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**LAW REVIEW**

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Volume 18

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2016 Special Issue: Law and Social Justice in Western Sydney

### **Call for Papers**

Submissions due 1 March 2016

The *Western Sydney University Law Review* will launch in 2016 with a special issue dedicated to the theme of 'Law and Social Justice in Western Sydney'. We seek submissions that challenge conventional notions of law as distinct from society and from the places where we live and work. In this issue, we aim to showcase diverse ways of thinking about law and its differential impacts on communities, families, and individuals. We seek to do this with a focus on our region of Western Sydney, as well as comparative analyses and understandings from similar and dissimilar regions across Australia and around the world. We also aim to interrogate concepts such as diversity and inclusion as vehicles for equality and justice. The language of multiculturalism, inclusion, and diversity has been mobilized in ways that range from Eurocentric, reductionist and essentialist to critical, post-modern and inter-sectionalist. How successful are we and other societies at ensuring these concepts work for equality and social justice? We are especially interested in innovative and interdisciplinary approaches to the special issue theme. Suggested topics include (but are not limited to) law and social justice in Western Sydney in relation to:

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# A DELICATE BALANCE: REGULATING MICRO SATELLITE TECHNOLOGY IN A BIG SATELLITE WORLD

STEVEN FREELAND\*

## ABSTRACT

The development of space-related technology since the dawn of the space age in 1957 has given rise to many new and exciting possibilities. It has also meant that space activities continue to evolve, facilitating the participation of a variety of space 'actors' other than States. One of the potentially most significant developments in this regard has been the increasing use of small satellites. These are in general cheaper and less complex to develop, build and launch than conventional satellites, and have thus enabled groups such as university students and non-profit organisations to become involved in space. More significantly, the possibilities now exist for 'traditional' users of outer space to also utilise this technology for existing as well as new commercial and other purposes. This may represent a pivotal moment towards the development of a new space paradigm. Yet, despite the tremendous potential offered by small satellites, it is important to recognise that, like other space objects, they are subject to the regulatory requirements specified in the international space treaties, as well as other instruments and national legislation. This article discusses a number of the more significant regulatory requirements and analyses how they might apply to space activities involving small satellites now and into the future.

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## I THE CHANGING NATURE OF SPACE TECHNOLOGY

October 1957 witnessed the launch of the first human-made space object to orbit the Earth, Sputnik 1. Since that time, there has been a breathtaking and seemingly endless development of space-related technology. Humankind is now engaged in a multitude of space activities far beyond the contemplation of those involved at that time. The utilisation of space technology now forms a crucial part of everyday society in all parts of the globe – irrespective of the (geo)political, economic and cultural characteristics of any one country. Simply put, our reliance on space technology is such that the world would cease to function in many respects without constant and unimpeded access, and this imperative is likely to become even more pronounced for future generations. This has primarily been driven by the increasing ‘commercialisation’ of outer space.

Yet, as is well known, there remains a vast gulf between the space capabilities of the relatively small number of space ‘powers’ compared with the rest of the world. It has been estimated that approximately up to 60 States now have some form of direct space capability,<sup>1</sup> although the extent to which they are able to utilise space for their own development (and other) purposes varies quite significantly. Of course, this also means that perhaps up to 140 States thus far do not realistically have *any* independent capability to directly access space themselves. This is despite their reliance on space-related technology for many aspects of their functioning and development. These countries are instead totally dependent on others for their space access, which therefore impacts upon their space ‘security’ and impedes opportunities for creativity, innovation and progress among their citizens. The reality is that their access to satellite data and the ability to utilise vital space technology in a crisis would be largely dependent on, and subject to, the strength and enforceability of their existing contractual relationships and political ties.

It is in this context that the recent development and adaptation of so-called ‘small’ satellite technology potentially represents a paradigm shift in the way humankind accesses space. These satellites are usually cheaper and less complex to develop, build and launch than conventional satellites. They therefore open the possibilities for a significantly greater degree of space access to a much larger range of space ‘actors’. Already, groups such as university students and non-

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<sup>1</sup> See, for example, Ram S Jakhu, ‘Global Space Governance System: Evolution and Sustainability’ (2015) *Annals of Air and Space Law* (forthcoming) 3.



profit organisations in both developed and developing countries have increasingly been able to become involved in space through these means.<sup>2</sup> The development of this technology may represent an important precursor to the establishment of indigenous and independent space programs in States that previously could not have considered such activities. In effect, by eliminating some significant barriers to entry, small satellite technology may facilitate capacity building, broader collaborative opportunities and education/training programs, as well as bridging (some) technology gaps, for hitherto 'non-space faring' States. It will also open up even more diverse commercial opportunities for a much broader range of potential service providers and, generally, 'bring space to more people.'

Significantly, as the technology develops even further, it may also open the door to traditional users of outer space – both States and private commercial entities – to utilise it for existing as well as new purposes, thus expanding the scope of their capability at a significantly lower relative cost. Of course, this may also require a mind-shift on the part of existing space actors as they grapple with whether, and how, to adapt to this relatively new technology and adjust their activities to react to the challenges posed by the potential for new market entrants.<sup>3</sup>

As a consequence, the increasing advent of this technology could potentially redefine the landscape of many activities in space. This new space paradigm will not see the end of more traditional satellite technology since, naturally, small satellite technology will not quench our insatiable demand for all that space can provide. However, it does open up a plethora of possibilities, many of which we are simply not in a position to comprehend or even imagine at this point. In this regard, one might liken the potential of small satellites to the way that mobile phones have revolutionised terrestrial communications activities. We simply do not know where this technology might ultimately lead and what it will allow us to do. However, we can confidently expect that it will open the door to an even more expansive array of commercial opportunities.

Thus, from a technological perspective at least, small satellite technology most likely represents a 'win-win' possibility that enhances the momentum for change and further promotes commercial space activities. Indeed, in many respects, this has been the singular

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<sup>2</sup> See, for example, below n 11.

<sup>3</sup> See, for example, Adriana Martin, 'Is There a Kodak Moment or a Bubble? Analysis of the Threat of New Entrants to the Existing Firms in the Space Industry' (Research Paper for the SIRIUS Chair, University of Toulouse, September 2014) (copy with author).

motivation for both developers and users thus far. As with many aspects related to the exploration and use of outer space, the technology continues to move forward at a rapid pace without sufficient attention being paid to the regulatory consequences and requirements. It is therefore important not to be too caught up in this wave of optimism and innovation, without at least also considering how these developments coexist with the current regulatory framework, which has largely been designed with 'big' satellite technology in mind.

The purpose of this article is therefore to take pause and reflect on various regulatory requirements and challenges posed by the existing international legal regime in relation to the use of small satellite technology. While many of the users of this technology are no doubt cognisant of these requirements, it is probably fair to say that many are not; or, put another way, they do not consider the regulatory issues with the same degree of attention as they do the technical factors.

What this discussion will highlight is the fact that the existing legal framework was not designed with small satellite technology specifically in mind. Moreover, there are significant political, legal and logistical realities giving rise to difficulties in amending the existing international legal regime. As a result, at least in the short-medium term, further regulation will be required – particularly at the national level – and this will necessitate a balancing of sometimes competing interests between protecting the State now and into the future from potentially very significant liability on the one hand, and encouraging innovation and research and development on the other. Although the discussion below focuses on the current regulatory requirements, it leads to the conclusion that the design of future legal regimes to deal specifically with small satellite technology will necessitate some fundamental policy decisions by national lawmakers and regulatory bodies.

## II THE CURRENT INTERNATIONAL LEGAL FRAMEWORK AND REGULATORY REQUIREMENTS

The international regulation of the exploration and use of outer space is primarily based upon a series of five United Nations Space Treaties<sup>4</sup>

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<sup>4</sup> These are: (i) *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies*, opened for signature 27 January 1967), 610 UNTS 205 (entered into force 10 October 1967) (*Outer Space Treaty*); (ii) *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects*

and several General Assembly Principles.<sup>5</sup> The Treaties in particular set out a number of fundamental rules, imposing various obligations on States Parties, some of which are also regarded as representing customary international law.<sup>6</sup> More and more States have come to recognise the need to promulgate national space laws to transform these international obligations into their respective domestic legal spheres.<sup>7</sup> Given that the advent of small satellite technology presents opportunities for hitherto non-space faring States to engage in space activities, it may well be that the development of such technology in a particular country may pre-date any specific applicable national laws. Thus, the possibilities of greater access to this technology may be a driving force in the enactment of a further wave of national space law in various countries – for example, as was the case in Austria, which enacted its national space law in late 2011.

It should be noted that, in addition to these various instruments, there have recently been an increasing number of ‘soft-law’ guidelines concluded that also relate to the conduct of particular activities in outer space.<sup>8</sup> This has been for several reasons, partly related to the strategic

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*Launched into Outer Space*, opened for signature 22 April 1968, 672 UNTS 119 (entered into force 3 December 1968) (*Rescue Agreement*); (iii) *Convention on International Liability for Damage Caused by Space Objects*, opened for signature 29 March 1972, 961 UNTS 187 (entered into force 1 September 1972) (*Liability Convention*); (iv) *Convention on Registration of Objects Launched into Outer Space*, opened for signature 14 January 1975, 1023 UNTS 15 (entered into force 15 September 1976) (*Registration Agreement*); and (v) *Agreement Governing the Activities of States on the Moon and other Celestial Bodies*, opened for signature 18 December 1979, 1363 UNTS 3 (entered into force 15 September 1984) (*Moon Agreement*).

<sup>5</sup> See, in particular: (i) *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, GA Res 1962(XVIII), UN GAOR, 1<sup>st</sup> comm, 18<sup>th</sup> sess, 1280<sup>th</sup> mtg, Agenda Item 28a, UN doc A/RES/18/1962 (13 December 1963); (ii) *Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting*, GA Res 37/92, UN GAOR, 100<sup>th</sup> plenary mtg, UN Doc A/Res/37/92 (10 December 1982); (iii) *Principles Relating to Remote Sensing of the Earth from Outer Space*, GA Res 41/65, UN GAOR, 95<sup>th</sup> Plenary mtg, UN Doc A/Res/41/65 (3 December 1986); (iv) *Principles Relevant to the Use of Nuclear Power Sources in Outer Space*, GA Res 47/68, UN GAOR, UN Doc A/Res/ 47/68 (14 December 1992); and (v) *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries*, GA Res 51/122, UN GAOR, 83<sup>rd</sup> Plenary mtg, UN Doc A/Res/51/122 (13 December 1996).

<sup>6</sup> See, generally, Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl (eds), *Cologne Commentary on Space Law, Volume I – Outer Space Treaty* (Heymanns Verlag, 2009); Stephan Hobe, Bernhard Schmidt-Tedd and Kai-Uwe Schrogl (eds), *Cologne Commentary on Space Law, Volume II – Rescue Agreement, Liability Convention, Registration Convention, Moon Agreement* (Heymanns Verlag, 2013).

<sup>7</sup> See United Nations Office for Outer Space Affairs, *National Space Law Collection* <<http://www.unoosa.org/oosa/en/ourwork/spacelaw/nationalspacelaw/index.html>>.

<sup>8</sup> For a discussion of the increasing trend towards the conclusion of non-binding instruments in the realm of outer space, and an overview of the most significant of these instruments, see Irmgard Marboe (ed), *Soft Law in Outer Space: The Function of Non-*

and political nature of space, which has made the finalisation of internationally binding treaties more difficult to achieve.

This article will refer primarily to existing 'hard-law' regulatory requirements that flow from the Space Treaties – although reference will be made to one important set of voluntary guidelines – from the perspective of how they may relate to the use of small satellites, and seek to raise some pertinent questions that arise from their applicability. It is not intended in this article to be exhaustive in this regard, or comprehensive as to all the precise details, but rather to raise the more significant issues and the challenges they pose. This will also serve to highlight the importance of properly addressing this issue by way of specifically directed regulation, given that the use of small satellite technology will most likely continue to grow exponentially into the future.

