the Labor Government's *Working Nation* strategy and established under the Employment Services Act 1994 (Cth). The Coalition has since indicated it will corporatise the Commonwealth Employment Service and tender out case management services, but the features of the new system reviewed by Price stay in place as a major development in unemployment law. In his final chapter, Price broadly explores the philosophy of unemployment law, offering 'Notes Toward a Legal Theory of Work'[3] and various proposals for reform.

[1] Rohan Price, *The Principles of Unemployment Law* (1996).
[2] Ibid 83.
[3] Ibid 124.

It is an ambitious program, and one which is ultimately unsuccessful for a variety of reasons. Price seems motivated by a — justifiable — moral outrage at the way unemployed people are treated by the current regime of legal regulation, yet the lack of a serious engagement with the debates that are shaping social policy both here and overseas means that the book can hardly be recommended as either a classroom text or as a primer for a non-legal audience. In the course of the book, Price touches on a number of contentious issues, such as post-modernism and the eclipse of class politics,[4] and the preoccupations of labour law academics.[5] However, unless Price is willing to engage with such issues at a deeper level, merely throwing them out to the reader is simply an exercise in self-indulgence.

For example, Price makes the suggestion that unemployment law and employment law should be studied together as the law regulating income[6] or, more generally, that unemployment law constitutes the 'other side of employment regulation'.[7] He puts this as a challenge to existing labour law paradigms,[8] yet it is a challenge made with little sense of the historical development of the discipline. Early exponents of the discipline — such as Otto Kahn-Freund and W Robson — did include unemployment insurance or welfare law within their ambit.[9] The 'disappearance' of unemployment law from the field of labour law is due to the post-war social accord which privileged trade unions as policy actors, and which was underpinned by what now appears as the aberration of a full employment economy with full-time contracts of indefinite duration.[10] The passing of that era has indeed provoked labour lawyers to return to the consideration of unemployment law within the wider study of the legal regulation of labour markets.[11]

The book is further marked by convoluted and sloppy prose that quickly fills up its 150 pages at the expense of the theoretical sophistication demanded by the topic. The publication is also marred by typographical errors. They are of a kind

[4] Ibid 12, 116. See also ibid 146, where Price writes: '[w]ithout reference to economic class, the discourse about rights appears to be an argument about subjective claims rather than objective entitlements', yet his own methodological preoccupation with the unemployed individual as the subject of legal regulation seems to undermine this claim. Again, for a book trying to trace the contours of a putative 'income law' (ibid ix, 151), there is little detailed consideration or analysis given to the distribution of poverty, rising inequality of market incomes, the redistributive effects of social security policies and trends in real disposable incomes. Cf Peter Whiteford, 'Income Distribution and Social Policy Under a Reformist Government: The Australian Experience' (1994) 22 *Policy and Politics* 239.

[5] Price, above n 1, 129–32.

[6] Ibid ix, 151.

[7] Ibid 124.

[8] Ibid 129–32.

[9] Richard Mitchell, 'Introduction: A New Scope and a New Task for Labour Law?' in Richard Mitchell (ed), *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995) vii.

[10] Ibid xi.

[11] Mitchell, 'Introduction: A New Scope and a New Task for Labour Law?', above n 9; Rosemary Owens, 'The Traditional Labour Law Framework: A Critical Evaluation' in Mitchell (ed), above n 9, 3; Christopher Arup, 'Labour Market Regulation as a Focus for a Labour Law Discipline' in Mitchell (ed), above n 9, 29.

— 'modem' for 'modern', 'befits' for 'benefits', 'an' for either 'on' or 'as' — that indicate the publishers know how to use a spellcheck program but will not do readers the courtesy of employing a proofreader. Apart from readers, lawyers and law teachers have an interest in seeing that their work is produced by law book publishers at a standard equal to that of other academic publishers.

Throughout the book, Price's coverage of legal principles does hint at broader issues that could inform his larger project. I mention this 'larger project' because it seems central to the book and is a worthy one generally, ie to rethink the position of unemployment law within wider notions of 'income law' and 'legal theory of work'. Yet despite setting himself this benchmark, Price's analysis rarely strays from the conventional. In the remainder of this review, I tease out some of the possibilities of this project. Like Price, I begin from the central substantive issue in unemployment law — testing a claimant's search for work — and suggest that administering the 'work test' necessarily entails assumptions about changing patterns of market employment and unemployment. Exploring these patterns in any detail in turn problematises conventional notions of 'work'. By rethinking the category of work, I go on to explore the rationales for a guaranteed minimum income scheme, a specific policy proposal put by Price.[12] Finally, I suggest that retheorising work and welfare needs to involve an attempt at theorising modes of social formation more generally.

## I FROM 'WORK TEST' TO 'ACTIVITY TEST'

It is unsurprising that testing the search for work — the 'work test' — provides the focus for much of Price's discussion, as it is central to the definition of 'unemployment' as well as to issues of labour market incentives and moral hazard. It is what defines the unemployed as members of the labour force, setting them apart from those drawing income support for disability, retirement and sole parenthood.[13] Because the work test tries to arrive at an evaluation of an individual's subjective state — the willingness to work — it also generates a raft of tribunal decisions and case law that can become part of the content of 'unemployment law' as traditionally taught. Yet if unemployment law is conceived of as the obverse of employment law, then the crisis afflicting labour

[12] Price, above n 1, 151–3.

[13] This distinction is, however, becoming less clear. For example, whereas the sole parent pension is not conditional upon searching for work, recent policy changes suggest a move toward rethinking sole parenthood as a labour market barrier rather than the absence of a 'breadwinner'. Sole parents have been offered programs that assist labour force participation (Jobs, Education and Training ('JET') scheme) and the pension is withdrawn once their youngest dependent child reaches 16 years, forcing them into market employment or onto unemployment benefits (with eligibility dependent on the search for work). The effect of such policies can be seen in the increase in actual labour force participation rates for sole parents: 42.8 per cent of female sole parents were in the labour force in 1980 and 52 per cent in 1992: Anne Edwards and Susan Magarey (eds), *Women in a Restructuring Australia: Work and Welfare* (1995) 266. Similar policy shifts can also be discerned in the administration of disability support payments: Terry Carney, 'Disability Support Pension: Towards Workforce Opportunities or Social Control?' (1991) 14 *University of New South Wales Law Journal* 220.

law generally — especially the rise in non-standard forms of work[14] — will also precipitate change in the structure of unemployment law. It is the nature of that change that I want to explore here.

The work test is now officially an 'activity test',[15] a change influenced by the Social Security Review set up in 1985 by the then Minister for Social Security, Brian Howe.[16] The Review proposed linking increased income support payments to a restructured income test, to encourage labour force attachment, and to an activity test which expanded the work test to include activities such as training.[17] That is, income support would be integrated with labour market programs provided through the Commonwealth Employment Service. Under the new test, claimants of unemployment benefits could prove their eligibility by undertaking a range of activities which were likely to reduce labour market disadvantage other than looking for full-time work, including training or labour market programs likely to improve their prospects for finding work, or developing a self-employment venture.[18] In practice, however, the activity test remains a work test: in 1995, 95 per cent of JSA recipients and 92 per cent of NSA recipients recorded job search as their activity type.[19]

Equally important, the period after 1991 has seen a number of changes made to the income test which have tried to encourage increased labour market attachment through accessing part-time and casual work. In particular, there have been changes to the 'earnings disregard' threshold which governs the amount a person or married couple can earn before the income test is applied.[20] Also, an earnings credit scheme was introduced (subsequently abolished by the Coalition government) which allowed a credit to be offset against income from employment,[21] as was a waiver of waiting periods for clients reclaiming their allowance within 13 weeks of losing entitlement.[22] The 1993 Discussion Paper of the Committee on Employment Opportunities identified further concerns regarding disincentives and distorted labour market choices.[23] In particular, the application of the income test to the joint income of couples provided a disincentive for partners of the unemployed to seek employment, and a lack of

14 See, eg, Owens, above n 11.

15 Social Security Act 1991 (Cth) ss 513(1)(b), 522.

16 Commonwealth of Australia, Department of Social Security, Social Security Review, *Income Support for the Unemployed in Australia: Towards a More Active System*, Issues Paper No 4 (1988) ch 16.

17 Ibid 267.

18 Social Security Act 1991 (Cth) s 522(2).

19 John Powlay and Kate Rodgers, 'What's Happened to the Work Test?' in Peter Saunders and Sheila Shaver (eds), *Social Policy and the Challenges of Social Change: Proceedings of the National Social Policy Conference, Sydney, 5–7 July 1995* (1995) vol 1, 161, 165.

20 Commonwealth of Australia, Department of Social Security, *Meeting the Challenge: Labour Market Trends and the Income Support System*, Policy Discussion Paper No 3 (1993) 19 ('*Meeting the Challenge*').

21 Ibid.

22 Ibid.

23 Committee on Employment Opportunities, *Restoring Full Employment*, Discussion Paper (1993) 168, 183.

incentive for either partner in an unemployed couple to seek a low-paid, full-time job. The resulting reforms signalled a shift to individual entitlement which, it was hoped, would encourage greater and more effective job searches by both partners of a married couple.[24]

One of the factors influencing these changes was the apparent relationship between the labour force status of women and that of their husbands, in particular the fact that women with unemployed husbands were much more likely to be unemployed than women with employed husbands.[25] Yet whether this is an effect of incentives built into the income test is doubtful. There are a host of possible explanations for this relationship, from locational disadvantage[26] to the persistence of gender stereotypes.[27] Financial incentives may actually have little or no behavioural impact, a point suggested by both Australian and British studies. These show that most claimants are unaware of how the income test actually works (and generally perceive it as harsher than it actually is). Claimants' attachment to the labour force tends to be based primarily on their preference for certain types of work and, for sole parents, on the significance attached to the parenting role.[28] Claimants also tend to place more importance on the perceived sense of financial security and stability provided by benefits than the intermittently higher income that may come from accepting short-term or casual work. Hence, administrative practices, such as waiting periods on re-application for the benefit, will affect the assessment of the financial consequences and risks of accepting a job.[29]

[24] The reforms also entailed the introduction of a new Parenting Allowance (half the married rate of benefit) for spouses of JSA and NSA recipients caring for children under 16 (Social Security Act 1991 (Cth) pt 2.18) and a Partner Allowance for spouses of JSA and NSA recipients who were born before 1955 and with little or no recent work experience and no dependent children (Social Security Act 1991 (Cth) pt 2.15A). This means that those spouses under 40 without children must now satisfy eligibility conditions, usually the activity test, to become entitled to an unemployment benefit.

[25] In 1994, the wives of unemployed men had a markedly higher unemployment rate than the wives of employed men (44.1 per cent as opposed to 4.3 per cent), while having a labour force participation rate one third lower (43.7 per cent as opposed to 68.4 per cent): Bettina Cass, 'Connecting the Public and the Private: Social Justice and Family Policies' (1994) *Social Security Journal* (December) 3, 18.

[26] Ranking Australian neighbourhoods by socio-economic status between 1976 and 1991, men's employment decreased more markedly in the bottom half of neighbourhoods than in the top half, while women's employment in the bottom half fell by 40 per cent, suggesting both husbands and wives are affected by the same regional variations in labour demand: Robert Gregory and Boyd Hunter, *The Macro Economy and the Growth of Ghettos and Urban Poverty in Australia* (1995) 14.

[27] The wife might not seek market employment so as not to undermine the husband's desire to be seen as the breadwinner: Bruce Bradbury, 'Added, Subtracted or Just Different: Why Do the Wives of Unemployed Men Have Such Low Employment Rates?' (1995) 21 *Australian Bulletin of Labour* 48, 49.

[28] Anne Puniard and Chris Harrington, 'Working Through the Poverty Traps: Results of a Survey of Sole Parent Pensioners and Unemployment Beneficiaries' (1993) *Social Security Journal* (December) 1.

[29] For a consideration of British studies regarding the issue, see Eithne McLaughlin, 'Work and Welfare Benefits: Social Security, Employment and Unemployment in the 1990s' (1991) 20 *Journal of Social Policy* 485.

Reforms to the income test do, however, indicate a pragmatic recognition of labour market change, especially the fact that, between 1980 and 1993, 60 per cent of new jobs have been part-time and that there has been a decline in the probability of leaving unemployment for full-time work and an increase in the probability of leaving unemployment for part-time work.[30] It appears, then, that part-time work — or seasonal, casual, voluntary or home work, or forms of self-employment — is increasingly becoming the typical rather than atypical form of labour market participation for many people; that these forms of participation are the options presented to the unemployed; and that the take-up of such options is being encouraged by a more flexible income test. Re-entry to the labour force is now likely to be characterised by a combination of part-payment of unemployment benefits and earnings from part-time work over a lengthy period.[31] Yet, as to whether this move into part-time work constitutes a 'pathway' to full-time work, Alan Jordan comments:

> The idea that large numbers of people can make a transition from unemployment through casual or part-time to full-time work, attractive though it may be, should be regarded with some scepticism. Too little is known of the circumstances under which it occurs. The strongest justification for encouraging employment that provides less than a full livelihood is that for many it may be the only alternative to complete and permanent unemployment.[32]

If this is the case, then the retained unemployment benefit is not compensation for unemployment, but compensation for *under*employment.

Such a shift is not, however, countenanced by the administration of an activity test which still privileges the search for full-time work. While it is true that the activity test recognises a wider range of activities than the old work test, it appears that someone combining ongoing part-time work with part-payment of benefits would still fall foul of the activity test. That is, their readiness and willingness to undertake full-time work could only be shown by their stating that they will accept any suitable offer of *full-time* work: that is, a willingness to surrender secure, ongoing part-time employment (which characterises, say, the retail and hospitality sectors) for insecure full-time employment.[33]

There seems a clear policy tension between the recognition of current labour market trends through changes to the income test and the continued emphasis on full-time work in the activity test.[34] This leads me to suspect that the activity test is less about incentive — most incentive effects remain unproven in any case — than about wider issues of social organisation. The strictures of the current activity test remain the last obstacle to introducing a form of Guaranteed

30 *Meeting the Challenge*, above n 20, 7, 9.

31 Powlay and Rodgers, above n 19, 167.

32 Alan Jordan, 'Labour Market Programs and Social Security Payments' (December, 1994) *Social Security Journal* 60, 71.

33 *Meeting the Challenge*, above n 20, 20.

34 Peter Saunders, *Improving Work Incentives in a Means-Tested Welfare System: The 1994 Australian Social Security Reforms*, Discussion Paper No 56, Social Policy Research Centre (1995) 28.

Minimum Income ('GMI'). In fact, there are already inklings of a GMI in those instances where the activity test surrenders its preoccupation with the search for full-time work by claimants living in remote areas[35] or where claimants over 50 earn at least 35 per cent of average male full-time weekly earnings from part-time employment.[36] This is a point recognised by Price, who comments, '[i]n this way, unemployment benefit takes on the character of an early retiring benefit or an additional remote living allowance'.[37] Price adds, however, that these initiatives reduce the issue to one of 'rights maximisation among sectional groups or particular cases rather [than] identification and action along the lines of socioeconomic traits'.[38] I am not sure what Price means here by 'socioeconomic traits' if these are not to include those very real labour market disadvantages suffered by older people or those living in remote areas. Further, rather than being about rights maximisation of sectional groups in the context of some sort of zero-sum game, the provisions can be seen as prefigurative of a renewed system of income support. Extending the rationale of such provisions was a possibility suggested in a policy paper of the Department of Social Security itself, which recommended 'recognition of the concept of "underemployment" as well as unemployment and the rights of underemployed people to receive income support'.[39]

It is clear that any discussion of the activity test necessarily leads into the broader issue of the merits of a GMI scheme. Before I address this, I want to consider one of the most serious shortcomings of Price's analysis.

## II 'WORK' V 'WELFARE'

Price veers between discussing a potential 'income' law and talking about the possibilities for a legal theory of 'work', yet he is ultimately concerned with income rather than work in any broad sense. To talk about a legal theory of *work* would mean having regard to the experience of those traditionally excluded from or marginal to that form of civil citizenship based around the wage contract.[40] Discussion of the experience of, for example, women and indigenous Australians could have profitably informed Price's attempt to place unemployment law in a wider context that begins to transcend the work-welfare dichotomy.

The trend toward increasingly diverse work patterns mentioned in the previous section necessarily has ramifications for the framing of this work versus welfare debate, a point recognised by Price when he writes:

35 Social Security Act 1991 (Cth) s 603(2).
36 Ibid s 602.
37 Price, above n 1, 7.
38 Ibid.
39 *Meeting the Challenge*, above n 20, 20, 87.
40 The typology of political, civil and social citizenship was developed by T Marshall: see 'Citizenship and Social Class' in T Marshall (ed), *Citizenship and Social Class and Other Essays* (1950) 1. For a useful introduction to the continuing influence of Marshall's insights on current social policy debates, see Terry Carney and Peter Hanks, *Social Security in Australia* (1994) ch 5.

> New patterns of work force participation are emerging... . The increasingly part-time nature of work raises the issues of whether a person can be regarded as a member of the work force and whether or not a person is unemployed. Linear sequences of education, followed by work, family obligations and retirement are becoming outdated as new life patterns and family types come into being.[41]

Thus 'work' and 'welfare' need to be rethought as life-course stages on a continuum, rather than oppositional positions within a strictly conceived work-welfare dichotomy.[42] Yet even here Price fails to question the category of 'work' itself, a remarkably unreflective position for a book that attempts to explore a legal theory of work. This has serious consequences for how he frames current policy issues. For example, he writes:

> [A] particular group, such as women, may not reap the benefits of full-time work, because part-time work is all that is on offer. In our community, there is an increasing number of people who are neither fully employed nor fully unemployed.[43]

Yet most women are more fully 'employed' than most men. A time-use pilot survey carried out by the Australian Bureau of Statistics in Sydney in 1987 revealed that for employed married women, the time commitment to domestic and caring work was twice that of men, while for single women, the commitment to these tasks was 50 per cent greater than that of single men.[44] That is, women's putative underemployment can only be understood in the context of that other work they do in the household, a point Price fails to recognise.

For Price, women may 'not reap the benefits of full time work because part-time work is all that is on offer'[45]. On the one hand, Price is correct here to suggest that women's labour market patterns are at least partly explained by labour market opportunities. This refutes much of the talk about women's 'choices' in constructing their preferred combinations of paid employment and domestic responsibilities. There is a tendency to read any data relating to women's work patterns, together with information about women's working preferences, as illustrating the outcome of 'women's choices'. Yet aggregate figures of women's labour force participation — including those Price gives[46] — tell very little. There are neighbourhoods where employment change in the last twenty years has led to increases in women's employment and neighbourhoods where women's employment has actually fallen by up to 40 per cent.[47] Belinda Probert offers that 'it is not very plausible to suggest that these changes are a

41 Price, above n 1, 5.
42 Bettina Cass, 'Overturning the Male Breadwinner Model in the Australian Social Security Protection System' in Saunders and Shaver, above n 19, 47.
43 Price, above n 1, 13.
44 Bettina Cass, 'Gender in Australia's Restructuring Labour Market and Welfare State' in Edwards and Magarey, above n 13, 38, 53.
45 Price, above n 1, 13.
46 Ibid 12, 117.
47 Gregory and Hunter, above n 26.

result simply of women's choices'[48] but that 'it is essential to assert the historical and social construction of the choices which individual women appear to be making freely'.[49]

Cross-national comparisons bear out Probert's point. In France, Italy and Finland, there is comparatively little part-time work done by women. For example, Finland has a female labour force participation rate of 73 per cent, but only 11 per cent of those women work part-time. By comparison, 30 per cent of women in Germany's labour force work part-time, suggesting that particular policy regimes and family forms produce a different pattern of women's 'choices'.[50]

On the other hand, it is a mistake to suggest, as Price seems to, that the principal constraint on women's full-time participation in paid employment is opportunity rather than domestic responsibilities. Many women are unable to take up full-time market employment because of caring responsibilities or, conversely, those women in full-time paid employment are often those women who can avoid or shift their responsibility for caring work. The corresponding pattern of men's part-time participation rates — falling to two per cent for men between 20 and 55 years when they are most likely to have dependent children[51] — suggests full-time employment is largely predicated on this avoidance. So even if full-time jobs were on offer, would they be taken up by women? Can women reasonably exercise choice when men refuse to take up caring work? Price seems to want to place the blame for women's under-representation in full-time paid employment on *changed* social conditions — especially a restructuring of the labour market which creates a disproportionate number of part-time jobs in traditionally female fields. Yet women's part-time paid employment might in fact represent a *continuity* in social conditions:

> If we take into consideration what we know about the impact of part-time employment on family relations and the relations of work, we might argue that what is most striking is not the extent of change but the powerful continuities ... . Women have been incorporated into the labour force, but have manifestly failed to challenge seriously the culture of work which rests on a traditional sexual division of labour at home, and within which work intensification has been accepted without resistance.[52]

Price's failure to acknowledge this work intensification not only shows the shortcomings of his putative theory of work, but also turns the policy question around the wrong way. He asks: '[g]iven the prevalence of part-time jobs, should unemployment benefits top-up the difference between a person's take-home pay and average weekly earnings?'[53] Yet any consideration of women's experience — that is, the experience of the greater mass of part-time workers — should lead

[48] Belinda Probert, 'The Riddle of Women's Work' (1996) 23 *Arena Magazine* 39, 45.
[49] Ibid 41.
[50] Ibid 41–2.
[51] Cass, 'Overturning the Male Breadwinner Model', above n 42, 57.
[52] Probert, 'The Riddle of Women's Work', above n 48, 41.
[53] Price, above n 1, 13.

to the question: is the aim to compensate for underemployment (ie 'topping up') or to pay for caring work currently being undertaken?

The social security system currently exhibits an ambivalence as regards this question. There has been a historical move to explicitly recognise caring work (eg Parenting Allowance, Sole Parents Pension and Carers Pension, all of which exempt the carer from the activity test), and also a move to promote the labour market participation of women (represented by changes to the Sole Parents Pension[54] and the partial disaggregation of the couple income unit). There is now both formal gender neutrality in provision[55] and a formal equality as regards choice: anyone can choose caring work or labour market participation, and couples can reverse or share breadwinning responsibilities.

Women's labour force participation and the emergence of dual income families (provoked as much by women's aspirations for social and economic independence as by public policy[56]) strike many as a sea-change. The impact of such a change should not be underestimated, least of all in the positive effect of ameliorating growing market income inequality between families.[57] Yet it can also be argued that the trend reveals stark continuities. When both partners of a heterosexual relationship with children participate full-time in market employment, the pattern derives from an earlier period when those in full-time paid work had someone else — generally a wife — to take care of their domestic responsibilities. Women can only choose this replacement of their domestic labour where they are wealthy enough to afford such options as a nanny or a cleaner, or eating out regularly, options that depend on high incomes, high education, and a stratified labour market.[58] 'What has not changed very much, however', argue Belinda Probert and Fiona Macdonald, 'is the pattern of paid work of their male partners — a pattern of work which they now share'.[59]

So despite the policy emphasis on choice, most women do not choose between paid and unpaid work as *exclusive* activities. As Ann Orloff comments, except for women who are wealthy enough to purchase the services of others, '[n]owhere in the industrialised West can married women and mothers choose *not* to engage in caring and domestic labour'.[60]

The policy issue then becomes that of getting men to take up involvement in the practical life of the home (which would involve a reversal of the trend

[54] For a discussion of these changes, see above n 13.

[55] Sheila Shaver, 'Women, Employment and Social Security' in Edwards and Magarey, above n 13, 141.

[56] Cass, 'Gender in Australia's Restructuring Labour Market and Welfare State', above n 44, 52.

[57] Peter Whiteford, 'Labour Market and Income Inequalities' in Australian Council of Social Services, *Proceedings of the Future of Work and Access to Incomes Seminar* (1995) 10, 29.

[58] Belinda Probert with Fiona Macdonald, *The Work Generation: Work and Identity in the Nineties* (1996) 63.

[59] Ibid.

[60] Ann Shola Orloff, 'Gendering the Analysis of Welfare States' in Barbara Sullivan and Gillian Whitehouse (eds), *Gender, Politics and Citizenship in the 1990s* (1996) 81, 86.

toward longer hours of paid employment for men).[61] Current ambivalent policy responses — attempting to universalise the benefits of men's citizenship through women's labour market participation on the one hand, and recognising new forms of citizenship based on granting parity to women's traditional unpaid work on the other[62] — tend to sidestep the third option, that of universalising the responsibility of primary care work through more flexible and appropriate employment arrangements for all workers.[63]

Price also mentions the fate of Aborigines and Torres Strait Islanders, but in the context of a discussion that ultimately dismisses them as a 'sectional interest'.[64] He mentions the Aboriginal Employment Development Policy but does not consider one of its central planks, the Community Development Employment Program ('CDEP'). Yet as Australia's only 'actually existing' work-for-the-dole scheme, I would have thought it worthy of some discussion. The CDEP scheme allows indigenous communities to pool unemployment benefits so that those eligible for benefits can be paid to work on community projects. As a work-for-the-dole scheme, it is susceptible to a host of criticisms: it only funds part-time work; some participants do not receive the rent assistance they would be entitled to under an unemployment benefit; and communities' 'no work no pay' rules may mean participants receive less than they would under a Department of Social Security ('DSS') entitlement. Furthermore, there is no evidence that the CDEP leads to better employment opportunities in the mainstream labour market.[65]

If the CDEP seems such a failure as a 'welfare' scheme, how can its persistence be explained? Part of the answer is that it is also a *cultural* scheme that allows for an 'Aboriginalisation' of paid employment. Specifically, indigenous organisations can determine the type and conditions of employment that suit local needs and direct time-use patterns toward locally controlled service delivery. They can also encourage the emergence of culturally distinctive features in local economies, which are paid for by relatively secure funds.[66] While the CDEP is in some ways typical of a trend that suggests that the future

[61] Cass, 'Connecting the Public and the Private', above n 25, 15. Nancy Fraser points out that much of the current welfare debate (especially in the United States) turns on fears of 'dependency' and 'free loading', whereas 'the real free-riders in the current system are not poor solo mothers who shirk employment. Instead, they are men of all classes who shirk carework and domestic labour': Nancy Fraser, 'After the Family Wage: A Postindustrial Thought Examination' in Nancy Fraser (ed), *Justice Interruptus: Critical Reflections on the 'Postsocialist' Condition* (1997) 62. See also ch 5, 'A Genealogy of "Dependency": Tracing a Keyword of the U.S. Welfare State', co-authored with Linda Gordon.