#### *A International Responsibility – Authorisation and Supervision*

The regime for space activities is structured on the basis that States bear international responsibility for 'national activities in outer space', including when such activities are carried on by non-governmental entities.<sup>9</sup> Whilst there is no precise definition in the *Outer Space Treaty* as to what constitutes a 'national' activity, the terms of the domestic space law of a particular State will clarify the scope of activities to which it refers – in essence, representing an interpretation by the drafters of that legislation of what they regard to be 'national activities in outer space', at least for the purposes of the specific domestic law.

A review of existing national space law indicates that, in most cases, States have legislated for the regulation of space activities based on the 'territoriality' of the activity (ie where an activity, for example a launch, involves the territory of that State), in accordance with general international law principles of jurisdiction. In addition, many States that have national space law also regulate space activities based on the nationality of the space actor (ie the person/entity engaged in the space activity). For example, the *Space Activities Act 1998* (Cth) provides that certain space activities carried out in Australia, or by an Australian national outside Australia, are subject to regulation under the legislation and require an appropriate approval under the licensing

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*binding Norms in International Space Law* (Böhlau, 2012); Steven Freeland, 'For Better or For Worse? The Use of 'Soft Law' within the International Legal Regulation of Outer Space' (2011) 36 *Annals of Air and Space Law* 409.

<sup>9</sup> *Outer Space Treaty*, art 6.

system it establishes.<sup>10</sup> Thus, a launch of a small satellite in Australia by an Australian University will engage the international responsibility of that State under the *Outer Space Treaty*. Likewise, so will the involvement of that University in a small satellite program – for example, the QB50 program<sup>11</sup> – where the satellites are to be launched from another State. In these circumstances, therefore, (international) responsibility under the *Outer Space Treaty* extends to extra-territorial activities.

Article 6 of the *Outer Space Treaty* goes on to require that the ‘appropriate State’ – which is generally regarded to mean the State whose national activity it is – undertake the ‘authorisation and continuing supervision’ of such activities. Typically, the authorisation of space activities is implemented by way of a licensing regime established under national law (at least for those States with specific domestic space legislation).<sup>12</sup> This can be through the creation of a comprehensive ‘one size fits all’ licence regime or, more likely, via the establishment of different forms of licence, depending upon the particular space activity for which authorisation is being sought. For example, the *Space Activities Act 1998* (Cth) creates a number of different licences to deal with specific space (launch-related) activities, including a ‘Launch Permit’ for launches from Australian territory,<sup>13</sup> and an ‘Overseas Launch Certificate’ for launches of a space object by an Australian national from launch facilities outside of Australia.<sup>14</sup>

In relation to the use of small satellites, there is little conjecture that their launch and use does, indeed, constitute a space activity. Moreover, the satellite itself would in most circumstances be a space object for the purposes of international space law – including for the purposes of the *Liability Convention* (see below), as well as the domestic law of most countries. Activities involving small satellites therefore would typically fall within the scope of article 6 of the *Outer Space Treaty*. This in itself is not surprising – what is, however, is that this is

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<sup>10</sup> See *Space Activities Act 1998* (Cth), pt 3.

<sup>11</sup> The QB50 mission involves the launching in 2015 of a network of 50 ‘CubeSats’ built by Universities all over the world as a primary payload, with the aim of performing various scientific experiments in the lower thermosphere at an altitude of approximately 320 kilometres: See *QB50 an FP7 Project*, ‘Mission Objectives’ <<https://www.qb50.eu/index.php/project-description-obj>>.

Australian universities are involved in this project: Australian Centre for Space Engineering Research, UNSW, Australia, *QB50 – an International Network of 50 CubeSats* <<http://www.acser.unsw.edu.au/QB50/index.html>>.

<sup>12</sup> See Steven Freeland, ‘Matching Detail with Practice: The Essential Elements of National Space Legislation’ (2010) *Proceedings of the International Institute of Space Law* 540.

<sup>13</sup> *Space Activities Act 1998* (Cth), sections 11 and 26(1).

<sup>14</sup> *Ibid* section 12(a).

not necessarily understood by the users of small satellites, particularly with respect to experimental projects. The reality is that those seeking to engage in small satellite activities, irrespective of where those satellites might be launched, should take careful note of the relevant national laws and apply for the requisite licence (where applicable). As noted below, this might also have added consequences in terms of financial and liability concerns, as well as other aspects of conditionality.

Moreover, the requirement of continuing supervision on the part of the State may be quite complex. There is, for example, some uncertainty as to how, in practice, the need for continuing supervision might be undertaken in circumstances where the relevant space activity is a cooperative venture between institutions in a number of States. Internal arrangements between the cooperating States should be put into place to allow for each State to, in some way, exercise a degree of supervision, at least in relation to those aspects of the activity (and over its nationals who may be involved in its ongoing operation) in which it has a specific interest. Yet, even this pre-supposes that the institutions or persons engaged in the small satellite activity have informed the relevant Government agency of their involvement, and have provided specific details as to the scope of the program, design, issues of control etc.

Adding to the complexity is the fact that most small satellites are not designed with control systems, and therefore cannot be manoeuvred once they are launched and operative. As soon as they are placed in orbit, their position cannot be altered from Earth. This may also explain why this requirement may often have been disregarded, leaving the responsible State in a difficult position in terms of its obligations under the *Outer Space Treaty*.

### B International Liability – National Indemnity Requirements

The general international liability provisions found in the *Outer Space Treaty*<sup>15</sup> and the more detailed regime specified in the *Liability Convention*<sup>16</sup> impose liability on a 'launching State' for certain damage

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<sup>15</sup> Article 7 of the *Outer Space Treaty* prescribes the general terms giving rise to international liability for damage caused by an object launched into outer space. The scope of international liability is then elaborated in the *Liability Convention*. However, even if it is not a State Party to the *Liability Convention*, a State would still be subject to the liability provisions in the *Outer Space Treaty*, as well as any other potential claims based on the general public international law principles of State responsibility.

<sup>16</sup> The identity of the relevant launching State(s) is determined at the time of launch, with article 1(c) of the *Liability Convention* defining a launching State as:

caused by a space object. There are no time limitations or caps on the amount of this liability under the *Liability Convention*, as long as it represents 'damage'<sup>17</sup> by a 'space object' as those terms are defined for the purposes of that Treaty.<sup>18</sup> In the absence of specific indemnities in relation to claims by third parties, or where the various exceptions and exonerations contained in the *Liability Convention* do not apply, a launching State will bear this international obligation of liability<sup>19</sup> even in circumstances where the space activity is undertaken by a non-Government entity and perhaps also even where the State may not be aware of the activity at all.<sup>20</sup>

This represents one compelling incentive for States to pass domestic space law. The enactment of national space law enables States to formalise domestic legal processes that would allow them to pass on financial responsibility to, and recover from their national non-governmental entities the full amount (or part thereof) of the damages for which the State may be liable at the international level. Of course, this does not remove the international obligation of liability of a launching State under the *Liability Convention* – this contingent liability remains in place in relation to any space object for which a particular State is deemed to be a launching State. However, it does enable the State to put in place a domestic mechanism by which it can transfer the financial risk associated with this potential international liability for third party claims. Indeed, this is precisely what a number of States have done in their national laws in relation to traditional satellite technology. For example, in Australia, one of the objectives of the *Space Activities Act 1998* (Cth) is: 'to provide for the payment of adequate

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(i) A State which launches or procures the launching of a space object;

(ii) A State from whose territory or facility a space object is launched'.

<sup>17</sup> Article 1(a) of the *Liability Convention* defines 'damage' as:

'... loss of life, personal injury or other impairment of health; or loss of or damage to property of States or of persons, natural or juridical, or property of international intergovernmental organizations'.

<sup>18</sup> As noted, it would be difficult to argue that an operating small satellite was *not* a space object for the purposes of the *Liability Convention*, even if it is not manoeuvrable whilst in operation.

<sup>19</sup> For a detailed analysis of the *Liability Convention*, see Steven Freeland, 'There's a Satellite in my Backyard! – Mir and the Convention on International Liability For Damage Caused by Space Objects', (2001) 24(2) *University of New South Wales Law Journal* 462.

<sup>20</sup> On this point, there may be an argument that, where the only possible relevant mode by which a State could be a launching State in a specific case is by 'procuring' the launch, there is a minimum threshold test to demonstrate such procuring, at least based on knowledge of the particular activity. However, it is unclear whether such an argument reflects the correct legal position.

compensation for damage caused to persons or property as a result of space activities regulated by [the legislation]’.<sup>21</sup>

As a consequence, national space legislation often attaches conditionality to the issue of a licence to engage in a specific space activity, the practical effect of which is to require the applicant to provide or somehow procure an indemnity to the Government for damage, although the amount may be subject to specific caps under particular national law. Although it would be relatively straightforward to simply require the applicant in these circumstances to take out appropriate commercial insurance against third party claims to the extent of the specified (maximum) damage, this would often be impractical (given the relative lack of depth of the international space insurance market) and, more specifically in the case of many small satellite operators, disproportionately costly.<sup>22</sup> Indeed, such a requirement might make the planned small satellite activity unaffordable, thus preventing it from going ahead at all.

This gives rise to difficult considerations that would require a balancing between the protection of the State from potential financial liability and the desirability of encouraging expertise, research and development, perhaps as a precursor to more profitable and commercial opportunities down the track. Such potentially conflicting interests between a need for regulation on the one hand and the provision of incentives for new innovation on the other are not unique to the situation of small satellite operators – similar arguments have been raised in relation to the requirement for the ‘equitable sharing of benefits’ derived from the exploitation of natural resources under the *Moon Agreement*. However, unlike the *Moon Agreement*, virtually every space-faring State is a party to both the *Outer Space Treaty* and the *Liability Convention* – and, in any event, the liability regime they establish arguably also reflects customary international law. It is therefore incumbent on all States with an (potential) involvement in space to somehow address this issue.

The ideal scenario would be for the small satellite operator to negotiate with the relevant launch service provider for the provision of insurance cover and/or an indemnity by that provider (and perhaps also the Government standing behind that provider) to the launching State and the payload owner (for example, the University that has built the small

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<sup>21</sup> *Space Activities Act 1998* (Cth), section 3(b).

<sup>22</sup> Section 47 of the *Space Activities Act 1998* (Cth) envisages that, in certain circumstances, rather than procure insurance, an applicant could instead demonstrate ‘direct financial responsibility’ as an alternative.



satellite(s)), at least in relation to certain elements of potential third party claims (again most likely subject to a cap). This is often the case in commercial launch service contract arrangements for large satellites. Some small satellite operators contend that the position is more complicated in the case of a collaborative small satellite program such as the QB50 project, involving Universities from several countries (and thus potentially a considerable number of launching States). However, the point remains that many such programs have proceeded without the issue even being raised with either the launch service provider or the intermediary arranging the launch.

Once again, this is something that should be negotiated coincidentally with the development of the technical aspects of such a program. A failure to do so potentially not only places the launching State in a difficult position, but might also expose the institution supporting the small satellite operators to a real and unacceptable risk of liability. Obviously, this should be of practical concern to those involved.

### *C Registration – National and United Nations Registers*

The *Registration Convention* creates a two-pronged regime of registers that are relevant in respect of space objects that are launched inter alia ‘into earth orbit’.<sup>23</sup> The State of Registry (as defined) is to maintain a national register in which such space objects are to be included and, in addition, shall provide certain specified information in relation to those objects to the United Nations, which itself maintains a central register.<sup>24</sup> In accordance with the terms of the *Outer Space Treaty*, the registration of a space object within a State’s national register also has implications with regard to the ‘jurisdiction and control’ of that object.<sup>25</sup>

In situations where a State, has not, for example, previously been involved in launching activities, it may not have in place a national register, nor a mechanism for the furnishing of the required information to the United Nations. There may be a time lag associated with the establishment of the national register, which in most circumstances could only be implemented under national space legislation.<sup>26</sup> Once again, this will require consultation and information flows between the small satellite operator and the relevant Government agency (if indeed such an agency exists).