[62] Cass, 'Gender in Australia's Restructuring Labour Market and Welfare State', above n 44, 48–51, refers to this ambivalence as 'Wolstonecraft's dilemma'.

[63] Fraser, 'After the Family Wage', above n 61. This would include extending the conditions, benefits and training opportunities characteristic of full-time work to part-time work: Cass, 'Gender in Australia's Restructuring Labour Market and Welfare State', above n 44, 54–9.

[64] Price, above n 1, 117–8.

[65] Diane Smith, '"Culture Work" or "Welfare Work": Urban Aboriginal CDEP Schemes' in Saunders and Shaver, above n 19, 195, 199.

[66] Ibid 200; Tim Rowse, 'Diversity in Indigenous Citizenship' in Ghassan Hage and Lesley Johnson (eds), *Republicanism, Citizenship, Community* (1993) 47, 58–9.

of indigenous Australians lies in labour force participation (or welfare payments for those unable to achieve this), the deeper policy ambivalence — 'welfare work' versus 'culture work' — might in fact be a boon, suggests Tim Rowse, as it 'recognises and accommodates the many ambiguities and indeterminacies of the historically emergent industrial culture'.[67] That emergent culture shows just how contingent any idea of 'work' actually is in the sense of paid employment. The imposition of a white welfare regime in outback communities in the 1950s meant not only attempts to restructure and commodify Aborigines' time,[68] but also the imposition of categories expressing:

> non-Aboriginal notions of breadwinners and dependents, notions which bore no necessary correspondence to Aboriginal traditions of labour division and duties to share ... . The theoretical distinction between the deserving and the undeserving, crucial to the state's training strategy and to the later administration of unemployment benefits, was difficult to apply in practice.[69]

Forms of identity politics based on race and gender do not, as Price suggests, merely represent the dissolution of a univocal logic of class into a morass of competing sectional claims. Rather, the experience of marginalised groups suggests that many understandings of class-based discourse about, for example, what counts as 'work', are themselves often limited or sectional.[70]

## III A GUARANTEED MINIMUM INCOME?

By broadening the idea of work, I want to move, in Rowse's words, to 'rethinking the rationale for public subsidy'.[71] Price's notion of a GMI is a payment 'topping up' net household income through income support products when it falls beneath a benchmark CPI-indexed household income.[72] It is difficult to see how Price's scheme, as outlined, offers anything particularly new except, perhaps, a more comprehensive bulwark against poverty by constructing a more seamless income support system than our current categorical system. The introduction of new payments to catch those who might fall through existing gaps in eligibility is, along with a renewed focus on adequacy of payments, partly the story of social security reform over the last decade, in particular the establishment of a means-tested family payment for the 'working poor' with children. A further concern with the interaction of market wages and the tax-

67 Tim Rowse, 'Rethinking Aboriginal "Resistance": The Community Development Employment (CEPD) [*sic*] Program' (1993) 63 *Oceania* 268, 283.

68 A particular focus of these attempts was the 'black stockworkers' year', then split between an 'idle' summer off-season, and intensive work at other times.

69 Rowse, 'Rethinking Aboriginal "Resistance"', above n 67, 279.

70 In this sense, a much better attempt to develop a 'legal theory of work' would look for those instances where, say, women's work erupts into legal consciousness, for example, in property division after family breakdown or common law damages for personal injury: see Regina Graycar, 'Legal Categories and Women's Work: Explorations for a Cross-Doctrinal Feminist Jurisprudence' (1994) 7 *Canadian Journal of Women and the Law* 34.

71 Rowse, 'Diversity in Indigenous Citizenship', above n 66, 60.

72 Price, above n 1, 151.

benefit system, and improvements in the social wage has been a defining aspect of social policy under the Prices and Incomes Accord.[73]

Such policy trends represent a pragmatic response to increasing market income inequality, and to the growing phenomenon of the working poor.[74] Income transfers and social services have done an important job in alleviating (but not reversing) growing inequality.[75] Price further justifies his notion of a GMI on the basis of communitarianism,[76] but the thrust of such a policy strikes me as basically palliative rather than giving rise to new relations of social solidarity. Unless allied with wider strategies, a GMI, rather than developing a new social dynamic, merely entrenches existing divisions between currently privileged wage earners and a claimant class.[77]

Such allied strategies must allow choice between market work and other forms of activity. This partly proceeds from my discussion in the preceding section concerning the dimensions of work itself. By reconceptualising work, it is possible to argue for a more equitable distribution of that work, in particular an equitable reduction of paid working time and the recognition and support of currently unpaid work. People then gain access to their desired mix of paid and unpaid work across their lifetime, with an adequate income secured against fluctuations. Recognition of different forms of social participation — full-time or part-time paid employment (or availability for paid employment), caring for children or dependent adults, community work, sustaining neo-traditional forms of land use, education and training — widens the concept of citizenship to recognise the value of different contributions made throughout the life course.[78]

[73] Cass, 'Connecting the Public and the Private', above n 25, 11. European proponents of a GMI argue that it must be characterised by flat-rate, needs-based payments, financed from general revenue, and based on individual entitlement: Ulrich Mückenberger, Ilona Ostner and Claus Offe, 'A Basic Income Guaranteed by the State: A Need of the Moment in Social Policy' in Claus Offe, *Modernity and the State: East and West* (1996) 200, 211. The first two aspects have been features of the Australian welfare system since Federation. The third is a more recent policy innovation developed under the Labor government, suggesting that the 'Australian social security system is more adaptable than most overseas systems to the new diversity in work patterns, wages and family structures': Commonwealth of Australia, Department of Social Security, *A Common Payment? Simplifying Income Support for People of Workforce Age*, Policy Discussion Paper No 7 (1995) 17 ('*A Common Payment*').

[74] In 1994, about 15 per cent of couples with children living in poverty had a family member in full-time market work and 14 per cent of working age single people in poverty were employed full-time: Bettina Cass, 'Precarious Labour, Precarious Welfare: Choices Facing Australian Public Policy' (Paper presented at Issues in Public Sector Change Seminar, Centre for Public Policy, Melbourne, 9 September 1996) 10.

[75] National Centre for Social and Economic Modelling ('NATSEM'), *Income Distribution Report* (1995) Issue 2.

[76] Price, above n 1, 152.

[77] On the geographic dimensions of such divisions, see generally Gregory and Hunter, above n 26.

[78] I have drawn here on the discussions in Mückenberger, Ostner and Offe, above n 73; Cass, 'Precarious Labour, Precarious Welfare', above n 74; John Keane and John Owens, 'Feedback' (1988) 7(21) *Critical Social Policy* 116; John Wiseman, 'After "Working Nation": The Future of Work Debate' (1994) 6 *Labour and Industry* 1. Because the income payment would not be totally independent of work in the broad sense (ie social contribution and participation), but would depend on reciprocal obligations while protecting against poverty, it might better be called a *conditional* minimum income: see *A Common Payment*, above n 73, 42–4.

A GMI in this form signals a surrendering of the commitment to 'full employment', and, perhaps, of a concomitant 'right to work'. Yet Australia can hardly return to full employment, as we never had it; we had full *male* employment. We have not substantially lost any of the jobs in aggregate that sustained full male employment, merely redistributed them: measured by total population per capita weekly hours of employment, in the 1990s Australia has an employment base as strong structurally as it was in the late 1960s,[79] whereas there has been a significant shift from full-time to part-time jobs. Given the changing employment demographic, the Labor government's *Working Nation* implicitly admitted Australia was already a post-'full employment' society, and predicted at best a five per cent unemployment rate by 2000,[80] which was in turn predicated on an annual growth rate of four and a half per cent.[81] Not only is 'full employment' therefore unlikely, it might be socially undesirable given ecological barriers to continued 'growth' and the fact that historically the commitment to full employment has strengthened hierarchical divisions between masculine and feminine spheres and worked to destroy traditional forms of life not regulated through the labour market.[82] Equal to the 'right to work' must be the right of all workers to periodically withdraw from the labour market without unfair financial penalty;[83] this, as I argued in the previous section, is a precondition for gender equity.

I have tried to stress the importance of placing discussion of a GMI in the context of theorising work itself. Outside of this context — as compensation for existing levels of unemployment, for example, or as a subsidy for low market wages — a GMI appears as just another welfare expenditure item. In light of a supposed 'crisis' of the welfare state, it thereby appears neither economically feasible nor politically sustainable. It is probably time to shift the terms of this 'crisis' rhetoric away from the distractions of the fiscal perils of an ageing population and Australia's global competitiveness[84] to the more salient issue in Australia, the future of work itself.

## IV THE FUTURE OF WORK AND THE POSSIBILITY OF POLITICS

In the previous section I suggested two aspects of the practical politics of a GMI which I felt were absent from Price's discussion. First, that both the form and rationale that a GMI might take are variable and need to be carefully thought

[79] John Freeland, 'Re-conceptualising Work, Full Employment and Incomes Policies' in Australian Council of Social Service, *The Future of Work* (2nd ed, 1995) 8, 37.

[80] Paul Keating, Commonwealth of Australia, *Working Nation: The White Paper on Employment and Growth* (1994) vol 1, 1.

[81] Saunders, above n 34, 1–2.

[82] Mückenberger, Ostner and Offe, above n 73, 208–9.

[83] Keane and Owens, above n 78, 120.

[84] Each of these concerns has become a staple of arguments for rolling back welfare spending: see, eg, National Commission of Audit, *Report to the Commonwealth Government* (1996). For a critique of this 'crisis' rhetoric in the Australian context, see Deborah Mitchell, 'The Sustainability of the Welfare State: Debates, Myths, Agendas' (1997) 9 *Just Policy* 53.

through. Second, that many existing provisions and trends in Australian social security are themselves prefigurative of a GMI.

But if I read Price's final chapter correctly, he is concerned with the possibilities for political action more generally. It comes through partly in his decrying of 'sectional interests and minority groups'[85] and his reaffirmation of a class-based trade union politics.[86] I feel it important, however, to push his analysis further. That is, is it enough to ask how traditional political actors can respond to the changed world of work when the changes themselves might have destroyed the grounding conditions for that type of action?

'The working class is not the homogenous group which it was during the Industrial Revolution'[87] argues Price, suggesting there is a growing tendency for much trade union politics to be about the promotion of sectional interests and division. Yet neither was the nineteenth century working class a homogenous group. It too was characterised by an elite of skilled workers; what was notable about the Industrial Revolution was that it was precisely this elite group which founded a labour movement. The reason they did so may be because an industrial work ethic, based on the dignity of labour, allowed for forms of solidarity based on either the shared experience of skill and productive identity opposed to the parasitic employer, or the shared experience of domination and arbitrary power.[88] The shared belief in the dignity of industrial work — potential or actual — produced the main characteristics of labourism for the first half of this century: a belief in industrial progress based on integration and hierarchy; a clear separation between the private and the public; strong work-based cultures and identities; a clear distinction between the masculine and feminine worlds; and, in Australia, a quest for racial purity.[89] Each of these ideologies is now open to widespread debate and there is little to be gained by returning to them.

The threshold question for any consideration of the future of class or trade union politics is whether this traditional grounding of socialist politics in forms of industrial solidarity, mutuality and co-operation has, under post-industrial forms of work — or post-industrial culture more generally — become attenuated into forms of association predicated on a heightened individualism.[90] The decentralisation of production and developments in communication and transportation technologies vitiate the need for face-to-face contact in the workplace. Outside the workplace, living spaces are dispersed through low density suburbanisation, making a collective face-to-face culture increasingly improbable.[91] The debate here is not one between Taylorism and autonomous work practices:

[85] Price, above n 1, 118–9.
[86] Ibid 143–7.
[87] Ibid 145.
[88] Kevin McDonald, 'On Work' (1993) 2 *Arena Journal* 33, 39.
[89] Ibid 35.
[90] Geoff Sharp, 'Reconstructing Australia' (1988) 82 *Arena* 70.
[91] Stanley Aronowitz, *The Politics of Identity: Class, Culture and Social Movements* (1992) 236.

these co-existed in the nineteenth century and they co-exist today.[92] It is, rather, about modes of self-formation, a point which Price does not appear to recognise. Instead, Price offers one 'high tech' path out of joblessness, advocating job creation schemes that focus on the communications sector. The internet, he suggests, provides a 'global forum for creativity, human excellence and business'.[93] The fact that the internet does away with the need for mutual presence is, according to Price, a point in its favour: '[t]he buyer [of an internet service] cannot see a person's wheelchair, that a person is a woman or an Aboriginal. The service is judged by the merits of the service, rather than costed according to the characteristics of its provider.'[94] The goal of establishing jobs that abolish fundamental forms of face-to-face interaction sits oddly, to say the least, with Price's goal of reviving a communitarian class politics. In fact, to set up as the ideal workplace, interactions where an Aborigine can at once provide a service yet be neatly rendered invisible to the consumer of the service is chilling in the current climate where government attacks on Aboriginal entitlements draw support precisely because of the lack of day-to-day reciprocal interaction between indigenous and settler Australians.

This is not to say that changes in social formation do not present their own possibilities for political action. The diminishing demand for industrial labour, the increase in tertiary education and intellectual training, the growth in underemployment and intermittent employment, all lead to an inversion of the industrial work ethic, a break in the link between production and socialisation and a conception of wage labour as an episode in life rather than an identity.[95] There is an opportunity here for social movements, including the labour movement, to construct counter models of flexibility around the work day and the life course that offer an alternative image of freedom and the good life.[96]

[92] In this way, the term 'post-industrial' is a misnomer if it conjures up non-Taylorised work practices. Whereas Taylorism — the detailed division of labour tasks into replicable, component parts to produce standardised mass products — characterised the industrial factory system, it remains prevalent in the new service industries (eg fast food) and in the field of information technology, which depends on the Taylorised production of its basic components and, increasingly, of its system software: Dennis Hayes, *Behind the Silicon Curtain: The Seductions of Work in a Lonely Era* (1989).

[93] Price, above n 1, 147.

[94] Ibid 147–8.

[95] Paolo Virno, 'Do You Remember Counterrevolution?' in Paolo Virno and Michael Hardt (eds), *Radical Thought in Italy: A Potential Politics* (1996) 241, 244–5.

[96] McDonald, above n 88, 41. Such struggles are not new, and have been characteristic of the labour movement since its inception. In the early days of industrialisation, the right to intermittent work was perceived as an important freedom for most craft workers, unfamiliar with permanent, continuous work throughout the year. The imposition of a welfare regime — as we saw in the case of Aboriginal workers — involved the simultaneous invention of 'unemployment' and 'employment', with the latter meaning full-time continuous employment. William Beveridge saw the new labour exchanges in early twentieth century England precisely in terms of abolishing this category of intermittent worker: André Gorz, *Critique of Economic Reason* (1989) 197, 213–4. Most historical struggles to shorten the working week have been motivated, however, by the desire to increase men's leisure time, rather than to redistribute the burdens of paid and unpaid work. Price approaches the issue of labour time and work redistribution by making the policy proposal that workers in an enterprise work a shorter week in return for accepting a new employee on the payroll: Price, above n 1, 144. The acceptance of a shorter

Against such aspirations, much of the recent rhetoric of workplace 'flexibility' now attempts to forge a new form of work discipline based on this taste for individual autonomy and entrepreneurial self-sufficiency:

> What is valued in and demanded of the single worker no longer includes the 'virtues' traditionally acquired in the workplace as a result of industrial discipline. The really decisive competencies needed to complete the tasks demanded by post-Fordist production are those acquired outside the processes of direct production ... In other words, professionalism has now become nothing other than a generic sociality, a capacity to form interpersonal relationships, an aptitude for mastering information and interpreting linguistic messages, and an ability to adjust to continuous and sudden reconversions.[97]

The shift is seen in the fate of the work test itself. Just as the old work test was the expression of the traditional industrial work ethic, so the new activity test valorises the new entrepreneurial subject. The Organisation for Economic Co-operation and Development ('OECD') has promoted the idea of the 'Active Society', where modern economies are dependent on 'widespread entrepreneurial initiative' and obsolete manufacturing sectors are being replaced by 'new dynamic, world-oriented, local economies' reliant on the 'mobilisation of ... human resources, not the attraction of massive, outside investments'[98]. The goal of the welfare state is to 'generate a labour market which is responsive to the requirements of an active society'.[99] The activity test's emphasis on programs likely to improve a person's prospects for finding work reinforce an emerging duty of labour market readiness. The aim seems to be to produce a legal subject at once disciplined *and* flexible. The legal regime now moves from objective, pre-ordained, mass norms of entitlement to personalised contracts between claimants and the state, with recipients who have been unemployed for longer

working week with a consequent drop in wages has generally been a defensive position by the labour movement. That is, it is done to preserve existing employment levels and rarely leads to employment growth at an enterprise: see, eg, the case studies in Hugh Compston (ed), *The New Politics of Unemployment: Radical Policy Initiatives in Western Europe* (1997). One reading of the Prices and Incomes Accord would see it as a similar proposal to Price's, albeit at a macro-economic level: workers accepted falling real wages in return for jobs growth. Price, however, makes only passing mention of the Accord, merely citing it as an example of 'centralised economic planning which has worked': Price, above n 1, 151. Given the fact that he offers no opinion as to what it was intended to do — whether in terms of jobs growth, productivity, real incomes or the social wage — it is difficult to know what to do with his comment that it 'worked'.

97 Virno, above n 95, 249. The emphasis on a generic sociality can be linked to wider social phenomena: the emphasis on self-improvement and 'performance', and the preoccupation with therapy and mood enhancing drugs such as Prozac. 'A key feature of the contemporary system is that the achievement of the things that are universal prerequisites for happiness (love, work ... play, expression) must increasingly be achieved through the use of a developed personality. The networks of others — from abiding partnership, to friends and colleagues — must be assembled and maintained through a sort of psychological entrepreneurship, and the "optimal" personality is one which can achieve this with the minimum of difficulty .... The obligation to personal entrepreneurship constructs a complete division between the society and the self; most — especially women — will internalise social failure as self-hatred and depression; some — especially men — will project it out and make it a general enemy': Guy Rundle, 'Pure Massacre' (1996) 23 *Arena Magazine* 2, 3.

98 James Gass, 'Toward the "Active Society"' (June-July, 1988) 152 *OECD Observer* 4, 7–8.

99 Ibid.

than 12 months being obliged to enter into 'Activity Agreements'[100] and those adults unemployed for longer than 18 months being required to enter into a Case Management Agreement.[101] The terms of such agreements may require a range of activities to be undertaken by the benefit recipient, including job search, vocational training, labour market programs and rehabilitation. The salient issue from a legal perspective is how the new emphasis on individualised agreements represents a diminished role for traditional merits review. The jurisdiction of both the Social Security Appeals Tribunal and the Administrative Appeals Tribunal to remake agreements has been removed, leaving them with a choice to either confirm agreements or send them back to the bureaucracy for renegotiation, without presuming to intervene more directly in the personalised negotiations between individual clients and their case managers.[102]

## V CONCLUSION

I have considered the issues of the activity test, the nature of work, the rationale for subsidy and the politics of class in some detail, mainly because *The Principles of Unemployment Law* fails to do so. Or, rather, they are raised in the book but not discussed sufficiently. Here I might have committed the cardinal sin of the reviewer: critiquing not the book Price has written, but the book I think he should have written. Yet I have proceeded on the basis of a sense that Price did not merely intend his book to be a coverage of the substantive law of unemployment but a manifesto of sorts, calling for a new way of discussing unemployment law. I have attempted to show where I think this call could lead. More work needs to be done; until it is, teachers and students seeking texts in this area may be better served by the already published works by Terry Carney and Peter Hanks,[103] and Peter Sutherland.[104]

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100 Social Security Act 1991 (Cth) s 593.

101 Employment Services Act 1994 (Cth) ss 38–9.

102 Terry Carney, 'Welfare Appeals and the ARC Report: To SSAT or not to SSAT: Is that the Question?' (1996) 4 *Australian Journal of Administrative Law* 25, 34–5.

103 Carney and Hanks, above n 40.

104 Peter Sutherland (ed), *Annotations to the Social Security Act 1991* (3rd ed, 1996).

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# INDIGENOUS HISTORY, CULTURE AND RESOLUTION OF CONTEMPORARY LAND USE DISPUTES AFTER *MABO* AND *WIK*: GIVING NATIVE TITLE FORM AND SUBSTANCE*

*Aboriginal Dispute Resolution* by Larissa Behrendt (Sydney: The Federation Press, 1995) pages 1–115. Price $16.95 (softcover). ISBN 1 86287 178 7; *Commercial Implications of Native Title* edited by Bryan Horrigan and Simon Young (Sydney: The Federation Press, 1997) pages i–x, 1–402. Price $75 (softcover). ISBN 1 86287 218 X; *No Ordinary Judgment* by Nonie Sharp (Canberra: Aboriginal Studies Press, 1996) pages i–xxv, 1–290. Price $34.95 (softcover). ISBN 0 85575 287 4; *Invasion to Embassy: Land in Aboriginal Politics in New South Wales 1770–1972* by Heather Goodall (Sydney: Allen & Unwin, 1996) pages i–xxiv, 1–421. Price $29.95 (softcover). ISBN 1 86448 149 8.

## I INTRODUCTION

The High Court's decision in *The Wik Peoples v Queensland*[1] unleashed a furious legal and political debate, in the recent past matched only by the reaction to the court's decision in *Mabo v Queensland [No 2]*,[2] the original native title case. *Mabo* provoked concern that the court had fundamentally 'changed' the common law in Australia,[3] rather than merely taken advantage of the first opportunity it had to restate the common law.[4] Either way, some thought that very little had changed.[5] Certainly, there was considerable debate about the doctrinal basis for the decision as well as a broader debate about the meanings and significance of the decision in both Indigenous and settler history, and the

* The terms Indigenous and Aboriginal are used interchangeably, reflecting, as appropriate, the language used in each publication.

1 (1996) 141 ALR 129 ('*Wik*').

2 (1992) 175 CLR 1 ('*Mabo*').

3 Gabriel Moens, '*Mabo* and Political Policy-Making by the High Court' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo — A Judicial Revolution* (1993) 48; Leonard Cooray, 'The High Court in *Mabo* — Legaliste or l'egotiste' (1993) 65 *Australian Quarterly* 82.

4 Richard Bartlett, '*Mabo*: Another Triumph for the Common Law' (1993) 15 *Sydney Law Review* 178; Garth Nettheim, 'Judicial Revolution or Cautious Correction' (1993) 16 *University of New South Wales Law Journal* 1.

5 Michael Mansell, 'The Court Gives an Inch but Takes Another Mile' (1992) 2(57) *Aboriginal Law Bulletin* 4; Michael Mansell, 'Australians and Aborigines and the *Mabo* Decision: Just Who Needs Whom the Most?' (1993) 15 *Sydney Law Review* 168; Noel Pearson, '204 Years of Invisible Title' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo — A Judicial Revolution* (1993) 75.

nation's psyche.[6] Since the first flush of outrage, attention has been focused on exploring the boundaries, detail, substance and protection of this thing called native title,[7] the operation of the legislative regimes established in response to *Mabo*,[8] and proposals for change to the legislation.[9]

The *Wik* case involved such an exploration, with the court finding by a four – three majority that the distinctive nature of the statutory rights granted under a pastoral lease did not necessarily extinguish native title. The vehemence of the political response to *Wik*[10] appears to have clouded the significance of the decision which, while raising some significant issues about the boundaries of extinguishment of native title at common law in Australia, also confirms the paramountcy of pastoral leaseholders' rights.[11] Legal commentary has focused on the implications of the decision and whether as a matter of practicality the legislative regime ought be amended.[12]

In this highly charged context, four books add substantial and varied intellectual and practical force to the ongoing debates surrounding native title, both in the narrow legal confines of practice and in relation to the larger public debates about native title, Indigenous–settler relations and reconciliation. Each book presents new and, in some cases, complex insights into the native title issue.

[6] Tim Rowse, *After Mabo — Interpreting Indigenous Traditions* (1993); Paul Patton, 'Post-Structuralism and the *Mabo* Debate' in Margaret Wilson and Anna Yeatman (eds), *Justice & Identity — Antipodean Practices* (1995) 153; Raymond Gaita, 'Mabo' (Pt 1) (1993) 9 *Quadrant* 36; Raymond Gaita, 'Mabo' (Pt 2) (1993) 10 *Quadrant* 44; Rosemary Hunter, 'Before Cook and After Cook: Land Rights and Legal Histories in Australia' (1993) 2 *Social and Legal Studies* 487; Ian Anderson, 'Black Suffering White Wash' (1993) 5 *Arena Magazine* 23.

[7] Eg *Coe v Commonwealth* (1994) 68 ALJR 110; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Mason v Tritton* (1994) 34 NSWLR 572; *Sutton v Derschaw* (Supreme Court of Western Australia, Franklin, Wallwork and Murray JJ, 16 August 1996); Richard Bartlett, 'From Pragmatism to Equality Before the Law' (1995) 20 *Melbourne University Law Review* 282; Kent McNeil, 'Racial Discrimination and the Unilateral Extinguishment of Native Title' (1996) 1 *Australian Indigenous Law Reporter* 181; Graeme Neate, 'Determining Native Title Claims: Learning from Experience in Queensland and the Northern Territory' (1995) 69 *Australian Law Journal* 510.