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<sup>23</sup> *Registration Convention*, art 2(1).

<sup>24</sup> *Ibid* art 4(1).

<sup>25</sup> *Outer Space Treaty*, art 8.

<sup>26</sup> See *Space Activities Act 1998* (Cth), pt 5.

In addition, with widespread cooperative small satellite programs that may potentially involve institutions from many countries, there will be need for careful coordination between the various launching States as to who should be the State of Registry – it can only be one of the launching States.<sup>27</sup> It may not, for example, make practical sense that each launching State would seek to be the State of Registry for its specific small satellites in the context of a joint program involving a large constellation of objects launched simultaneously from the one launch vehicle.

#### *D Sustainability of the Space Environment – Space Debris Mitigation*

One of the major challenges for the future exploration and use of outer space is the growing proliferation of space debris. Much has been written about the exponential growth of pollution in outer space and the hazards that it poses.<sup>28</sup> These discussions are indicative of the many views that exist as to how the problems should be addressed, given that the whole issue of the environment of outer space is a complex one, with many interconnecting variables at play. As noted above, these variables, and the enormous financial implications that would arise from setting in motion binding requirements, have meant that, to date, only soft-law guidelines, rather than hard law treaty regulation, have been agreed to address this issue. Nonetheless, these guidelines,<sup>29</sup> although voluntary and expressed in general terms, are significant in that they reflect the existing practices as developed by a number of States and international organisations and set (minimum) standards towards which space-faring nations should strive.

The principles underpinning the debris mitigation guidelines are that care should be taken to minimise the risk of debris creation in the conduct of space activities.<sup>30</sup> The importance of space for all aspects of

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<sup>27</sup> *Registration Convention*, art 1(c).

<sup>28</sup> See, for example, Ulrike M Bohlmann and Steven Freeland, 'The Regulation of Space Activities and the Space Environment' in Shawkat Alam, Md Jahid Hossain Bhuiyan, Tareq MR Chowdhury and Erika J Techera (eds), *Routledge Handbook of International Environmental Law* (Routledge, 2013) 375.

<sup>29</sup> See Inter-Agency Space Debris Coordination Committee, *Space Debris Mitigation Guidelines* (IADC Debris Mitigation Guidelines, 2007), which is found in *IADC Document Registration List* <[http://www.iadc-online.org/index.cgi?item=docs\\_pub](http://www.iadc-online.org/index.cgi?item=docs_pub)>; *International Cooperation in the Peaceful Uses of Outer Space*, GA Res 62/217, UN GAOR, UN Doc A/Res 62/403 (1 February 2008), which (in paragraph 26) endorsed the Space Debris Mitigation Guidelines agreed by the United Nations Committee on the Peaceful Uses of Outer Space (UN Guidelines) <[http://orbitaldebris.jsc.nasa.gov/library/Space%20Debris%20Mitigation%20Guidelines\\_COPUOS.pdf](http://orbitaldebris.jsc.nasa.gov/library/Space%20Debris%20Mitigation%20Guidelines_COPUOS.pdf)>.

<sup>30</sup> The UN Guidelines recognise two broad categories of space debris mitigation measures: those that curtail the generation of potentially harmful space debris in the near

our lives necessitates a diligent adherence to these standards to the greatest extent possible. It is generally recognised that it is in the interests of all space-faring States to follow these guidelines, and this is, as noted, increasingly reflected in their practices. The long-term sustainability of outer space activities is a matter of interest and importance for the international community as a whole, and is now one of the principal focal points for the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS).<sup>31</sup>

There are some potentially significant environmental challenges that arise from the use of small satellite technology. Growing demand and the expanding range of functions and, ultimately, commercial services they can provide points to rapid increases in the numbers of small satellites that will be placed into Earth orbit. In order to utilise this technology to achieve global coverage, very large constellations of small satellites will be required, and are being planned.<sup>32</sup> Whilst these satellites will primarily be placed into a low Earth orbit, projects such as these will populate important orbits with a significant number of space objects and increasingly pose a potential collision risk.

Even with respect to the current low-cost small satellite programs, the issue still remains. Many experimental satellite programs have been exactly that – experimental. They have often utilised existing off-the-shelf components, and the expectations of mission success for any significant period of time have not necessarily been high. It is fair to say that such circumstances give rise to lower perceptions of risk and a higher tolerance towards failure. For many such programs, at least in the relatively early phases of small satellite development, the process has largely been about the journey (to space) rather than delivery of services – though of course this is now changing. Many of these programs have relied on ‘piggy-back’ launches, which has meant that

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term – minimisation of the production of mission-related space debris and the avoidance of break-ups (Guidelines 1-5); and those that limit their generation over the longer term – end-of-life procedures that remove decommissioned spacecraft and launch vehicle orbital stages from regions populated by operational spacecraft (Guidelines 6-7).

<sup>31</sup> See, for example, United Nations Information Service, ‘Long-term Sustainability of Outer Space Activities Among the Key Topics of Scientific and Technical Subcommittee at its 51st Session’ (Press release, UNIS/OS/432, 7 February 2014) <<http://www.unis.unvienna.org/unis/en/pressrels/2014/unisos432.html>>.

<sup>32</sup> See, for example, Ellie Zolfagharifard and Sarah Griffiths, ‘Elon Musk’s New Mission Revealed: SpaceX Founder Confirms Plans for Tiny Satellites that will Provide Cheap Internet Worldwide’ *Daily Mail* (Online), 12 November 2014 <<http://www.dailymail.co.uk/sciencetech/article-2830263/Elon-Musk-s-new-mission-revealed-SpaceX-founder-confirms-plans-tiny-satellites-provide-cheap-internet-worldwide.html>>. This article reports that SpaceX plans to launch 700 satellites (each weighing 113 kilograms), and Google 180 satellites, both in an effort to provide internet services for the 4.8 billion people of the world who are still without online access.

the satellites have been placed in orbits significantly higher than the very low orbits that would allow them to decay relatively quickly. For many small satellites, therefore, there is a potentially very long period (perhaps in excess of the 25 years cap suggested by the IADC Debris Mitigation Guidelines) before orbital decay, even though the satellite itself will have been functioning for only a short timeframe.

Moreover, as is well known, there are several variants of small satellite technology. Whilst it is too simplistic to categorise them solely on the basis of their size and weight, the so-called 'pico' (0.1-1 kilogram) and 'femto' (less than 100 gram) satellites may be too small to be picked up by conventional tracking systems. Yet, as is also well known, even such low mass objects can cause catastrophic damage in certain circumstances. The potential consequences, and therefore the potential risks, would, of course, be greatly magnified should the development of a large-scale commercial human spaceflight industry, despite recent setbacks, ultimately come to fruition.<sup>33</sup>

Of course, these issues are relevant to the question of potential liability raised above. They also point to the need to carefully consider how, and to what extent, the future implementation of small satellite programs can and will be undertaken, so as to be, as much as possible, consistent with the overarching goal of managing the long term sustainability of outer space activities in such a way as to maximise the (commercial) benefits that can be derived, whilst maintaining appropriate and acceptable safety standards, particularly for missions involving humans.

In some senses, therefore, the environmental consequences relating to small satellite programs have not really been properly factored into the regulatory framework. This is also a question of education and awareness, but is a highly important factor to take into account when designing the future legal regime to apply to such programs.

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<sup>33</sup> See, for example, Andrea Peterson, 'Manned commercial space flight: The final unregulated frontier' *The Washington Post* (Online), 6 November 2014 <<http://www.washingtonpost.com/blogs/the-switch/wp/2014/11/06/manned-commercial-space-flight-the-final-unregulated-frontier/>>. For a discussion of the relevant legal issues related to the proposals to establish a commercial human spaceflight industry, see Steven Freeland, 'Fly Me to the Moon: How Will International Law Cope with Commercial Space Tourism?' (2010) 11(1) *Melbourne Journal of International Law* 90.

*E Other Regulatory Considerations – Frequency Allocation and Traffic Management*

As noted, these brief comments do not purport to be comprehensive as to the relevant regulatory factors associated with this new commercial space paradigm featuring large-scale small satellite programs. However, the primary regulatory issues that ultimately stem from the principal requirements under the United Nations Space Treaties have been raised. There are, of course, other equally relevant considerations that also arise. For example, as more such programs emerge, particularly offering commercial services, the issue of radio frequency usage becomes all important. The existing use of the amateur band frequencies will no longer be applicable and appropriate. The regulatory framework of the International Telecommunications Union (ITU) will become even more relevant. Whilst the ITU operates effectively to manage the use of radio spectra, it is highly bureaucratic. Decisions about allocations of valuable (commercial) frequencies take significant periods of time, and are sometimes highly political. The coordination of frequencies so as to minimise harmful interference is complex. This lengthy process does not necessarily sit comfortably with the shorter timeframes associated with small satellite programs, and procedures will need to be established to accommodate this technology without compromising the important work of the ITU. This will not be an easy task.

In addition, the introduction of large numbers of small satellites will highlight even more the imperatives to consider the development of international traffic management systems involving space traffic, as well as its intersection with air traffic. Once again, while some initial steps are being taken to consider these issues,<sup>34</sup> there is much work to be done by all stakeholders.

### III CONCLUDING REMARKS

These comments have served to highlight the fact that the current international legal framework continues to apply to new and developing technologies – such as small satellites – that will contribute to the further evolution of commercial space activities. Of course, the business case for those large programs that have been announced is yet to be proven and, whilst it is clear that small satellites will form a

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<sup>34</sup> For example, from 18-20 March, 2015, the United Nations Office for Outer Space Affairs (UNOOSA) and the International Civil Aviation Organization (ICAO) jointly sponsored an 'AeroSPACE' symposium where some of these issues were discussed.

(significant) part of the future dimension of space, there may be some false starts along the way as to the most appropriate approach to be undertaken by those entities seeking to utilise the technology to develop very significant commercial businesses.

That said, the existing law and the technology, at least at the international level, do not represent a natural fit. The international regulatory framework was not designed specifically to deal with the advent of this technology, nor for the expansive range of new space actors. Moreover, these new actors in particular may not be completely aware of, or understand, the relevance and implications of the existing framework.

The United Nations is therefore conscious of the imperative to explore the potential dynamics of the small satellite industry, and promote the need to address both the challenges and the opportunities posed by small satellites. It has, for example, established the Basic Space Technology Initiative (BSTI),<sup>35</sup> which seeks to support capacity building in fundamental space technology, and also to promote the use of space technology and its applications for sustainable development. This has partially been guided by the growth of small satellites technology and the increasing access to them of universities and smaller institutions, in countries along the full spectrum of economic development. The BSTI represents a useful international cooperative attempt to better understand the dimensions of the issues that will arise. Despite these initiatives, however, it seems unlikely that binding international frameworks will be put in place anytime soon to effectively deal with this technology.

Yet, even putting these initiatives aside, it is clear that such shifts in space technology require the development of appropriate regulatory standards in a relatively short timeframe. Small satellite entrepreneurs are anxious that any real (or perceived) barriers to entry posed by national regulatory requirements are removed. Many of these entities believe that, if they are not able to develop and implement their plans in the short-term, then the opportunity will be lost, since someone else will do it instead, perhaps in a more 'user friendly' domestic regulatory environment.

Whether or not these fears are justified in every case, what seems increasingly likely is that, in some respects, small satellite technology will become a mainstream methodology for utilising space for

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<sup>35</sup> See UNOOSA, *Basic Space Technology Initiative (BSTI)*  
<<http://www.unoosa.org/oosa/en/ourwork/psa/bsti/index.html>>.

commercial purposes. Attempting to regulate this 21<sup>st</sup> century technology solely by reference to 20<sup>th</sup> century regulation is therefore likely to create difficulties and uncertainties, and perhaps deter some who would otherwise consider engaging in the space industry.

In the meantime, however, there is no doubt that small satellite technology can offer great opportunities, but it also poses some significant challenges to the broader perspective of the exploration and use of outer space. The need for clear regulation to specifically address this technology is clear and it thus falls on national lawmakers to provide what is required within a more expedient timeframe. Pressure is already being exerted by industry associations and representatives in various States seeking clarification of the regulatory requirements in relation to this new technology.<sup>36</sup>

In the end, therefore, clear domestic policies must be formulated. National legislatures have to come to grips with the ever-changing range of space technology, particularly if they wish to become increasingly involved in space activities. Some Governments are already attempting through their legislation to deal specifically with the issues that arise through the advent of small satellite technology,<sup>37</sup> but there is a long way to go. Whatever rules are put in place must find the right balance between, on the one hand, the need for regulation of the financial and technical elements, so as to minimise the risks to an acceptable level, and the facilitation of research and innovation to allow for greater and more efficient access to space, and the potential for commercial returns, on the other.

Public policy questions arise as to whether, for example, to exempt (non-commercial?) small satellite operators from several of the existing national regulatory requirements that apply to their large satellite 'brethren'. Yet, to do so may have the ultimate effect of minimising the incentives or motivation of these operators to engage in best practices, or to take simple, inexpensive steps to ensure that their local stakeholders are covered by existing protections. Naturally, this may not necessarily be the case when it comes to commercial small-satellite enterprises; however, it is suggested that the industry as a whole

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<sup>36</sup> See, for example, Space Industry Association of Australia, 'Discussion Paper on the Regulatory Requirements for Launches of Small Satellites for Scientific and Educational Purposes', February 2015 (copy with author).

<sup>37</sup> See, for example, Irmgard Marboe and Karin Trautmüller, 'Small Satellites and Small States: New Incentives for National Space Legislation' (2012) 38 *Journal of Space Law* 289, where the authors describe how the national laws of Austria, Belgium and The Netherlands have been structured to deal with the possibility of future small satellite programs involving those countries.

would not necessarily be unduly stifled by the requirement that, in all circumstances, they take proper and appropriate risk management steps. Any relaxation of the rules for the users of this technology will bring with it added risk for the regulators and the relevant State, even though in many cases these might be quite small.

These are difficult choices and States will take differing paths depending upon their specific circumstances. This will, unfortunately, mean that there is unlikely to be established a uniform international set of rules to address the complexities of small satellites, at least in the short-medium term. Perhaps we might see the emergence of a soft-law code of conduct at the international level, but this may not provide a sufficient base to determine the conduct of those new actors in the space paradigm.

This again points to the strong role that national law and lawmakers have to play, which will require close consultation between all stakeholders, and emphasises the need for regulators, the scientific community, the entrepreneurs and the lawyers to all talk to each other to a far greater degree than has thus far been the case.



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# A LEGAL AND SOCIAL ANALYSIS OF 'ONE PUNCH' CASES IN WESTERN AUSTRALIA

CATHERINE FERGUSON AND RACHEL ROBSON\*

## I INTRODUCTION

As a result of increasing violence, particularly prevalent in the North Bridge entertainment area in Perth,<sup>1</sup> in August 2008 a new offence was added to the Western Australian *Criminal Code 1913* (WA).<sup>2</sup> The formal terminology for this new offence is 'unlawful assault causing death.' Colloquially it was referred to as 'One Punch' legislation; a term that has recently moved through other colloquial terms such as 'King Hit' and currently 'Coward's Punch.' The change in colloquial terminology was an effort to stigmatise the behaviour in the eyes of young men, the targeted population of the legislation according to government and media reports.

Amendments to the WA Code were established in the *Criminal Law Amendment (Homicide) Act 2008* (WA), which made a range of other significant changes to homicide law in Western Australia (WA). Many of the amendments were the result of recommendations made by the Law Reform Commission of Western Australia (LRCWA) in its 2007 report.<sup>3</sup> The new offence was introduced after a number of violent attacks that had resulted in the death of a victim and where the accused was acquitted of manslaughter as the intention to kill and the foreseeability of the death could not be proved. The new offence dispensed with the notion of foreseeability and intention, providing that criminal responsibility would still attach to the offender even if the offender did not intend the death of the victim, and even if the death was unforeseeable.<sup>4</sup>

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<sup>1</sup> Vincent Hughes and Ben Thompson, *Is Your House in Order? Re-visiting Liquor Licensing Practises and the Establishment of an Entertainment Precinct in Northbridge* (Research Report prepared for the Commissioner of Police, Western Australian Police, 2009) 14.

<sup>2</sup> Hereafter *WA Code*.

<sup>3</sup> Western Australian Law Reform Commission, *Review of the Law of Homicide: An Issues Paper*, Discussion Paper, Project No 97 (2007)

<[http://www.lrc.justice.wa.gov.au/P/project\\_97.aspx](http://www.lrc.justice.wa.gov.au/P/project_97.aspx)>

<sup>4</sup> *WA Code* s 281(2).

The offence of unlawful assault causing death was not a recommendation of the LRCWA,<sup>5</sup> but was introduced as a result of public pressure and the WA State Government's need to be seen to be 'tough on crime.'<sup>6</sup> The introduction in 2012 of similar legislation in the Northern Territory (NT)<sup>7</sup> and in 2014 in New South Wales (NSW)<sup>8</sup> and Victoria<sup>9</sup> also appeared to be the result of intense media and public campaigning,<sup>10</sup> despite academic opinion that the existing criminal law did not require a 'one punch' law.<sup>11</sup>

This article considers some of the legal implications and unintended consequences of the WA legislation and uses the process of content analysis to analyse 12 cases of unlawful assault causing death that have passed through the WA court system, where the accused has either pled guilty or been found guilty of unlawful assault causing death. In 11 of the 12 cases, the offender pled guilty. The cases analysed in this article were identified from the records of the WA Office of the Director of Public Prosecutions<sup>12</sup> and the Judges Sentencing Remarks (JSRs). This allowed an analysis of several aspects of the case, including the offender's background (gender and age), details of the victim, the relationship between the victim and the offender, location of the offence, the sentence applied and the mitigating and aggravating circumstances taken into consideration in the sentencing. Legal aspects in relation to intention and foreseeability are also presented.

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<sup>5</sup> Julia Quilter, 'The Thomas Kelly Case: Why a "One Punch" Law is Not the Answer' (2014) 38 *Criminal Law Journal* 16, 20.

<sup>6</sup> Julia Quilter, 'Responses to the Death of Thomas Kelly: Taking Populism Seriously' (2013) 24(3) *Current Issues in Criminal Justice* 439, 441.

<sup>7</sup> *Criminal Code Amendment (Violent Act Causing Death) Act 2012* (NT); Sue Erickson, 'One Punch Commenced in the Northern Territory' (2013) 38 (1) *Alternative Law Journal* 58.

<sup>8</sup> *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (NSW).

<sup>9</sup> *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014* (Vic). The Act amended the *Crimes Act 1958* (Vic) and the *Sentencing Act 1991* (Vic), with the significant change being that one punch deaths would carry with them a non-parole period of 10 years jail. During the Second Reading Speech, the Victorian Parliament shared many of the same sentiments expressed by the WA Parliament, acknowledging that the proposed changes increased the severity of the penalty for one punch deaths in order to guarantee that the offenders would go to jail for at least 10 years for fatal acts of violence. See, Victoria, *Parliamentary Debates*, Legislative Assembly, 20 August 2014, 2824 (R Clark).

<sup>10</sup> Julia Quilter, 'One-punch Laws, Mandatory Minimums and 'Alcohol-Fuelled' as an Aggravating Factor: Implications for NSW Criminal Law (2014) 3(1) *International Journal for Crime, Justice and Social Democracy* 81, 81-83.

<sup>11</sup> Quilter, above n 5, 26-27. Quilter explains that the existing legislation is already capable of dealing with the 'one punch' attacks, and that, unlike the Code jurisdictions, there is no gap to fill regarding the defence of accident.

<sup>12</sup> Office of the Director of Public Prosecutions for Western Australia, *Schedule of s 281 Prosecutions*. The Schedule (current at 1 January 2014) is accessible at: <[http://www.dpp.wa.gov.au/\\_files/assault\\_occasioning\\_death.pdf](http://www.dpp.wa.gov.au/_files/assault_occasioning_death.pdf)>.

## II THE INTENTION OF THE WEST AUSTRALIAN PARLIAMENT

The Parliamentary intention of introducing this law into WA was to target street male-to-male violence<sup>13</sup> which had increased by 71% between the years of 2005 and 2009 in the Northbridge entertainment precinct.<sup>14</sup> The male-to-male violence aspect of the legislation was noted in the JSRs in *Western Australia v Anderson*<sup>15</sup> and *Western Australia v Mako*<sup>16</sup> that '...the offence was introduced to deal with so called "one punch" homicides, where an offender punches a victim who falls, hits their head on the ground and dies ...'<sup>17</sup>. Although many of the references to this offence in the Second Reading of the *Criminal Law Amendment (Homicide) Bill 2008* (WA) used the term 'one punch',<sup>18</sup> the language used in s 281 of the *WA Code* is not to a specific 'one punch' assault; it is to 'assault' generally, thus encompassing the actions or conduct that fall within the definition of assault in the *WA Code*.<sup>19</sup> In other words, the way in which the WA legislation is phrased allows it to encompass other forms of assault (not only one punch) that result in the victim's death.

The Second Reading of the Bill continued over several sessions and suggested that the provision of s 281 would have a deterrent effect on such assaults. However, in the *Parliamentary Debates* on 6 May 2008 the following comment was made: 'On the surface it looks as though the legislation deals with one punch homicide situations, but a Pandora's box is being opened up almost by stealth in the way in which this legislation could be interpreted.'<sup>20</sup> On 18 June 2008 it was also observed that:

This is the so-called one punch homicide provision. As members will note, we are about to agree to this clause with virtually no debate, which is interesting in that the government's spin machine, which is

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<sup>13</sup> ABC Radio National, 'One Punch Solution Risks Missing the Target' *Law Report*, 19 November 2013 (Damien Carrick, Ralph Kelly and Julia Quilter) <<http://www.abc.net.au/radionational/programs/lawreport/one-punch-solution-risks-missing-the-target/5099954#transcript>>.

<sup>14</sup> Hughes and Thompson, above n 1, 14.

<sup>15</sup> Unreported, District Court of Western Australia, Wager DCJ, 10 September 2010) ('*Anderson*').

<sup>16</sup> [2010] WASC 63 (1 September 2010) ('*Mako*').

<sup>17</sup> *Mako* [2010] WASC 63 (1 September 2010) [32]. See also Western Australia, *Parliamentary Debates*, Legislative Council, 15 May 2008, 3123e (Sue Ellery); Western Australia, *Parliamentary Debates*, Legislative Council, 18 June 2008, 4028 (Simon O'Brien).

<sup>18</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1209c (J A McGinty).

<sup>19</sup> *WA Code* s 222.