[8] See, eg, Native Title Act 1993 (Cth); Native Title Act 1993 (Qld); Land Titles Validation Act 1993 (Vic); *North Ganalanja Aboriginal Corporation (for and on behalf of the Waanyi People) v Queensland* (1996) 135 ALR 225; *Kanak v National Native Title Tribunal* (1995) 132 ALR 329; *Northern Territory v Lane* (1995) 138 ALR 544; *WMC Resources Ltd v Lane* (Federal Court of Australia, Nicholson J, 19 March 1997); Bryan Keon-Cohen, 'Applications for a Determination of Native Title to the National Native Title Tribunal: Basic Procedures and Some Problems of Proof' in Margaret Stephenson (ed), *Mabo — The Native Title Legislation* (1995) 84; Richard Bartlett, 'Dispossession by the Native Title Tribunal' (1996) 26 *University of Western Australia Law Review* 108, 133–7.

[9] Native Title (Amendment) Bill 1996 (Cth).

[10] See, eg, Lenore Taylor and Paul Syvret, 'Industry Dismayed by Wik Ruling', *The Australian Financial Review* (Sydney), 24 December 1996, 1; Dennis Burke, 'Judgment Adds to Delay and Expense', *The Australian* (Sydney), 7 January 1997, 11; Lenore Taylor, 'It's True — A Wik is a Long Time in Politics', *The Australian Financial Review* (Sydney), 24 January 1997, 33.

[11] *Wik* (1996) 141 ALR 129, 189–90.

[12] See, eg, Commonwealth Attorney-General's Department, *Legal Implications of the High Court Decision in* The Wik Peoples v Queensland, Advice to the Prime Minister (23 January 1997); Hal Wooten, 'Why Legislation is the Best Solution to Wik Deadlock', *The Australian* (Sydney), 15 April 1997, 15.

While Sharp[13] and Horrigan and Young[14] focus on specific (but very different) aspects of native title, Goodall[15] and Behrendt[16] bring significant Indigenous and academic insights into the Indigenous lives, cultures and histories that underpin aspects of native title claims, and provide possibilities for informed resolution of native title disputes.

## II THE SUBSTANCE OF *MABO — NO ORDINARY JUDGMENT*

The *Mabo* case ran for ten years, culminating in the High Court decision on 4 June 1992. Central to the case were questions challenging the mono-cultural nature of Australian common law and its inability to recognise and accord value to interests in and relationships to land that were different from those emerging from English property law. First Williams,[17] and later Sharp,[18] identified this issue of difference as the heart of Blackburn J's difficulty in *Milirrpum v Nabalco Pty Ltd and Commonwealth.*[19] Both were critical of Blackburn J's differentiation between the spiritual and the economic (as if they were irreconcilable) and his Honour's focus on the spiritual as the point of departure from common law interests in land. Such a narrow approach, they argued, inevitably resulted in a diminution of Indigenous relationships to land and the non-recognition of those relationships which occurred in *Milirrpum.*

Sharp's view was aired in an article published in the immediate aftermath of the *Mabo* decision in which she provided background to some of the anthropology in the *Mabo* case and, in particular, this issue of the relationship between the land interests of the people of Mer and the common law. Sharp was able to present particularly acute observations and insights on this issue, as a result of her playing a significant role as a researcher and anthropologist during the planning stages of the case and throughout its conduct.[20] She had earlier undertaken field work in the Torres Strait for her doctorate and had published widely on Torres Strait Islander culture.[21] In the years leading up to the issue of proceedings and preparation for the hearing of the *Mabo* case, she was involved in the early informal meetings which explored the possibilities of embarking upon the case. She was later engaged in specific research in relation to the plaintiffs' relationship with land that was directed at countering Blackburn J's arguments for rejecting the Yolgnu claim in *Milirrpum,* providing both docu-

[13] Nonie Sharp, *No Ordinary Judgment* (1996).
[14] Bryan Horrigan and Simon Young (eds), *Commercial Implications of Native Title* (1997).
[15] Heather Goodall, *Invasion to Embassy: Land in Aboriginal Politics in New South Wales 1770–1972* (1996).
[16] Larissa Behrendt, *Aboriginal Dispute Resolution* (1995).
[17] Nancy Williams, *The Yolngu and Their Land — A System of Land Tenure and the Fight for its Recognition* (1986).
[18] Nonie Sharp, 'No Ordinary Case: Reflections Upon *Mabo (No 2)*' (1993) 15 *Sydney Law Review* 143.
[19] (1971) 17 FLR 141 ('*Milirrpum*').
[20] Sharp, *No Ordinary Judgment*, above n 13, xxiii.
[21] The bibliography contains a list of Sharp's relevant publications: ibid 279–80.

mentary and oral historical research, and preparing proofs of evidence for the case. She was thus extremely well placed to produce the complex work that is *No Ordinary Judgment.*

At first glance, the book is useful as an historical record of one of the most significant and fascinating cases in Australian legal history. It provides a chronology of the events in the litigation,[22] as well as some detailed discussion of the evidence and the problems raised by it for the legal system within which the case was heard.[23] There is a substantial section on the plaintiff who gave the case his name, providing insights into the complexity of his life and his struggle for land, as well as some detail about the failure of his particular claim on the basis of the status of his adoption in traditional Meriam law.[24] However the book goes beyond mere historical record as it confronts some of the broader issues raised by the case itself and for native title generally.

The book is divided into five parts, the titles of which reflect both the breadth and the utility of the work. The title of the first part, 'Interests of a Kind Unknown to English Law', borrows from a number of cases that have dealt with these issues.[25] The three chapters in this section provide an introduction to and context for the later sections in the book, as well as some preliminary observations about the nature of Meriam culture and relationship to land. The second chapter provides some information about the relationship of the Meriam people with their colonisers along with fascinating insights into the early planning for the case, revealing a suspicion of the Queensland government requiring absolute secrecy on the part of those involved in the preparation of the case. It also reveals the obstacles placed in the way of the plaintiffs by the Queensland government, most significantly, its response to the action, put by P J Killoran in evidence, that the claim was nothing 'more than a wistful nostalgia among the Meriam for the ways of their forebears'.[26] In what is a recurring theme throughout the book, Sharp describes this process as one of exclusion of one culture by another through the imposition of its own rules — in this case by the coloniser defining 'property rights' as those of the colonising system.[27]

This issue of cross-cultural systems of meaning is taken up in the following two parts of the book — 'Meriam Perspectives' and 'European Perspectives' — which describe, analyse and contrast the same set of events from the Meriam and European points of view. It is in these parts of the book that Sharp explores the different meanings of land and ownership between the two systems. Using the evidence given by Meriam witnesses before Moynihan J as the starting point of her analysis, what emerges is a complex system of beliefs, integrally related to land (and water) which provide the basis of social and spiritual relationships and

22 Ibid xi–xii.
23 Ibid chh 6–7.
24 Ibid 65–8.
25 *Milirrpum* (1971) 17 FLR 14; *Adeyinka Oyekan v Musendiku Adele* [1957] 1 WLR 876.
26 Sharp, *No Ordinary Judgment*, above n 13, 33.
27 Ibid.

responsibilities to land and to each other. It is an imbued system that regulates and gives meaning to existence and includes relationships to space and species.[28] The use of the term 'ownership' in evidence attracts meaning in this context which is vastly different from that of the European system.

Reference to *Milirrpum* in the third section of the book provides a sharp contrast to this paradigm, explored from the Meriam perspective and, in particular, the extent to which Blackburn J erred in attempting to equate 'Yolgnu land use with ownership and possession'.[29] Again using the transcript of the hearing before Moynihan J, Sharp attempts to unravel similar difficulties experienced by his Honour in the facts hearing before the Queensland Supreme Court in *Mabo*. The medium for this exploration is that of the conflict between the hearsay rule and oral evidence of traditions of the Meriam people, reflected in very different cultural notions of private and public rights. Sharp points out that the justification used by counsel for the Meriam people relied on the proposition that what the Meriam claimed in relation to land was very different from the 'clan or collective ownership'[30] in *Milirrpum* and was a rather more precise claim to 'specified allotments of land'[31] by individuals. This system of individual (or private) rights was nonetheless formed and framed by common 'traditional principles'.[32] While this characterisation of the rights and interests was designed to overcome the public–private distinction sought by the hearsay evidence rule,[33] Sharp suggests two further consequences. First, the familiarity of this notion of individual rights and ownership rather than communal rights enabled Moynihan J to find 'ownership' in the Meriam people.[34] However, as with the Yolgnu in *Milirrpum,* such a categorisation did not fit the form of land ownership actually enjoyed by the Meriam people.

This issue of cross-cultural meaning and understanding runs throughout the book and provides vital insights into the ways in which the dominant system constructs and thereby reinterprets meaning for Indigenous peoples. Part four of the book — 'No Ordinary Case' — brings this into sharp focus as Moynihan J's determination on the facts is explored in detail. The telling conclusion here is

> that the judge's rather limited perception of the existential world of the Meriam may have its source in the Hobbesian assumption about a human nature 'peculiarly appropriate to a possessive market society' as the *universal* state of human nature. ... [H]e then projects these social values on to the pre-Christian Meriam.[35]

[28] Ibid 85.
[29] Ibid 103.
[30] Ibid 108.
[31] Ibid.
[32] Ibid.
[33] Ibid 109.
[34] Ibid.
[35] Sharp, *No Ordinary Judgment*, above n 13, 144 citing Crawford Macpherson, *The Political Theory of Possessive Individualism — Hobbes to Locke* (1977) 271–2.

Ultimately it is this long discussion of evidence and the cross-cultural insights it provides that makes the book so compelling. The High Court decision itself is given only one chapter in this part of the book and, apart from a most enlightening analysis of the manner in which Dawson J dealt with Moynihan J's findings of fact, the discussion of the judgment is largely unremarkable. This emphasis reasserts the significance of the 'substance' of the *Mabo* case — the life and culture of the Meriam people — although the place of native title within the common law property system, its place in the hierarchy of rights and the suggestion that Indigenous rights are 'a shadow of the rights known to our law'[36] remain central themes in the book.

The scant treatment of the High Court's decision is perhaps the major limitation of the book. The book is based on Moynihan J's findings which were largely ignored by the High Court. Whether that approach was indicative of disagreement or whether it was unnecessary, remains to be explored. The issues raised by Sharp in relation to Moynihan J's treatment of the relationship of the Meriam with their land, the place of the spiritual within Australian native title jurisprudence and the extent to which substance can be given to the specifics of Indigenous custom, values and culture by the court's characterisation of native title also remain for exploration. It is unfortunate that Sharp did not extend her analysis to a more detailed examination of the High Court's treatment of these issues.

As the Meriam people's sea claim did not finally proceed for determination before the High Court,[37] and in spite of recognition of rights to water in the Native Title Act 1993 (Cth),[38] the subject has received scant attention in the literature.[39] Therefore, in the final part of the book — 'Native Title in Australia' — Sharp's chapter on the specifics of the Meriam sea claim and the issue of sea claims generally is most welcome. However, it does not seem to fit with the final chapter of the section (and the book) which provides a fitting finale to the earlier discussion about the cross-cultural context of Australian social and legal relations and the impact and force of the final recognition of Indigenous rights to land. Sharp uses the post-*Mabo* negotiations culminating in the Native Title Act 1993 (Cth) as the vehicle for this discussion. Both this and her optimistic conclusion that 'cross-cultural cooperation depends ultimately upon a reciprocal understanding of the strong stories which the cultures have to give one another'[40] are poignant reminders of the fragility of these relationships as the post-*Wik* debate and decisions seek to reinterpret both the negotiations and consequential agreements embodied in the Act.

[36] Ibid 182.
[37] Ibid 202.
[38] Native Title Act 1993 (Cth) s 223.
[39] David Allen, 'Salt-Water Dreaming' in Peter Jull *et al* (eds), *Surviving Columbus — Indigenous Peoples, Political Reform and Environmental Management in North Australia* (1994) 39; Richard Cullen, 'Rights to Offshore Resources After *Mabo* 1992 and the Native Title Act 1993 (Cth)' (1996) 18 *Sydney Law Review* 125.
[40] Sharp, *No Ordinary Judgment*, above n 13, 207.

## III THE CENTRALITY OF LAND IN CULTURE AND HISTORY — *INVASION TO EMBASSY*

In contrast to the minutiae of Sharp's analysis of Meriam culture and traditions and their inter-relationship with the settler legal system, Goodall has produced an expansive examination of key land-based conflicts, and the social policies which backed European land claims from 1788 until 1972. The work is bounded by the events of the arrival of the colonising power and the Aboriginal Tent Embassy established on the lawns of Parliament House on 26 January 1972 and focuses on battles over land in New South Wales. Not surprisingly, Goodall identifies land as the central issue in her history of Indigenous–settler relations. It is land, she contends, that has been at the heart of Indigenous–settler conflicts, land being central to Indigenous peoples' lives and identity[41] and a 'central element of debate and desire for groups of white Australians ... over many years of colonial experience'.[42] Thus Indigenous demands for land did not occur in a vacuum but rather were 'interventions into that mainstream discourse about land, its values, its rightful or desirable possessors and its meanings'.[43]

Goodall explores these interventions at points 'of high Aboriginal political activity'[44] and while this does not produce a 'continuous narrative',[45] it provides substantial coverage of major events during two centuries, each part of the book dealing with a particular period. The first part of the book focuses obviously on land and briefly reviews the range of relationships Indigenous peoples throughout Australia have with land. In doing so, Goodall draws distinctions between particular groups as she focuses on the south-east of the continent. Both in this specific part of the book[46] and throughout, she emphasises the significant land relationship enjoyed both pre- and post-invasion by these groups of people, confirming the continuities of these relationships and consequently the contemporary significance of land among south-eastern Aboriginal groups. Neither the force of invasion nor the extent of resistance are minimised, but there is room for some focus on European land interests, desires and imaginings and what Goodall identifies as 'dual occupation' of land by Indigenous people and pastoralists.