<sup>20</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2008, 2438 (M J Cooper).

dealing so effectively with the gas crisis and other things, would have us believe that proposed new section 281 is the beginning and end of this Bill in response to public concern about so-called one-punch homicides going unpunished.<sup>21</sup>

The joint media statement issued by the WA Premier and Attorney General on 3 August 2008 indicated that a media campaign would be developed to make people aware of the consequences of 'one punch' attacks.<sup>22</sup>

As suggested from the *Parliamentary Debates* on 6 May 2008, s 281 has opened a Pandora's box and the intended target population, that is, young men swinging punches, is not the population that is being found guilty of this offence. The terminology used in the *WA Code*, 'unlawful assault causing death', has allowed it to be applied across a number of different circumstances, in particular, domestic violence, or intimate partner violence.<sup>23</sup>

A 2012 Human Rights Briefing Paper<sup>24</sup> considered the rights of women in relation to the use of this offence in cases where domestic violence has been present. Offenders tried and sentenced under this legislation may receive a shorter sentence than if charged and found guilty of manslaughter, for which the maximum sentence is greater.<sup>25</sup> Shorter sentences are likely to be applied due to the hierarchy of homicide offences in which murder is the highest, followed by manslaughter and then unlawful assault causing death. Rachel Ball indicated that a number of cases that have resulted in convictions under this legislation have involved inter-partner or domestic violence and that the application of the unlawful assault causing death rather than the higher offences reduces the value of the lives of women. This situation was also identified in Quilter's analysis of the WA data.<sup>26</sup> However, this new offence with its dispensation of intention and foreseeability has been found to be useful to bring perpetrators of violence to account

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<sup>21</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 18 June 2008, 4028 (Simon O'Brien).

<sup>22</sup> Alan Carpenter and Jim McGinty, 'Campaign Promotes Tough New One Punch Laws' (Media Statement, 3 August 2008).

<sup>23</sup> Jane Cullen, 'WA's 'One Punch' Law: Solution to a Complex Social Problem or a Way Out for Perpetrators of Domestic Violence?' (2014) 2(1) *Griffith Journal of Law & Human Dignity* 53, 54-55.

<sup>24</sup> Rachel Ball, Human Rights Implications of 'Unlawful Assault Causing Death Laws' (Briefing Paper, Human Rights Law Centre, 2012) <[www.hrlc.org.au/files/Assault-causing-death-HRLC-briefing-paper.pdf](http://www.hrlc.org.au/files/Assault-causing-death-HRLC-briefing-paper.pdf)>.

<sup>25</sup> The possible maximum sentence for the offence of manslaughter is life imprisonment, provided in s 280 of the *WA Code*.

<sup>26</sup> Quilter, above n 5, 24-25.

and to be punished where previously a defence of accident<sup>27</sup> may have resulted in no punishment.

In describing the intention of this legislation, the WA government's media releases indicated that it was targeted at young males who frequented entertainment areas and who were often severely intoxicated. This notion has been replicated in the media in both NSW and Victoria when discussing the introduction of their legislation. There is a culture in Australia of masculinity that supports physical violence and which is 'both culturally respected and partly excused in law'.<sup>28</sup> Tomsen and Crofts suggest that there is still a socially acceptable masculine response to insult and that is to resort to violence.<sup>29</sup> This sensitivity to insults has been reported in men from lower socioeconomic groups who indicated a need to respond aggressively to insults and in some instances demonstrate their masculinity by not avoiding a physical conflict.<sup>30</sup> Sensitivity to insults is enhanced when alcohol has been used.<sup>31</sup> In an analysis of coward's punch deaths across Australia, Pilgrim, Gerostamoulos, and Drummer reported that 90 cases were identified within the years of 2000 to 2012. Taking a victimology approach, almost 80% of the deaths were those of young men who were under the influence of alcohol or drugs; with the majority affected by alcohol. The median age of these victims was 33 years with a range of 5 to 78 years.<sup>32</sup> Of the 90 cases only four involved female victims.

Several statements on the introduction of legislation across Australia have suggested that 'one punch' legislation will make people think about throwing that punch that might kill, however social science research indicates a relationship between alcohol and violence,<sup>33</sup> and between alcohol and lack of thinking.<sup>34</sup> Such research indicates that

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<sup>27</sup> *WA Code* s 23B(2).

<sup>28</sup> Stephen Tomsen and Thomas Crofts, 'Social and Cultural Meanings of Legal Responses to Homicide Among Men: Masculine Honour, Sexual Advances and Accidents' (2012) 45(3) *Australian and New Zealand Journal of Criminology* 423, 424.

<sup>29</sup> *Ibid.*

<sup>30</sup> Stephen Tomsen, 'Boozers and Bouncers': Masculine Conflict, Disengagement and the Contemporary Governance of Drinking-Related Violence and Disorder' (2005) 38(3) *The Australian and New Zealand Journal of Criminology* 283, 284-285, 290-291.

<sup>31</sup> Tomsen and Crofts, above n 28, 434.

<sup>32</sup> Jennifer Pilgrim, Dimitri Gerostamoulos and Olaf Drummer, 'King Hit Fatalities in Australia, 2000 - 2012: The Role of Alcohol and Other Drugs' (2014) *Drug and Alcohol Dependence* 119, 120.

<sup>33</sup> Joseph Boden, David Fergusson and John Horwood, 'Alcohol Misuse and Violent Behaviour: Findings from a 30-year Longitudinal Study' (2012) 122 (1-2) *Drug and Alcohol Dependence* 135, 135 - 136.

<sup>34</sup> Claude Steele and Lillian Southwick, 'Alcohol and Social Behaviour I: The Psychology of Drunken Excess' (1985) 48 *Journal of Personality and Social Psychology* 18, 19; Shantha

this aspect of thinking before throwing a punch is unlikely to be addressed by the legislation as drunken young men do not think about the consequences of their actions. However, the culture of male violence needs to be addressed at a societal level<sup>35</sup> and cultural change takes time,<sup>36</sup> sometimes over several generations unless hastened by specific action. Therefore, the deterrence effect of the legislation is at the very least doubtful.

Recent concerns have emerged that the 'one punch' laws are simply not effective.<sup>37</sup> Presently, the evidence and cases from WA demonstrate that the provision of unlawful assault causing death has not achieved what was intended by Parliament. As is demonstrated in the social analysis of the WA cases included in this paper, the majority of cases involving the offence of unlawful assault causing death occur in very different environments to the believed or expected environment of the entertainment sector with young men fuelled by alcohol.<sup>38</sup> Another concern is the pattern of sentencing in the 'one punch' cases. The case law demonstrates that the sentences imposed are significantly less than what the provision can provide. This is surprising considering section 281 is void of several legal considerations, thus increasing the severity of the offence and the likelihood of convictions.

### III HISTORY OF THE 'ONE PUNCH' LAWS ACROSS AUSTRALIA

The first appearance in Australia of a law designed to specifically capture the one punch assaults originated in Queensland.<sup>39</sup> In 2007, two men died after being punched to the head.<sup>40</sup> The offenders were charged with manslaughter under the Queensland *Criminal Code Act*

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Rajaratnam, Jennifer Redman and Michael Lenne, 'Intoxication and Criminal Behaviour' (2000) 7(1) *Psychiatry, Psychology and Law*, 59, 65.

<sup>35</sup> John Anderson, 'The Conversation: Mandatory Sentences Can't Deliver Justice or Stop One-Punch Killings', *The Conversation* (online), 21 August 2014 <<http://www.theconversation.com/mandatory-sentences-can't-deliver-justice-or-stop-one-punch-killings-30647>>.

<sup>36</sup> Jan Rotmans, Rene Kemp and Marjolein Van Asselt, 'More Evolution than Revolution: Transition Management in Public Policy' (2001) 3(1) *Foresight* 15, 18-19.

<sup>37</sup> Aleisha Orr, 'Could there be a one-punch law rethink?', *WA Today* (online), 31 January 2014 <<http://www.watoday.com.au/wa-news/could-there-be-a-one-punch-law-rethink-in-wa-20140131-31rta.html>>; Erickson, above n 7, 58; 'One Punch Laws - Mandatory Sentences for Drunken Violence a 'Recipe for Injustice' say NSW legal experts', *ABC News* (online), 23 January 2014 <<http://www.abc.net.au/news/2014-01-22/one-punch-mandatory-sentences-27a-recipe-for-injustice27/5212462>>.

<sup>38</sup> Quilter, above n 5, 23 - 25.

<sup>39</sup> *Ibid* 18.

<sup>40</sup> *Ibid*. David Stevens died after being punched by Jonathan Little, and little more than a month later, Nigel Lee died after being punched during a fight with William Moody.

1889 (Qld),<sup>41</sup> but were acquitted in each case on the grounds that the outcome was not foreseeable.<sup>42</sup> It was here that discussions regarding a 'gap' in the existing legislation began.<sup>43</sup> The public response was largely fuelled by anger that there was no justice for the deaths of two young men, and that the system should be reviewed to remedy any flaws.<sup>44</sup> The political response was the production of a Bill that, if it had passed, would have amended the *Queensland Code* to add a new offence of unlawful assault causing death.<sup>45</sup> The then Queensland Government commissioned the Queensland Law Reform Commission (QLRC) to investigate and produce its findings on the applicability of an unlawful assault causing death provision.<sup>46</sup> The result was that the QLRC advised against such a law as they found that the proposed provision would not 'fit well within the existing structure and policy of the Code'.<sup>47</sup> The references to this concern were targeted at the existing manslaughter provision, which required foreseeability of death in order to operate. The proposed provision of unlawful assault causing death would have removed the foreseeability requirement.<sup>48</sup>

The failure of the original one punch provision in Queensland did not deter other Australian jurisdictions from a legislative response to quell community concerns with WA being the first Australian jurisdiction to enact a one punch law. As was the case in Queensland, the introduction of the Bill appeared to be in response to the concern in the community regarding several 'one punch' deaths. In each case the offender was charged under s 280 of the *WA Code* and was acquitted.<sup>49</sup> Like in Queensland, the acquittals resulted in public and political debate to resolve this 'gap' in the existing WA criminal law legislation.<sup>50</sup> In 2008, following a review of WA's homicide laws, a new homicide offence was inserted into the *WA Code*, with the same name as the proposed Queensland provision had had: unlawful assault causing death.<sup>51</sup> The new provision was enacted even though the

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<sup>41</sup> Hereafter *Queensland Code*.

<sup>42</sup> *Queensland Code* s 23(10)(b)(ii) provides that 'an ordinary person would not reasonably foresee as a possible consequence'.

<sup>43</sup> Quilter, above n 5, 21.

<sup>44</sup> Cullen, above n 23, 58.

<sup>45</sup> *Criminal Code (Assault Causing Death) Amendment Bill 2007* (Qld).

<sup>46</sup> Quilter, above n 5, 16, 19.

<sup>47</sup> Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008) 200-205 [10.91]-[10.92].

<sup>48</sup> Cullen, above n 23, 58; Quilter, above n 5, 21.

<sup>49</sup> Cullen, above n 23, 56-57.

<sup>50</sup> *Ibid* 57.

<sup>51</sup> Quilter, above n 5, 19-20.

Western Australian Law Reform Commission did not support the establishment of this new offence.<sup>52</sup>

Other Australian jurisdictions shared concerns similar to those expressed by WA, regarding the 'one punch' deaths. In 2013, Thomas Kelly died from a 'one punch' attack. The offender, Kieran Loveridge, received a 4-year sentence of imprisonment for the manslaughter of Thomas Kelly.<sup>53</sup> In response, a NSW one-punch law modelled on the WA provision was suggested.<sup>54</sup> The media statement made by the NSW Attorney General captures the concerns and intent behind such a provision as that suggested by the WA Parliament:

The new offence and proposed penalty will send the strongest message to violent and drunken thugs that assaulting people is not a rite of passage on a boozy night out...the community expects you to pay a heavy price for your actions.<sup>55</sup>

#### IV THE GAP IN A MANSLAUGHTER CHARGE

As previously mentioned, prior to the drafting of s 281, offenders of 'one punch' or 'king hit' attacks were charged under s 280 of the *WA Code* – the manslaughter provision. The 'gap' that is referred to is the possibility of acquittal from a charge of manslaughter on the grounds of the defence of accident.<sup>56</sup> Section 280 of the *WA Code* provides 'If a person unlawfully kills another person under such circumstances such as to not constitute murder, the person is guilty of manslaughter and is liable to imprisonment for life.' 'Kill' is defined in s 270 of the *WA Code*, and is relatively uncontentious. For the purposes of the homicide provisions, a person is said to have killed another person if they cause another person's death by direct or indirect means.<sup>57</sup> In WA, a killing is unlawful unless 'authorised, justified or excused by law.'<sup>58</sup> If a killing is authorised, justified or excused by law, then criminal responsibility is detached from the offender.