The second part of the book explores the impact of growing intensive land use and the Aboriginal response to this in the form of successful land demands, the large scale creation of Aboriginal reserves and the operation of the Aborigines Protection Board. The description of strategies and actions in this period are enlightening as they reveal the development of sophisticated demands based around Indigenous cultural meanings, but reflecting an understanding of the limitations of the settler legal and political imagination. Both this and the first part resonate strongly with current native title claims, most particularly the Yorta

41 Goodall, above n 15, 1–19.
42 Ibid xx.
43 Ibid.
44 Ibid xxi.
45 Ibid.
46 Ibid 11–19.

Yorta claim through the discussion about activity on and around Cumeragunja, and the *Wik* case, with its exploration of the land and legal relationships between the Crown, pastoralists and Aboriginal people in the nineteenth century. While Henry Reynolds has provided substantial historical research and writing[47] in relation to these latter relationships, Goodall's work is more accessible and places these relationships in a broader political context. Identifying this interconnection between her work and contemporary debates gives greater force to her point that Aboriginal land interests arise from particular historical contexts as Aboriginal people engage in changing life conditions under colonialism.[48]

Parts three and four of the book describe and analyse the increasing deprivation of both land and liberty for Aboriginal people in New South Wales between 1910 and 1939. This period was characterised by bitter and almost invariably unsuccessful battles fought to prevent removal of people from both pastoral and reserve lands, created in the nineteenth century. Goodall details the emergence of political organisations as well as grass roots actions in response to these government actions, culminating in a strike by Aboriginal workers at Cumeragunja.

Part five of the book describes and analyses movements from land into towns and activities within rural communities which marginalised and segregated Aboriginal inhabitants. Goodall details community and political activity aimed at regaining land and the consequences of these campaigns. Through the use of interviews and contemporary accounts, chapter 20 provides a description of these activities in several country towns in New South Wales, one poignantly titled 'Coonamble 1960: Australia's Little Rock'.[49] The final part focuses on the 1967 referendum, the role of assimilation policies and the political movement leading to the establishment of the Tent Embassy. Both these parts and part three have added force as they rely on the personal accounts of participants in the events, revealing a history of active resistance to dispossession and removal from land, and a maintenance of relationships to place regardless of removal. Both parts five and six are characterised by Goodall's restatement of land as the recurring theme and issue, even though, on the surface the battles here appear to be about housing or liberty or some other conventional notion of 'rights' rather than 'land'. This serves to reassert the centrality of land in the ongoing negotiation of Indigenous–settler relationships.

The book is a compelling account of Aboriginal–settler relations, supported by massive and meticulous research. As with Sharp's book, Goodall provides a context for the current land-based debates following *Mabo* and *Wik*. Not only does it provide insights into land-use and relationships since 1788, but it seeks to explain those relationships and to identify the major events that have framed and formed the relationships. Thus when the High Court refers to co-existence as it

[47] Henry Reynolds, 'Native Title and Pastoral Leases' in Margaret Stephenson and Suri Ratnapala (eds), *Mabo — A Judicial Revolution* (1993) 119; Henry Reynolds and Jamie Dalziel, 'Aborigines and Pastoral Leases — Imperial and Colonial Policy 1826–1855' (1996) 19 *University of New South Wales Law Journal* 315.

[48] Goodall, above n 15, xx.

[49] Ibid 283.

did in *Wik,* the source of this idea can be readily understood. The lived, rather than the legal, reality of land tenure histories and Aboriginal–settler relations emerges dramatically in this book.

## IV INDIGENOUS TRADITIONS AND LEGAL PRACTICE — *ABORIGINAL DISPUTE RESOLUTION*

While Sharp and Goodall provide insights into the substance and form that native title might assume, the remaining two books focus far more on the practicalities of native title — claiming it, using it, negotiating over it and resolving disputes arising in relation to it.

In *Aboriginal Dispute Resolution,* Behrendt explores the manner in which Indigenous peoples have resolved disputes among their own members. In particular, she focuses on the cultural values of Indigenous people which provide the basis for a very different method of dispute resolution than that practised in the European system, either formally or informally. The focus of the book is again on land, because, Behrendt says, land is 'central to Aboriginal existence and survival',[50] it is 'the basis of economic independence'[51] and it is the source of major conflict 'within the Aboriginal community and between our community and those outside it'.[52]

Behrendt explores dispute resolution in what she describes as traditional and contemporary Aboriginal society. She very briefly sketches aspects of traditional culture and identifies the dispute resolution mechanisms that emerge from it — using that as a basis for comparison with some aspects of non-Aboriginal culture,[53] as well as with the different elements that characterise Aboriginal disputes and what she describes as the 'British legal system'.[54] There is then a short section on contemporary Aboriginal values which are also contrasted with non-Aboriginal values.

The following two chapters, dealing with socio-economic and criminal justice issues, provide further background for the major discussion in the book which revolves around the use of mediation techniques for resolving disputes within Aboriginal communities and between Aboriginal and non-Aboriginal groups. These chapters bring into sharp relief the reasons why, in Behrendt's view, conventional decision-making methods are inappropriate: power differentials and cultural inappropriateness. These result in the high rate of Aboriginal imprisonment and unsuccessful negotiations between Aboriginal and non-Aboriginal parties in land-use disputes.

Behrendt then makes a strong argument for the use of alternative dispute resolution methods in intra-Aboriginal disputes, adapting mediation techniques

[50] Behrendt, above n 16, 9.
[51] Ibid.
[52] Ibid 10.
[53] Ibid 18.
[54] Ibid 22.

to suit specific cultural and community values.[55] In relation to resolution of disputes between Aboriginal and non-Aboriginal parties, Behrendt argues that the differentials of power and resources, and cultural unfamiliarity will always place Aboriginal participants at a disadvantage. As a result, merely using mediation techniques in dispute resolution will exacerbate these inequalities. The solution proposed is 'creativity and flexibility in the development of real alternatives to the present system'.[56] The rest of the book is devoted to developing frameworks and models that reflect this creativity and flexibility.

In developing her models for alternative dispute resolution, Behrendt draws a distinction between what she describes as traditional, rural and urban Aboriginal communities. She then develops models for each group, recognising the difficulties for each in its dispute settlement relationship with the non-Aboriginal community. Despite her distinction here, Behrendt continually asserts the traditional basis of the cultural values of urban communities, a crucial point in this time of native title and the need to prove continuing 'connection' with land and tradition.[57] She argues that the models can be adapted to both intra-community disputes and provide an alternative to non-Aboriginal interventions, particularly through the criminal justice system, as well as disputes between Aboriginal and non-Aboriginal parties. In the context of this review, it is the latter discussion that provides the most useful insights into the manner in which non-Aboriginal parties should approach dispute resolution with Aboriginal parties, particularly in relation to land access. The ultimate message is that communities be dealt with as self-determining entities 'with deference to their values and customs'.[58]

The book is short and limited by its generalities in describing Aboriginal cultural values and practices. However, Behrendt acknowledges this limitation and rather than providing an inflexible and prescriptive model for dispute resolution, prefers to highlight the elements that should be the focus of dispute resolution. Thus the significant factors that emerge from her analysis include acknowledgment of the appropriate Aboriginal system of decision-making, with power and status being accorded to the cultural values of the particular Aboriginal group. Perhaps a more significant difficulty with the book is its assumption that alternative dispute resolution can somehow overcome or rectify the fundamental oppression of Indigenous people reflected in the legal system but sourced in the broader dominant forces within society at large. The validity of this assumption is not examined and on its face appears at odds with her emphasis on the legal system as a source of oppression. Behrendt argues that the recognition of sovereignty of Aboriginal people will reverse this oppression but fails to link this proposition with her main argument that alternative dispute resolution is a

[55] Ibid 64.
[56] Ibid 72.
[57] Native Title Act 1993 (Cth) s 223(1).
[58] Behrendt, above n 16, 90.

significant tool in rearranging the relationship between Indigenous people and the legal system.

These shortcomings limit the utility of the book. However, the book does reinforce the centrality of recognising and respecting cultural difference and developing strategies to meet and work with these differences. As the dominant theme in the book, the issue of cultural difference is addressed in a practical and useful manner. Consequently, the book provides a useful starting point for developing strategies and protocols for resolving issues between Aboriginal and non-Aboriginal interests.

## V NATIVE TITLE AND LEGAL PRACTICE — *COMMERCIAL IMPLICATIONS OF NATIVE TITLE*

Behrendt's book might be seen as an adjunct to the native title practice book *Commercial Implications of Native Title*.[59] Although Stephenson[60] produced a very useful book on native title legislation in 1995, and Butterworths produces a looseleaf service,[61] this new book appears at a time when there has now been substantial development in the operation and practice of native title legislation with some High Court[62] and many lower court decisions[63] on issues arising under or in relation to the legislation. However, it also appears at a time when the legislation is in a significant state of flux as the Commonwealth Government has introduced two sets of major amendments to the Native Title Act 1993 (Cth) and further major amendments are likely as a result of the *Wik* decision.[64] *Commercial Implications of Native Title* incorporates considerable discussion of *Wik* in the introduction and in a chapter of its own.[65] There is minimal, and in some cases, inadequate discussion of the case in other chapters. However, the book does not (and cannot) predict the extent of the proposed *Wik* amendments, nor the fate of those and other proposed amendments to the Act in the Senate.

The book reflects no Indigenous perspectives on the issues raised and is clearly aimed at professional advisers of non-Aboriginal clients whose interests may be affected by native title. As a result there is minimal consideration of the origin, nature and content of native title and its implications for Indigenous people. In this regard it stands in direct contrast to Sharp and her preoccupations.

59 Horrigan and Young, above n 14.

60 Margaret Stephenson and Suri Ratnapala (eds), *Mabo — A Judicial Revolution* (1993).

61 Butterworths, *Native Title* (1996).

62 *Western Australia v Commonwealth* (1995) 183 CLR 373; *North Ganalanja Aboriginal Corporation (for and on behalf of the Waanyi People) v Queensland* (1996) 135 ALR 225; *Wik* (1996) 141 ALR 129.

63 Eg *Kanak v National Native Title Tribunal* (1995) 132 ALR 329; *Northern Territory v Lane* (1995) 138 ALR 544; *Walley v Western Australia* (1996) 137 ALR 561; *Ward v Western Australia and United Gold NL* (Federal Court of Australia, Lee J, 14 December 1995); *Ward v Western Australia* (1996) 136 ALR 557; *WMC Resources Ltd v Lane* (Federal Court of Australia, Nicholson J, 19 March 1997).

64 Prime Minister, Commonwealth of Australia, *Amended Wik 10 Point Plan* (8 May 1997).

65 Bryan Horrigan, 'The Legal, Political and Commercial Implications of the High Court's *Wik* Decision — The Way Ahead' in Horrigan and Young, above n 14, 81–90.

That said, the book does provide the first comprehensive coverage of the Native Title Act 1993 (Cth) and its operation in a form that highlights the major issues that arise in the native title arena. As the title indicates, the book identifies as its focus the implications for commercial operations as a result of the implementation of the native title regime. Not surprisingly, the book is organised around significant commercial issues. The three parts of the book make a distinction between broad law and policy issues (Part I: Key Developments in Native Title Law and Policy), specific commercial concerns (Part II: Commercial Sector Implications) and the substance of native title such as proof and resolution of disputes (Part III: Native Title Dispute Resolution).

There are three features of the book that mark it as a useful practical resource for native title practitioners. The first is that it provides a brief and efficient overview of State and Territory native title legislative schemes and the ways in which they interact with the Commonwealth legislation.[66] The material in this section is inadequate for any major problem-solving but remains a useful resource with material accessible from one source.

The second and most significant benefit of the book is its identification of the major commercial concerns and the provision of insightful information and discussion of the issues. This is the heart of the book and it provides useful information, both backgrounding the source of concerns as well as providing practical information for their resolution. Chapter 5 deals with the commercial implications of native title for mining and resources and focuses on the key issue of security of title. Grants, renewals, extensions and their impact on bargaining are all considered. The chapter suffers from brevity and a lack of detail but does identify the main issues requiring attention.