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<sup>52</sup> Western Australian Law Reform Commission, *Review of the Law of Homicide*, Final Report, Project No 97 (2007) 90-91.

<sup>53</sup> *R v Loveridge* [2013] NSWSC 1638 [79] (Campbell J).

<sup>54</sup> Quilter, above n 5, 17.

<sup>55</sup> Greg Smith SC MP, *Unlawful Assault Laws Proposed*, Media Release (12 November 2013) quoted in Quilter, above n 5, 18.

<sup>56</sup> Cullen, above n 23, 56.

<sup>57</sup> *WA Code* s 270.

<sup>58</sup> *Ibid* s 268.



The manslaughter provision in the *WA Code* provides that manslaughter is an unlawful killing, but in circumstances that do not constitute murder.<sup>59</sup> There are three types of murder in s 279 of the *WA Code* with intention being a necessary element for the first two listed types of murder.<sup>60</sup> The first type requires intent to kill,<sup>61</sup> and the second type requires the intent to harm or endanger a person.<sup>62</sup> If intention is not proved, and if the death is not the result of the prosecution of an unlawful purpose,<sup>63</sup> which is the third type of murder in WA, then it is likely that the unlawful killing falls under the manslaughter provision.<sup>64</sup>

A requirement that needs to be met to sustain a conviction of a charge of a type of unlawful killing, whether it is murder or manslaughter, is that the death that occurred must have been a reasonably foreseeable outcome that resulted from the actions of the offender.<sup>65</sup> The bar was set at a very high level,<sup>66</sup> with even a slight doubt capable of breaking down a charge of manslaughter. The insertion of s 281 into the *WA Code* was qualified in order to remove the possibility of acquittal by recourse to the defence of accident.<sup>67</sup>

## V THE LEGAL FRAMEWORK

Section 281 of the *WA Code* provides:

- (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
- (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

In comparison to the other homicide offences in the *WA Code*, unlawful assault causing death is seen as the least serious homicide offence.<sup>68</sup> In

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<sup>59</sup> *Ibid* s 280.

<sup>60</sup> Eric Colvin and John McKechnie, 'Criminal Law in Queensland and Western Australia Cases and Commentary' (LexisNexis Butterworths Australia 6<sup>th</sup> edition 2012) 71 [4.20] - [4.21].

<sup>61</sup> *WA Code* s 279(1)(a).

<sup>62</sup> *Ibid* s 279(1)(b).

<sup>63</sup> *Ibid* s 279(1)(c).

<sup>64</sup> Thomas Crofts and Kelly Burton, 'The Criminal Codes Commentary and Materials' (Thomson Reuters Australia 6<sup>th</sup> ed 2009) 92 [3.500].

<sup>65</sup> Quilter, above n 5, 21.

<sup>66</sup> *Ibid*.

<sup>67</sup> *Ibid* 19-20.

<sup>68</sup> *Western Australia v JWRL* [2009] WASC 392 [5] (Heenan J).

the hierarchy of homicide offences in WA, murder is the most serious homicide offence, with manslaughter sitting just beneath murder. Unlawful assault causing death sits at the bottom.<sup>69</sup> Where unlawful assault causing death is placed on the hierarchy is determined by its maximum penalty. Both murder and manslaughter hold a maximum penalty of life imprisonment<sup>70</sup> whereas the maximum sentence for unlawful assault causing death is 10 years imprisonment.<sup>71</sup> Although all homicide offences result in death, the lower maximum penalty awarded for unlawful assault causing death implies that Parliament recognised that the offence was not as serious as the other homicide offences in the *WA Code*. Consequentially, there is no justification for a penalty that is comparable to the penalty for murder or manslaughter.<sup>72</sup> Section 281 is a truly unique homicide provision – in addition to a substantially lesser maximum penalty than the other homicide offences, the provision requires a type of conduct (an unlawful assault),<sup>73</sup> and has excluded the fault elements of intention and foreseeability.<sup>74</sup> These unique qualities not only broaden the scope of the provision but seek to ‘close the gap’ discussed above.

### *A Unlawful Assault*

For the purposes of s 281 of the *WA Code*, the death does not need to arise from the direct result of the assault. As seen in subsection (1), liability extends to a death that occurs from an indirect result of the assault.<sup>75</sup> Assault is defined in s 222 of the *WA Code*, as direct or indirect striking, touching, moving or application of force to a person without their consent. The definition of assault extends to cover attempts and threats of force, through the use of bodily acts or gestures where there is an existing ability for the perpetrator to affect the purpose of the attempt or threat of force.<sup>76</sup> As seen from this definition, an assault for the purposes of the *WA Code* is a broad concept, encompassing a number of actions. The use of the element of assault in s 281 means that any action that may constitute an assault will be captured, extending the operation of s 281 far beyond the restraints of applying to a ‘one punch’ attack.

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<sup>69</sup> Quilter, above n 5, 23.

<sup>70</sup> *WA Code* ss 279(4), 280.

<sup>71</sup> *Ibid* s 281(1).

<sup>72</sup> *Western Australia v JWRL* [2009] WASC 392 [5] (Heenan J).

<sup>73</sup> *WA Code* s 281(1).

<sup>74</sup> *Ibid* s 281(2).

<sup>75</sup> *Ibid* s 281(1).

<sup>76</sup> The final paragraph in s 222 of the *WA Code* provides that the application of force includes the application of ‘heat, light, electrical force, gas odour or any other substance or thing whatever if applied in such a degree as to cause injury or personal discomfort’.

### B Foreseeability, Intention and Accident

The determination of criminal responsibility is through the application of fault elements, such as foreseeability and intention. Reasonable foreseeability is a common law test, dealing with causal responsibility.<sup>77</sup> While an accused may be held criminally responsible for their conduct, a determination of foreseeability will provide direction to the level of consequence for the actions of the accused.<sup>78</sup> It is a prospective test, asking if the event that occurred was 'a possible consequence' of the actions of the accused.<sup>79</sup> If this is answered in the affirmative, then the event will have been foreseeable.<sup>80</sup> In the case of homicide the test can be defined as determining if it is reasonably foreseeable that the death that resulted was a natural consequence of the accused's conduct.<sup>81</sup>

Intention, which is the second fault element excluded from s 281, can be characterised in several ways. It has been identified that when a person intends something, they will act to bring that intention into reality.<sup>82</sup> Intention can also be the doing of an act that will almost certainly have a specific result;<sup>83</sup> thus, 'intention is the act or determining mentally on some result.'<sup>84</sup> Intention and foreseeability are inextricably linked - when an event is reasonably foreseeable, intention may be a reasonable inference.<sup>85</sup> Intention can result from the knowledge of probable consequences, which is relevant when considering the commission of specific acts. If an individual does an act, with the knowledge that such an act may result in specific consequences, then the individual may be regarded as having formed the intention for those consequences to occur.<sup>86</sup>

When it comes to s 281, intention is irrelevant in determining criminal responsibility. However, there is some ambiguity in the express irrelevance of intention from the provision of unlawful assault causing death. As stated above, if a person has the knowledge that from the

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<sup>77</sup> Eric Colvin, 'Causation in Criminal Law' (1989) 1(2) *Bond Law Review* 253, 259.

<sup>78</sup> *Royall v The Queen* (1991) 172 CLR 378 [3] (Brennan J).

<sup>79</sup> *Schmidt v Western Australia* [2013] WASCA 201 [78] (30 August 2013) (Martin CJ).

<sup>80</sup> *Ibid.*

<sup>81</sup> *Royall v The Queen* (1991) 172 CLR 378 [3] (Brennan J), quoting *Roberts* (1971) 56 Cr App R 95, 102 (Stephenson LJ).

<sup>82</sup> *Peters v The Queen* (1998) 192 CLR 493; *R v Wilmut (No 2)* [1985] 2 Qd R 413 (Connolly J). This is also known as direct or purpose intention.

<sup>83</sup> *Peters v The Queen* (1998) 192 CLR 493 (McHugh J). This is also known as oblique or knowledge intention.

<sup>84</sup> *R v Ping* [2005] QCA 472 [29] (Chesterman J).

<sup>85</sup> *Schmidt v Western Australia* [2013] WASCA 201 [79] (30 August 2013) (Martin CJ).

<sup>86</sup> *R v Crabbe* (1985) 156 CLR 464 [8].

commission of an act, certain consequences may result, then they are deemed to have formed an intent to achieve those consequences.<sup>87</sup> With the case of unlawful assault causing death, if a person punches another person, knowing that it is probable that the person may die as a result of the punch, then they are already deemed to have the intent to kill that person. This raises a contentious question of whether or not the implication of intention in those circumstances would amount to murder in the *WA Code*. Such considerations are outside the scope of this article, although the question revolves around the determination of whether or not the offender believed the event of death to be 'possible' or 'probable', with only the latter able to imply intent.<sup>88</sup>

The importance of the exclusion of foreseeability and intention from s 281 is determined by reference to the effect of the exclusion, which ensures that the defence of accident cannot be a consideration for a charge of unlawful assault causing death. As foreseeability is the 'touchstone of accident',<sup>89</sup> it is crucial in determining whether the defence of accident can excuse the criminal responsibility of the accused, because if it is established that the death was reasonably foreseeable, the defence of accident will be excluded.<sup>90</sup> Likewise, if intent is formed, then the argument that the event was an accident collapses – there cannot be 'accidents' fuelled by intention.<sup>91</sup> The absence of these two fault elements eliminates a means of assessing the relationship between the offender's conduct and the resulting death.<sup>92</sup> Under s 281, criminal responsibility will attach to an offender, regardless of whether or not the death is foreseeable and regardless of what the offender intended.<sup>93</sup>

## VI ONE PUNCH IN AUSTRALIA

The various 'one punch' provisions in Australia and their particular features are outlined in Table 1. Presently only the Australian Capital Territory (ACT), South Australia (SA), and Tasmania have not enacted a 'one punch' provision into their criminal law legislation.<sup>94</sup>

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<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

<sup>89</sup> Toby Nisbet, 'The Scope of the Provocation defence and Consent in Code Jurisdictions' (2012) 36 *Criminal Law Journal* 356, 358.

<sup>90</sup> *Kaporonovski v The Queen* (1973) 133 CLR 209, 231 (Gibbs J).

<sup>91</sup> Ibid.

<sup>92</sup> Western Australian Law Reform Commission, above n 52, 90.

<sup>93</sup> *WA Code* s 281(2).

<sup>94</sup> At the time of writing, the authors could not locate any news or information that indicated that these jurisdictions might be considering the enactment of a 'one punch' provision into their existing criminal law legislation.



Some discussion is warranted on the Victorian provision. The addition of s 4A to the *Victorian Crimes Act* seeks to amend the manslaughter provision provided in s 5. As a result, the Victorian legislation does not have a separate provision but has extended their manslaughter offence. The one punch provision provides that the act of a 'single punch or strike' is deemed a 'dangerous act for the purposes of the law relating to manslaughter'.<sup>95</sup> This can be contrasted to the other jurisdictions, whose one punch provisions stand as offences in their own right.

### *A The Language of One Punch*

An issue regarding the Australian 'one punch' provisions is that, although marketed as 'one punch' laws by the media,<sup>96</sup> with the consequence being that the general public refers to these laws by this colloquial term, no Australian jurisdiction has expressly named their provision 'one punch' (see Table 1). Despite this, some jurisdictions have attempted to capture the notion of 'one punch' in their provisions. Queensland uses the language of 'unlawful striking,' with Victoria using the words 'single punch or strike'.

The WA provision is far removed from distilling the notion of 'one punch' when looking at the title of the provision. The use of the words 'unlawful assault causing death' is broad, both in name and effect. The NSW provision is also far removed from the colloquial language of one punch with reference to assault, as is the Northern Territory's provision, which refers to a 'violent act' in the *Criminal Code Act 1983* (NT).<sup>97</sup>

However, unlike WA and NSW, the NT provision attempts to incorporate the notion of 'one punch' within the meaning of 'violent act', which includes a 'punch'.<sup>98</sup> This is in contrast to the WA provision,

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<sup>95</sup> *Victorian Crimes Act* s 4A(2).

<sup>96</sup> Christopher Knaus, 'New Study Reveals Alcohol, Not Drugs, Major Factor in One-Punch Assaults', *The Canberra Times* (online), 11 March 2014 <<http://www.canberratimes.com.au/act-news/new-study-reveals-alcohol-not-drugs-major-factor-in-onepunch-assaults-20140310-34i1o.html>>; Nicholas Cowdery, 'The Folly of Our Penalties: Opinion', *ABC News* (online), 8 January 2015 <<http://www.abc.net.au/news/2015-01-08/cowdery-the-folly-of-our-one-punch-penalties/6006044>>; Joanna Menagh, 'Man on Trial Accused of Killing Irishman With One Punch in Kebab Shop', *ABC News* (online), 11 May 2015 <<http://www.abc.net.au/news/2015-05-21/man-convicted-of-one-punch-death/6487038>>.

<sup>97</sup> Hereafter *NT Code*.

<sup>98</sup> *NT Code* s 161A(5).

as the definition of an assault in the *WA Code* does not refer to the conduct of a 'punch'.<sup>99</sup>

### *B Disregarding Fault Elements*

Each jurisdiction that has enacted a 'one punch' law has attached different considerations or disregarded particular elements to the provision. As stated, the WA provision has expressly removed the fault elements of intention and foreseeability.

As seen from Table 1, the WA provision is not unique in this regard, as the NT and Queensland have also eliminated the elements of foreseeability and intention from their one punch laws. The NT one punch provision, s 161A Violent Act Causing Death, excludes the fault elements of intention and foreseeability by expressly providing that an offender will be 'strictly liable' for the deceased's death.<sup>100</sup> The strict liability provision in the *NT Code* operates to exclude the 'fault elements' (which include foreseeability and intention) from the physical elements of an offence.<sup>101</sup>

Queensland also disregards the fault elements of foreseeability and intention by use of another provision. The Queensland one punch provision, provided in s 314A, excludes the operation of s 23(1)(b), which relates to foreseeability and intention.<sup>102</sup>

The NSW assault causing death provision differs from the other one punch provisions in Australia as the *Crimes Act 1900* (NSW)<sup>103</sup> expressly states that there must be an assault that occurs from an intentional hit.<sup>104</sup> However, in accordance with WA, NT, and Queensland, the element of foreseeability is expressly discarded as a consideration from the NSW assault causing death provision.<sup>105</sup>

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<sup>99</sup> *WA Code* s 222.

<sup>100</sup> *NT Code* s 161A(1), (2).

<sup>101</sup> *Ibid* s 43AN. The fault elements are provided in s 43AH(1). Intention is expressly included as a fault element for the purpose of the *NT Code*. However, there is no reference to foreseeability; rather, the reference is to 'knowledge'. The fault element of knowledge is then provided for in s 43AJ, with the same test of foreseeability in WA.

<sup>102</sup> The defence of a use of force to prevent the repetition of an insult in s 270 of the *Queensland Code* is also removed as a consideration from s 314A(2).

<sup>103</sup> Hereafter *NSW Crimes Act*.

<sup>104</sup> *NSW Crimes Act* s 25(1)(a).

<sup>105</sup> *Ibid* s 25(4).

### *C The Required Conduct*

The significance of the inclusion or exclusion of the fault elements of foreseeability and intention are one of several considerations that can be made when determining the scope of the one punch provisions. The act that is required to invoke the relevant provision (according to the jurisdiction) can significantly increase the likelihood of liability. Each provision is different in the amount of required conduct. The NT provision is narrower in its scope, as it requires a 'violent act', which involves the 'direct application of force'.<sup>106</sup> The WA provision is broader in its operation, requiring an unlawful assault,<sup>107</sup> which includes both indirect and direct application.<sup>108</sup> Likewise, the NSW assault causing death provision is broad in scope, also requiring an assault to invoke the provision.<sup>109</sup> The required conduct for the Queensland one punch provision is quite restricted in comparison to the NT and WA provisions. The required conduct for s 314A of the *Queensland Code* is limited to 'striking' of the 'head or neck' of another person.<sup>110</sup> Similarly, the Victorian provision also has a limited scope, referring only to punching or striking a person's head or neck.<sup>111</sup>

When compared to the other 'one punch' provisions in Australia, the WA provision appears to have the broadest operation. Not only are the elements of intention and foreseeability eliminated as considerations from s 281 of the *WA Code*, but the requirement in s 281 of 'unlawful assault' consequentially has the effect of widening the scope of the required conduct to invoke the provision. Although the NSW provision also maintains a broad range of conduct through the term 'assault', it requires the element of intention, which somewhat limits its application. The WA legislation is unique in its scope, and, as determined through a review of Judges Sentencing Remarks ('JSRs') from the WA Supreme Court and the WA District Court, s 281 is capturing a variety of conduct that results in death, including circumstances of domestic violence.

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<sup>106</sup> *NT Code* s 161A(5). This subsection further specifies that a hit, blow, kick, punch or strike is conduct of a violent nature.

<sup>107</sup> *WA Code* s 281(1).

<sup>108</sup> *Ibid* s 222.

<sup>109</sup> *NSW Crimes Act* s 25A(1).

<sup>110</sup> *Queensland Code* s 314A(1).

<sup>111</sup> *Victorian Crimes Act* s 4A.



## VII SENTENCING ISSUES

A review of the WA unlawful assault causing death cases discussed below revealed that there has not yet been a case where the maximum penalty of 10 years has been imposed. The application of sentencing in WA is governed by the *Sentencing Act 1995* (WA).<sup>112</sup> The principle of sentencing is provided in s 6, and states that the sentence administered must be equivalent to the severity of the offence,<sup>113</sup> which is determined on a case-by-case basis.

The *WA Sentencing Act* provides that when determining an appropriate sentence the circumstances of the commission of the offence, including any vulnerability of the victim, aggravating factors and mitigating factors are all considerations.<sup>114</sup> An aggravating factor is a factor that the court believes to increase the liability of the offender,<sup>115</sup> whereas a mitigating factor is any factor the court believes to decrease the offender's liability.<sup>116</sup> With the unlawful assault causing death case studies, remorse appeared to be a consistent mitigating factor. Although intention is excluded from s 281, intention has been implied into considerations of remorse. In the case of *Western Australia v Loo*,<sup>117</sup> the judge, in his sentencing remarks, stated to the convicted, 'You did not intend or expect your punch to cause him his death or to cause him serious injury.'<sup>118</sup> Likewise, the lack of intention was the subject of comment in *Western Australia v Jones*<sup>119</sup> and *Western Australia v Lillias*.<sup>120</sup> In the case of *Western Australia v Indich*,<sup>121</sup> the sentencing judge actually noted that there was no intent to kill.<sup>122</sup> Later, during these considerations, the sentencing judge commented on the remorse and regret that the accused had shown for the death of the victim.<sup>123</sup> The sentence imposed on Indich was two years and 10 months.<sup>124</sup>

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<sup>112</sup> Hereafter *WA Sentencing Act*.

<sup>113</sup> *WA Sentencing Act* s 6(1)

<sup>114</sup> *Ibid* s 6(2)(a) – (d).

<sup>115</sup> *Ibid* s 7(1).

<sup>116</sup> *Ibid* s 8(1).

<sup>117</sup> Unreported, District Court of Western Australia, Martino DCJ, 27 November 2012 ('*Loo*').

<sup>118</sup> *Ibid* 3.

<sup>119</sup> [2011] WASC SR 136 ('*Jones*').

<sup>120</sup> [2012] WASC SR 100 ('*Lillias*').

<sup>121</sup> [2010] WASC 211 (13 January 2010) ('*Indich*').

<sup>122</sup> *Ibid* [9].

<sup>123</sup> *Ibid* [16].

<sup>124</sup> *Ibid* [19] – [22].

Sentencing a person for the commission of an offence is a means of holding them accountable for their actions.<sup>125</sup> The removal of intention as a consideration to the provision of s 281 was to ensure that people are held accountable for their violence, no matter what was intended. However, when it comes to sentencing for s 281, a lack of intention in the offender appears to be viewed as evidence of remorse, which is a commonly applied mitigating factor in sentencing. Therefore, the offender's culpability is lessened, and a lower sentence justified.

In the cases examined for this article, the highest sentence received was five years imprisonment without parole (only half of the maximum statutory penalty), and the lowest term of imprisonment received was 16 months. This is without taking into account the two year suspended sentence in 2010,<sup>126</sup> and the 18 months suspended sentence in 2012.<sup>127</sup> The highest sentence was given to an offender in a severe case of intimate partner violence, which prompted considerable social comment, especially from those who work with victims of such violence.<sup>128</sup> Additionally, a proposal was prepared for consideration in the WA parliament that unlawful assault causing death in circumstances of intimate partner violence should be more highly penalised than other cases. However, this proposal did not proceed to law.<sup>129</sup>

## VIII METHODOLOGY OF THE SOCIAL ANALYSIS OF WA CASES

### *A Cases*

Twelve cases were identified from a document of the Office of the Director of Public Prosecutions<sup>130</sup>. These 12 cases were tried between the commencement of the legislation in 2008 and 31 December 2013. Interestingly, there were no convictions for this offence during 2013, the reason for which is unclear. The twelve cases represent those that have been found guilty of unlawful assault causing death per s 281 of

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<sup>125</sup> This is captured by the principle of sentencing in s 6(1) of the *WA Sentencing Act*, which provides that 'a sentence imposed on an offender must be commensurate with the seriousness of the offence.'

<sup>126</sup> *Western Australia v JWRL (a child)* [2010] WASCA 179.

<sup>127</sup> [2012] WASCSR 100.

<sup>128</sup> Rachel Ball, Human Rights Implications of 'Unlawful Assault Causing Death Laws (Briefing Paper, Human Rights Law Centre, 2012) <[www.hrlc.org.au/files/Assault-causing-death-HRLC-briefing-paper.pdf](http://www.hrlc.org.au/files/Assault-causing-death-HRLC-briefing-paper.pdf)>.

<sup>129</sup> Cullen, above n 23, 67 - 68.

<sup>130</sup> Office of the Director of Public Prosecutions for Western Australia, *Schedule of s 281 Prosecutions*. The Schedule (current at 1 January 2014) is accessible at: <[http://www.dpp.wa.gov.au/\\_files/assault\\_occasioning\\_death.pdf](http://www.dpp.wa.gov.au/_files/assault_occasioning_death.pdf)>.

the *WA Code*. The researchers wrote to both the WA District Court and the WA Supreme Court to obtain the Judges' Sentencing Remarks (JSRs), which were provided. The individual cases reveal the discrepancies between the intent of the legislation and reality. One limitation of this research is that the information obtained has been extracted from JSRs and there may be additional circumstances of both the offender and the victim that were not mentioned. The researchers were diligent in ensuring that extrapolation from the facts did not occur.

### *B Procedure*

The JSRs were read to extract information that facilitated descriptions of those sentenced under s 281 of the *WA Code*. Descriptions of the perpetrators, victims, and circumstances of the offence were analysed to note similarities and dissimilarities across the cases. One of the aims of undertaking this analysis was to consider the reality of the cases against the intentions of the West Australian Parliament for the introduction of the legislation. The intention of the legislation was to address the issue of deaths resulting from alcohol affected young men assaulting each other in entertainment areas.