There is a separate chapter on freshwater resources, detailing the law on the content of native title in such resources and the current law covering such resources in a variety of jurisdictions. Given the currency of the Yorta Yorta claim over major water resources, some attention to the nature of that claim might have been useful. In addition there is no consideration of the application of the Native Title Act 1993 (Cth) to waters. Despite this limitation, the chapter remains a valuable contribution to a rather unexplored area of native title.

The two most useful chapters in this part of the book, and perhaps the whole book, cover the financial accounting and auditing implications and the practical implications for financiers, land dealers, investors and professional advisers. The first of these focuses not only on the risk factors and possibility of increased costs as a result of native title, but the ways in which these impact upon accounting and reporting requirements for companies. The propositions argued rely upon particular assumptions about the impact of native title. Even if these assumptions are questioned, the chapter provides some insights into the ways in which the commercial sector views native title and the manner in which its assumptions and characterisation of the issues must be incorporated into any

[66] Horrigan and Young, above n 14, 81–90.

analysis of the impact of native title. The chapter on the implications for advisers is extremely useful. In essence it provides a checklist of factors that should be considered and dealt with in any case which is 'touched' by native title.

The third contribution of the book lies in its treatment of negotiated resource agreements. The checklist approach provides useful information with which to approach this task. In addition, the specific chapter on the point provides an effective summary of the matters that might influence such negotiations including the legal framework. It also provides some international experiences that might inform the process, as well as examples of both agreements and terms within existing Australian agreements.

Only two chapters in the book[67] focus on the substance of native title rights. The first of these presents some useful information about native title holders' access to resources with a strong focus on issues of extinguishment. The major criticism of this chapter is its almost exclusive, but not unexpected, focus on Queensland legislation. For this reason it is of less immediate utility than other parts of the book, but remains useful as an introduction to this issue. As a chapter concerned with extinguishment, it also suffers from the absence of any consideration of the broad extinguishment issues raised in the various *Wik* judgments.

The second of these chapters is extremely valuable. Drawing on his experience in land claims under the Aboriginal Land Rights Act 1976 (NT) as well as both the Commonwealth and Queensland native title legislation, Graeme Neate produces a practical and insightful discussion of the legal and cultural issues that arise in the process of proving native title, particularly in the section entitled, 'What procedures can be adopted to prove native title'. The chapter does not deal directly with abandonment, and in particular whether proof of abandonment lies with the Crown. However, this shortcoming is balanced by a detailed consideration of the complex issue of 'connection' with land and the associated issues of proof.

Some significant issues that have emerged in practice, such as the duty of states to negotiate in good faith and a whole range of decisions by the National Native Title Tribunal, are given insufficient attention. The chapter by the President of the Tribunal may well have been the appropriate vehicle for a more detailed discussion of this aspect of the Tribunal's work.[68]

The final chapter of the book attempts to suggest some appropriate responses to the *Wik* decision. In doing so, it also raises some questions about the extent and impact of the decision and the extent to which it may impact upon commercial operators. Devoting a chapter to *Wik* appears to be an attempt to overcome the problems associated with the book's timing in relation to the decision and the

[67] David Yarrow, 'Ownership and Control of Natural Resources and Their Impact on Native Title' in Horrigan and Young, above n 14, 126; Graeme Neate, 'Proof of Native Title' in Horrigan and Young, above n 14, 240.

[68] R French, 'The National Native Title Tribunal's Experience: Promise, Pain and Progress' in Horrigan and Young, above n 14, 29.

inadequacy of discussion of the issue in some of the other chapters. In spite of its limitations, the book is useful and informative.

## VI CONCLUSION

The legal and cultural complexity of native title is well illustrated by each of the books reviewed. Each work produces new insights and adds to the body of knowledge in the area, albeit in very different ways. The major focus of Horrigan is the provision of practical information for commercial operators who have contact with the native title process. It succeeds in this aim. However, apart from the chapter by Neate, the book lacks insights into the central themes that underpin all native title issues so well explored and unravelled by Sharp in particular, but also by Goodall and in a different way by Behrendt.

Behrendt, in particular, provides some of the cultural substance that is lacking in Horrigan. While Horrigan focuses on resolution of disputes, such a focus is markedly inadequate unless it also provides some understanding of the complex cultural and social environment in which the disputes arise and the factors that at least one of the parties see as important. Behrendt provides a framework within which cultural difference and understanding might be negotiated as a first step in resolution of disputes. Sharp's analysis of the different cultural realities resulting in different meanings of language graphically illustrates this point of view.

The Horrigan book stands in stark contrast to the other books reviewed. While Horrigan's approach suggests that native title is ultimately reducible to its legal and commercial implications, the other books leave no doubt about the complex human, commercial and political relationships produced by the Indigenous people's land relationships in a colonial and post-colonial context. The force of the latter works is the presentation of both shared and conflictual experiences of land, land-use and co-existence, negotiated over two hundred years. It is an experience that cannot be simply or conveniently reduced, confined or adequately reconciled by the application of commercial or legal formulae.

To read and consider each of the books in isolation is perhaps to misconstrue the dramatic impact of Indigenous land interests on the settler history and contemporary psyche of Australia. Each of the books contributes to an understanding of this impact in its own way. This is not to suggest that each book does not make a significant contribution to its particular field or to the overall body of knowledge on native title. Rather, the combination of the works produces an overwhelming sense of the cultural and social complexity of relationships, the surface of which is touched by the enjoyment of native title, native title litigation and its resolution. The consequences of ignoring this complexity may be yet to emerge.

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*Proprietary Interests in Commercial Transactions* by Sarah Worthington (Clarendon Press: Oxford, 1996) pages i–xlviii, 1–245, bibliography 247–61, index 263–270. Price $100 (hardback). ISBN 0 19 826275 2.

Dr Worthington focuses on personal proprietary interests arising in commercial transactions[1] — an area littered with apparently disparate and undoubtedly difficult principles. Her aim is to clarify those principles and in the process demonstrate that the law here is not as fragmented as it first appears. Aside from the academic value of such a project, it gives the student or practitioner a framework in which to place the case law.

Yet a work of 250 pages covering reservation of title, *Quistclose* trusts,[2] floating charges, the *De Mattos v Gibson* principle,[3] common law and equitable 'tracing' of assets, constructive trusts and liens might seem likely either to get bogged down in explicating case law or to fly so high over the material that the reader loses sight of all familiar landmarks. This work does neither, and that is its first strength.

The exposition of case law is deftly handled, although that alone is not sufficient since these topics are not susceptible to a simple analysis on the basis of *stare decisis*. The cases need to be interpreted; the concepts which underpin the judgments enunciated. Dr Worthington gives concise accounts of competing interpretations and draws them together at the end of each relevant section to demonstrate a certain coherence between topics.

The work originates from the author's doctorate of philosophy at Cambridge. Although a doctoral thesis has been through a number of stages of formal review (supervisors, examiners, publisher's referees) by the time it reaches the bookshop shelves, publication is usually only a secondary motivation for the work. Often then the quality and refinement of thoughts and arguments are only readily accessible to readers who are willing to follow the thesis through page by page, from beginning to end. This work eschews that stereotype, which is its second strength.

The text is well sign-posted. It is separated into parts, chapters, sections and various layers of sub-sections in a way which is not disruptive, perhaps because time is taken to explain why the discussion is being divided up in the way it is. Concluding sections and recapitulations at the beginning of new sections provide guidance within the text itself. Importantly, there are copious cross references to other parts of the text. All this makes it possible to dip into the text and find easy directions to other relevant sections. The detailed index and contents page are

[1] Sarah Worthington, *Proprietary Interests in Commercial Transactions* (1996).

[2] Classically, a *Quistclose* trust is a loan of money for a specific purpose in circumstances where the money is held on trust for the beneficiaries of that purpose unless and until the purpose can no longer be fulfilled, at which stage it is held on trust for the lender: *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567.

[3] The principle (not at all clearly established) that a person, who obtains contractual rights to use property of another, can restrain a third party not privy to the contract (but who has notice of the first person's contractual rights) from using the property in a manner inconsistent with those contractual rights: *De Mattos v Gibson* (1858) 4 De G & J 276.

almost redundant.

Consequently the work can be recommended as an introductory text (on the assumption that junior undergraduates are likely to want or need to be introduced to these complex areas). It would be a good starting point for the more advanced undergraduate, the graduate student of equity or commercial proprietary interests, or the practitioner who needs an understanding of any of these complicated areas.

Finally, despite its compact size, the work is a great source-book since it is comprehensively footnoted.[4] The footnotes fulfil the purposes of providing the reader with immediate access to further arguments or asides which would otherwise disrupt the flow of the main text, and also of providing references to cases, articles and other texts which take the discussion further. Notably, the selection of references seems to have been driven less by a CD-ROM or on-line search engine than by a desire to selectively illustrate different aspects of the relevant issues (which is helped by the frequent addition of a few words indicating how a particular reference fits in with preceding references and with the text).[5] There is also a bibliography which brings together all of the articles and texts referred to in the footnotes. Incidentally, the book is almost entirely free from typographical errors.

Personal property law is an area which has received much attention recently,[6] despite having a rather neglected past.[7] As Dr Worthington notes, 'the time is ripe for a critical reappraisal of the current state of personal property law.'[8] The remainder of this review will look at three aspects of Dr Worthington's reappraisal. First, the order in which the material is presented; secondly, some of the notable substantive points made; and thirdly, a few concluding comments on the scope of the project.

Dr Worthington divides the discussion into two main parts: proprietary interests arising by agreement (retention of title; *Quistclose* trusts; floating charges; the *De Mattos v Gibson* principle); and proprietary interests arising by operation of law (legal and equitable 'tracing' as a result of void, voidable or incomplete contracts, no consideration or theft; constructive trusts; equitable liens).[9]

The discussion of tracing in the second part is itself divided into separate chapters on the position at common law and in equity. This aspect of the exposi-

[4] It should be noted, however, that the book deals with the law as at February 1996.

[5] See, eg, Worthington, above n 1, 104. Despite her 'antipodean' background, Dr Worthington resists the temptation to give a disproportionate number of comparative references to Australian law. But there has perhaps been some over-compensation: when discussing criticisms of the bar to recovery for mistakes of law, one would expect to see a reference to *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353: Worthington, above n 1, 160 n 98.

[6] See the extent of recent material in the bibliography. See also Robert Chambers, *Resulting Trusts* (1997); Lionel Smith, *The Law of Tracing* (1997) (forthcoming).

[7] This is evidenced by the fact that, traditionally, undergraduate law courses have not regarded personal property law as a discrete subject, or even as a discrete part of a property law course. Rather it has been divided between areas such as trusts/equity and tort, and more specific areas such as sale of goods.

[8] Worthington, above n 1, 243.

[9] Cf ibid 243: contracts are also essential to understanding proprietary interests arising by operation of law.

tion is somewhat problematic since, as Dr Worthington herself notes, one must recognise the 'necessary and intimate integration of law and equity. It is no longer possible to describe legal outcomes by reference solely to contract law, property law, or equity.'[10] Maintaining that division between common law and equity, while possibly justifiable on pedagogical grounds — it makes the material more digestible for the newcomer — results in the discussion having to be prematurely curtailed when equitable or legal proprietary rights arise in the wrong chapter.[11]

The only other matter of presentation to regret is that, when analysing cases in chapter four to show the appropriateness of her preferred explanation of how floating charges 'float', Dr Worthington does not offer a side-by-side comparison of how the alternative explanations of floating charges would cope with those authorities.

The recent attention of academic literature in this area has been mirrored by, and perhaps to an extent has influenced,[12] a rapid development of the law by courts, particularly in England. That is particularly evident in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*,[13] the test case arising out of *ultra vires*[14] interest rate swap transactions entered into by many local councils in the United Kingdom in the 1980s. The House of Lords' decision in *Westdeutsche* was handed down after Dr Worthington's book had been edited. She did, however, have the opportunity to comment on the decision in an addendum which (in keeping with the style elsewhere) is sufficiently well cross-referenced to the main argument that the unfortunate timing does not ultimately matter.

Turning to substantive points of note, it is good to see strong reaffirmation of the fact that a trustee of resulting and constructive trusts is not necessarily fixed with the full ambit of fiduciary duties which may rest with an express trustee.[15]

Also worthy of note is Dr Worthington's emphasis on intention as the basis of both *Quistclose* trusts and retention of title.[16] As a consequence, she argues, it should be possible for a seller of goods to obtain, through a 'retention' of title clause, title in manufactured products made using those goods, and to obtain title to proceeds from the sub-sale of those goods.[17] It should also, she argues, be possible to construct a *Quistclose* trust in respect of assets other than loan funds[18] — for example, in respect of proceeds from the sub-sale of goods subject to a retention of title clause.[19]

[10] Ibid.
[11] See, eg, ibid 126.
[12] See, eg, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, 689–90, 702–3 ('*Westdeutsche*').
[13] [1996] AC 669.
[14] See generally *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1.
[15] Worthington, above n 1, xiv, xvi, 25.
[16] Ibid 25–6, 70. Note the restraining influence of giving priority to substance over form: ibid x, 22, 76 n 40. Cf 'motivation': ibid xii, 152.
[17] Ibid 42.
[18] Ibid 65. Cf above n 2.
[19] Ibid 70.

The *De Mattos v Gibson* principle[20] is explained as giving the plaintiff (that is, the contracting party who has the ability to restrain use of property by a third party which conflicts with its contractual rights) a right akin to that of a potential beneficiary under a discretionary trust. In other words, the third party has a power to use the property in any way which does not conflict with those rights, a power which is equivalent to a 'trust power'.[21] Although Dr Worthington considers that this analysis does not require the creation of any new type of interest,[22] it could amount to the recognition of a new category: a discretionary constructive trust.[23]

Perhaps the most interesting points are made in discussing the remedies that are available to plaintiffs seeking to enforce common law and equitable property rights. In order to better protect third party takers of goods[24] from a thief, or from a purchaser under certain[25] void contracts, Dr Worthington suggests that common law title to goods should in fact transfer upon delivery,[26] although the title will be able to be challenged in equity. This would ameliorate the odd situation where a plaintiff who has only an equitable proprietary interest can obtain a better remedy (return of property *in specie*) than a legal owner (conversion).[27]

Dr Worthington is also concerned, however, to ensure that the original owner retains their right to sue in conversion, which of course requires proof of a right to immediate possession. Therefore she suggests separating transfer of legal title (at least when that legal title is 'assailable') from the transfer of the right to possession, so that the original owner can still have that possessory right.[28] While the resulting position may accord with the lay perception of the effect of theft,[29] it does make the legal notion of a right to possession even more removed from lay conceptions: it would not be unreasonable to assume that if full legal title has passed, the right to possession has passed *a fortiori*.

The last substantive points to note relate to Dr Worthington's treatment of the doctrine of tracing. As she states, 'the current views of the tracing process' are that the traditional tracing rules merely concern the issue of identification and say 'nothing of the rights — personal or proprietary — which might eventually

20 See generally above n 3.

21 Worthington, above n 1, 112. Beneficiaries under a *Quistclose* primary trust are possibly in the same position: Worthington, above n 1, 114 fn 81.

22 Ibid 115.

23 At one point, Dr Worthington notes that the courts' aim in protecting the plaintiff in these cases 'seems to be to deny the defendant any unjust enrichment', although she does not then address the various elements which make up the restitutionary action for unjust enrichment: ibid 103.

24 As Dr Worthington notes, money will almost always lose its identity in the hands of the purchaser/thief (and therefore common law title to it will pass from the original 'seller'); similarly, common law title to shares and realty will usually have been transferred from the seller pursuant to a collateral conveyance accompanying the void contract of sale: ibid 125.

25 Ibid 124.

26 Ibid 125, 128.

27 Dr Worthington notes also that a plaintiff seeking to recover property transferred by them under a voidable contract will be in a better practical position if in fact strict *restitutio in integrum* is impossible, since then equity's remedies, rather than those of the common law, will be relevant: ibid 131–2.

28 Ibid 132, 144.

29 Ibid 128–9.

be asserted'.[30] However, Dr Worthington considers that there is no room for restricting a tracer merely to a personal claim against a defendant[31] since:

> there is not a single example of a situation where equity imposes an obligation to account or an obligation to transfer or restore property, *and* the asset in question is identifiable *and yet* the holder of the asset is not considered to hold it on trust.[32]

She recognises that the type of interest which a tracer can assert over traced property may differ depending on the circumstances,[33] but it must be a proprietary interest of some sort. It is nevertheless important to maintain the distinction between rules of identification and rules governing what rights a tracer may assert in the traced property, yet Dr Worthington does not always observe this distinction.[34]

Dr Worthington observes that a person with a right to trace only has a mere power, or power *in rem*, which can then be 'crystallised' in respect of the traced property.[35] This is borne out by those cases which consider priority disputes between a tracer and a person who obtains a proprietary interest in property before the tracer asserts any rights to it.[36] It also fits interestingly with her analysis of goods transferred pursuant to a contract voidable in equity. Dr Worthington identifies the original owner's right prior to actually avoiding such a contract as a mere equity, which is then crystallised over the goods once the contract is avoided.[37] If, before then, the purchaser has exchanged the goods for other property, the analysis suggests that the original owner's mere equity can (subject to the rules of identification) be crystallised in respect of those exchange-products.[38] In other words, the law relating to avoiding contracts is possibly part of the same body of law that governs what interest a tracer may crystallise in respect of traced property.

A cohesive body of the law of personal property seems much further off than (and perhaps depends on there being) a cohesive law of restitution. As Professor Burrows has commented, '[t]he single greatest problem facing the English law of restitution is that, unfortunately, ... illogicality appears to be embedded in the law and continues to be embraced by both judges and academics'.[39]

Dr Worthington's project is to provide 'a better understanding of existing

30 Ibid 166, 166 fn 128.

31 Cf Peter Birks, *Introduction to the Law of Restitution* (1989) 394–401; but see Andrew Burrows, *The Law of Restitution* (1993) 374.

32 Worthington, above n 1, xix.

33 Ibid 179, 180.

34 Ibid 173.

35 Ibid 175. An analogy might be drawn with floating charges, although perhaps not on Dr Worthington's preferred view of how floating charges 'float': ibid 80–1, 99.

36 *Re French's Estate* (1887) 21 LR Ir 283, 312; *Bourke v Lee* [1904] 1 IR 280, 283; *Scott v Scott and Provincial Bank of Ireland* [1924] 1 IR 141, 150–1. Cf *Cave v Cave* (1880) 15 Ch D 639, 649.

37 Worthington, above n 1, 165.

38 Ibid 166.

39 Andrew Burrows, 'Swaps and the Friction between Common Law and Equity' [1995] *Restitution Law Review* 15, 25.

principles, a more vigorous assertion of them, and a greater appreciation of their limits'.[40] In so doing, she seeks to identify, and (to the extent necessary) suggest changes to achieve, logical consistency over the topics she covers.[41] For her, the project offers:

> one version of a more theoretically rigorous analytical framework for proprietary interests in personal property. This framework is essentially conservative: it adopts existing conceptual formulations but subjects them to a more exacting appraisal in order to define their limits ... This, in turn, helps to clarify the practical application of those concepts in commercial dealings.[42]

Such a project in a field as diverse and complex as that of personal property is immensely useful. However, it is important to bear in mind that the primary value governing the interpretation of cases is that of logical consistency. 'The analysis here is concerned with defining and describing the current law on proprietary interests, not with evaluating the many policy considerations which might require such interests to be limited or regulated.'[43] For example, where a minority of decided cases are logically inconsistent with the preferred framework, Dr Worthington concludes that they 'might have been better decided' the other way.[44] Sometimes it seems sufficient for Dr Worthington if consistency is found in the results of cases, if not in their reasoning.[45]

A purely descriptive approach to explaining law is, however, likely to be problematic, particularly in relation to property rights. Normative issues, issues of 'value', are bound to arise. In fact, every so often the text moves from the descriptive to the normative[46] — particularly when discussing the basis of constructive trusts and liens. Both are seen to be grounded in the equitable maxim that equity regards as done that which ought to be done.[47] Recourse to that maxim must inevitably put normative considerations in the foreground — the word 'ought' is clearly a normative term (albeit one that is tempered by existing categories of constructive trusts or liens).[48] Dr Worthington finds the

40 Worthington, above n 1, 245.

41 See, eg, ibid 130, 163.

42 Ibid 4.

43 Ibid.

44 Ibid 96 (in relation to cases concerning execution creditors).

45 Ibid 99. Cf Birks, above n 31, 397: 'If it were permissible to say that the law is what they [the House of Lords in *Sinclair v Brougham* [1914] AC 398] did, not what they said'.

46 Worthington, above n 1, 99 (noting where the result of cases is 'consistent with an inherent sense of what is fair and commercially acceptable'), 173 ('[c]ommercial certainty demands fixed rules, but commercial sensibilities require them to be based on fitting considerations'), 227 fn 28 ('there is no reason for equity to bind the conscience of either party to act in any particular way'), 228 fn 34 and 233 fn 57 ('unconscientious or unfair', quoting *Hewett v Court* (1983) 149 CLR 639, 668–9 (Deane J)). At one point it is stated that 'justice does not require the proprietary and personal claims to be quantitatively equivalent. They are not in other circumstances': Worthington, above n 1, 159. In fact the second sentence implies that the considerations of justice referred to are simply those of consistency. If there are other considerations, what they are is not made clear.

47 Ibid 189, 225.

48 Ibid 225. The maxim could be seen (like the principle of unjust enrichment) as 'a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant' to hold property on a constructive trust or subject to an equitable lien: *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256–7. Although the

analysis here 'difficult',[49] and that is possibly because normative concerns need to play a more explicit role. However normative issues are never really addressed,[50] and that seems to leave the analysis somewhat wanting.

This is also apparent in the discussion of the House of Lords' decision in *Westdeutsche*.[51] Dr Worthington identifies the primary reason underpinning that decision as the undesirable commercial consequences associated with the imposition of a resulting trust in that case.[52] As Lord Browne-Wilkinson concludes at one point, 'I can see no moral or legal justification for giving such priority to the right of T to obtain restitution over third parties who have themselves not been enriched, in any real sense, at T's expense'.[53] Dr Worthington makes some very telling criticisms of the Law Lords' use of trust doctrine.[54] Her emphasis on attaining a greater degree of logical coherence also answers one of the 'policy' concerns of the House of Lords: lack of predictability. However one suspects that a fuller answer to the *Westdeutsche* decision would be available if more consideration were given to identifying and resolving the issues of policy which were of concern in the case.

At the base of Dr Worthington's project is a particular view about the proper scope of interpretation of case law. On the model of legal interpretation propounded by Ronald Dworkin, for example, the interpreter (whether judge or legal academic)[55] must keep in play two distinct notions: 'fit' with the existing body of law; and 'justification'.[56] Dr Worthington can be seen as concentrating on the former and she implies that, in *Westdeutsche*, the Law Lords were swayed by considerations of 'justification' to an impermissible extent.

In discussing the House of Lords' overruling of *Sinclair v Brougham*[57] in *Westdeutsche*,[58] Dr Worthington notes that:

> the most that can be said is that the reasoning leads to results that some might

maxim is not of course a licence to determine the result of cases 'by reference to some subjective evaluation of what is fair or unconscionable' (*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353, 379), it could be said that the maxim, as a unifying legal concept, 'assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case': *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 257.

49 Worthington, above n 1, 241.

50 There is frequent use of 'ought' in inverted commas or italics, indicating that a certain distance is being maintained from the normative issues: ibid 227 fn 28, 228, 233, 236, 238.

51 [1996] AC 669.

52 Worthington, above n 1, xvii.

53 *Westdeutsche* [1996] AC 669, 704.

54 See, eg, Worthington, above n 1, x, xii–xiii, xiv, xxi.

55 Ronald Dworkin, *Law's Empire* (1986) 14–15. This model of interpretation could be crudely summarised as follows. While an interpretation must be consistent (or 'fit') with the case law to a large extent (some cases can be dismissed as, say, wrongly decided: see, eg, text accompanying n 43), there are likely to be alternative interpretations which are similarly consistent but which differ in, for example, the extent to which they go beyond existing case law. The interpreter should choose the interpretation which offers the best 'justification' of that area of the law. The interpreter must bear in mind that the interpretation which best 'justifies' an area of law may not be the one which best 'fits' the existing case law.

56 Ibid 255–6, 231.

57 [1914] AC 398 ('*Sinclair*').

58 [1996] AC 669, 709, 688 (Lord Goff in dissent).

> find commercially objectionable — or even unsustainable. Before this is used to deny the reasoning, however, it is important to determine whether the consequences *are* so objectionable, and whether interference with the reasoning can, on that basis, be justified without statutory intervention.[59]

The 'reasoning' presumably refers to whatever strict *ratio decidendi* is gleaned from *Sinclair*. If so, merely upholding *Sinclair* is unlikely to have been sufficient to establish a proprietary interest in *Westdeutsche* — for it is clear that the doctrine of *stare decisis* does not mean that all logical extensions of any particular *ratio* are *ipso facto* law. Dr Worthington therefore implies that the law can be extended or changed to create greater logical consistency, or 'fit', but that alterations to accord with notions of 'justification' at the expense of 'fit' are suspect.[60]

None of this is intended to undermine the worth of Dr Worthington's project, which as noted is vital in such a complex area as personal property law. It is merely an attempt to place the project in a broader context. Perhaps a complete explanation of personal property rights requires one to start with a theory of property[61] and move from that, through the historical division between common law and equity, to a logical analysis of contemporary common law and equitable property law. Dr Worthington's work will be an essential source of the latter. Until that, possibly Herculean, task can be accomplished, *Proprietary Interests in Commercial Transactions* should be examined by anyone wishing to know more about this area of the law: it is accessible, thorough and thought-provoking.

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59 Worthington, above n 1, xvii n 55.

60 Achieving greater 'fit' is of course one possible 'justification' — but clearly not the only, or even predominant, one.

61 See, eg, Jeremy Waldron, *The Right to Private Property* (1988); Stephen Munzer, *A Theory of Property* (1990).

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