### *C Results and findings*

#### *1 Demographics of offenders*

All offenders sentenced under this legislation to date are male. The age of offenders ranged from 18 years to 78 years of age. Mean age is calculated at 37 years. Given the wide range of age (60 years) the median age was also calculated as 34.5 years. Nine of the 12 offenders had a history of violent offending and seven cases indicated mental health issues, in particular, substance abuse.

Guilty pleas were made by 11 of the 12 offenders and this may be the result of the legislation making intention and foreseeability of the outcome irrelevant. If offenders insisted that they were not guilty, the charge of manslaughter with higher penalties may have been applied.

#### *2 Demographics of victims*

Five of the victims were female. The age of victims ranged from 2 years to 83 years of age. In five cases the age of the victim was not mentioned in the JSRs. The average age of victims excluding the 2 year old and the 83 year old was 29.6 years (six victims). Four of the victims were

substance affected at the time of their death. The demographics of the WA victims are quite different to those of the Australia wide study on one punch deaths.<sup>131</sup>

### *3 Relationships between victim and offenders*

Four of the twelve victims were de facto or estranged intimate partners (females), four were family members, and three were known to the offender (acquaintances). It is unclear in the final case whether the offender and victim were known to each other. In *Anderson*,<sup>132</sup> the victim was a two-year old boy, who was not punched, but treated roughly by his uncle. Again these dynamics are quite different to the Australia wide study where over one third of the victims did not know the offender.<sup>133</sup>

### *4 Location of Offence*

Interestingly although the legislation appeared, according to government and media statements, to be introduced in an effort to reduce male-to-male violence in inner city locations, none of the offences occurred in such circumstances. In seven of the 12 cases the offence occurred in a suburb of Perth. Five offences occurred in country locations. Eight offences occurred in a residence, two in parks, one in the street outside the victim's home, and one at an Aboriginal camp. The location of the WA cases is again different to those cited in the Australian study in which approximately one third of the cases occurred near licensed premises including nightclubs.<sup>134</sup>

### *5 Sentences*

Sentences ranged from 16 months to 60 months with an average term of 32.72 months (excluding the suspended sentences). Nine of the 12 offenders were eligible for parole. Two offenders received suspended sentences (18 months and 24 months respectively).

#### *(a) Reason for sentence (imprisonment)*

In three cases (*Loo*, *Anderson* and *Western Australia v Blurton*<sup>135</sup>) the judge referred to general deterrence, and indicated that the sentence should send a message to the community about violence and its

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<sup>131</sup> Pilgrim, Gerostamoulos and Drummer, above n 32, 120.

<sup>132</sup> Unreported, District Court of Western Australia, Wager DCJ, 10 September 2010.

<sup>133</sup> Pilgrim, Gerostamoulos and Drummer, above n 32, 120.

<sup>134</sup> *Ibid.*

<sup>135</sup> Unreported, District Court of Western Australia, Curthoys DCJ, 23 February 2012 (*'Blurton'*).

potential results.<sup>136</sup> In *Western Australia v Sinclair*<sup>137</sup> specific deterrence was referred to<sup>138</sup> and in *Jones* both specific and general deterrence was mentioned.<sup>139</sup> There was also an implicit rather than explicit mention of deterrence in *Lillias*.<sup>140</sup> In *Western Australia v Robinson*,<sup>141</sup> the Judge mentioned all aspects of sentencing (deterrence, rehabilitation, punishment, and community protection).<sup>142</sup> In *Indich*, the Judge referred to the offender's potential for rehabilitation.<sup>143</sup> Therefore the most commonly mentioned reason for the sentence was general deterrence.

## 6 Mitigating circumstances for sentencing

### a) Aboriginality

Six of the offenders are identified as Aboriginal from the information recorded in the JSRs. There is another offender whose surname suggests that he may be Aboriginal. This means that between 50% and 58% of offenders charged with this offence are or may be Aboriginal. Aboriginality may be considered a mitigating circumstance given the inequalities that Aboriginal peoples suffer across a range of education, health and social aspects of life.<sup>144</sup>

### (b) Traditional punishment

It was indicated in one case that the offender was potentially subject to traditional punishment.<sup>145</sup> In *Lillias*, the Judge also raised the issue of leniency as a result of the potential threat of tribal punishment.<sup>146</sup> Traditional punishment was also taken into consideration in *Robinson*, whose sentence was reduced by the amount of time already spent in custody, making the offender immediately eligible to apply for parole.<sup>147</sup>

### (c) Remorse

The legislation took away intention and foreseeability however a number of the JSRs made statements about intention and foreseeability

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<sup>136</sup> *Loo*, 4 – 5; *Anderson*, 12; *Blurton*, 4.

<sup>137</sup> Unreported, District Court of Western Australia, Bowden DCJ, 25 May 2012 ('*Sinclair*').

<sup>138</sup> *Sinclair*, 6 – 7.

<sup>139</sup> *Jones* [24].

<sup>140</sup> *Lillias* [17].

<sup>141</sup> [2011] WASC 59 ('*Robinson*').

<sup>142</sup> *Robinson* [47].

<sup>143</sup> *Indich* [17] – [18].

<sup>144</sup> *Munda v Western Australia* (2013) 249 CLR 600; [2013] HCA 38.

<sup>145</sup> *Sinclair*, 5.

<sup>146</sup> *Lillias* [4] – [6], [10], [19].

<sup>147</sup> *Robinson* [21] – [25].

which then led on to the offenders' displays or statements of remorse. From the context of these statements within the JSRs, it would appear that remorse was taken as a strong mitigating factor, resulting in reduced terms of imprisonment (or in two cases a suspended sentence).

Mitigating and aggravating factors in sentencing give effect to the fact that no two offenders, or offences, are the same. Remorse may well be a relevant mitigating factor, being displayed easily through the offending parties' later actions, such as cooperating with the police and making a guilty plea. This was highlighted in *Jones*, where the sentencing judge noted that the offender's actions after he killed the deceased showed a lack of remorse.<sup>148</sup> Remorse as a mitigating factor highlights that despite a person's actions, the outcome of death may well have been an accident, and accident is not a defence under s 281 of the *WA Code*. The intent behind s 281 was to punish the conduct as well as the outcome, and to hold the offenders accountable for their conduct. The result of sentencing with s 281 is that punishment for the offenders' actions is so mitigated as to drastically reduce the sentence, despite the conduct of using intentional force to the victim, force that led to the victim's death.

#### *(d) Mental Health Issues*

In five cases there was no mention of specific mental health issues, suggesting no mitigation in relation to the offence. In other cases specific issues were mentioned although these were not always considered mitigating circumstances. More specifically, the JSR in relation to the oldest offender indicated that he was suffering from a delusional disorder, which most likely affected his perceptions and behaviour, resulting in his attack on his elderly neighbour. The 78 year old still received a prison sentence of 2 years and 8 months. Another offender had been prescribed anti-psychotic medication but had not been taking it for two months preceding the attack. In this case the offender was under the influence of methylamphetamine at the time of the attack. Three of the offenders were reported to have serious and ongoing issues with alcohol. Being affected by self-inflicted substances is not considered as a mitigating circumstance in sentencing.

### *7 Aggravating circumstances for sentencing*

#### *(a) Previous criminal history and violent offences*

Nine of the 12 cases also reported prior offences. Two of those who did not have prior offences included both the youngest and oldest offenders. Eight of the offenders had a history of violent offences; the

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<sup>148</sup> *Jones* [2], [7] - [10].

remaining case indicated prior offences but did not specify their nature. Where the deaths for which the offenders were sentenced involved domestic violence, a history of such violence was evident from previous charges mentioned.

### *D Discussion of the Social Analysis of the WA Cases*

The Parliamentary debate records and media statements of the WA government imply that s 281 was introduced to reduce male to male drunken violence in entertainment areas with a view to providing increased community safety. Of the individuals who have been sentenced under this legislation, only one fits the intended population of young men violently assaulting each other (*JWRL*), but even then, the circumstances of this assault in a local park do not fit with the expected locations of unlawful assaults causing death. There are discrepancies between the reasons provided by the WA government for the enactment of the offence and the demographics and circumstances of those who have been tried and found guilty under s 281.

In the analysis of the JSRs for the 12 offenders who had been found guilty of unlawful assault causing death in WA, the reality is quite different to the expectations. It would appear that s 281 has had unintended consequences that are revealed in the descriptions of the offenders found guilty under s 281 and the circumstances in which the offences occurred. The majority of the offenders found guilty under s 281 of the *WA Code* are male, aged in mid-30's, with a history of substance misuse, a history of violence and, in particular, intimate partner violence. This description is markedly different from that which appeared to be intended – male, aged 18 – 30, no ethnicity mentioned, drunk or under the influence of drugs. Aboriginal peoples' over representation in the prison system is well established with approximately 40% of the WA adult male prisoner population being Aboriginal.<sup>149</sup> Of the offenders found guilty of unlawful assault causing death 50% of those sentenced were identified as Aboriginal.

Additionally, the demographics of the victims are quite different to those cited in media and government statements on the introduction of the legislation and to those victims examined in Australia wide research.<sup>150</sup> Victims were both male and female and ranged in age from

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<sup>149</sup> Department of Corrective Services, *Monthly Graphical Report, Adult Prisoner Population*, (June 2014) <[http://www.correctiveservices.wa.gov.au/\\_files/about-us/statistics-publications/statistics/mg-report-1406.pdf](http://www.correctiveservices.wa.gov.au/_files/about-us/statistics-publications/statistics/mg-report-1406.pdf)>.

<sup>150</sup> Pilgrim, Gerostamoulos and Drummer, above n 32, 120.

two years to 83 years of age. In most instances the offender knew the victim, and eight of the 12 cases were clearly intimate partner violence or family violence. It is interesting that within the WA cases that covered six years there were five female victims whereas Pilgrim, Gerostamoulos and Drummer<sup>151</sup> reported only four cases in their Australia wide research that reviewed one punch deaths between 2000 and 2012. Female victims are over-represented in the WA data.

The maximum sentence that may be applied for this offence is 10 years. Even with a 25% reduction for a guilty plea, the maximum sentence would be seven and a half years<sup>152</sup> (90 months). The average sentence applied has been 32.72 months ranging from 16 months to five years. Two offenders received suspended sentences and the majority of offenders were eligible for parole which means that they will possibly serve shorter prison sentences. In reading the JSRs, it is evident that the sentencing judges take into account mitigating and aggravating circumstances. Several offenders were acknowledged as 'traditional' Aboriginal men and tribal punishment was explicitly mentioned (but not sanctioned) in a number of the cases. In *Lillias* the judge indicated quite clearly that because of threats of tribal punishment, the sentence applied was lenient: 'In fact those threats mean that you receive a lot of leniency from this Court.'<sup>153</sup>

The sentences applied are well below the maximum ten years available under the legislation. Although the WA JSRs mention a discount for a guilty plea, and it is common practice to discount by 25% of the sentence, the amount of discount has not been stated in each case and this may be a reason why the WA sentences appear low. Other benefits to the offenders of pleading guilty to unlawful assault causing death are discussed below.

Guilty pleas to unlawful assault causing death were made by 11 of the 12 offenders and this ensured that some form of punishment was applied. Pleading not guilty may have resulted in a trial that found that the offender had intended or could have foreseen the outcome and therefore the offence could be considered manslaughter or murder with higher sentences being applied. In some cases pleading guilty to a lesser charge with a lower penalty may be an attractive option for the offender. However, these lower sentences have also attracted the attention of women's interest groups in relation to the intimate partner violence aspect whereby offenders may, by pleading guilty to the lesser

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<sup>151</sup> Ibid.

<sup>152</sup> *WA Sentencing Act* s 9AA.

<sup>153</sup> *Lillias*, 5.



charge of unlawful assault causing death, avoid the longer sentences applied when charged and found guilty of manslaughter or murder<sup>154</sup>. However the proof required for intention to kill and/or the foreseeability of death has been reported to sometimes result in offenders being found 'not guilty' and therefore no punishment is applied, and this was one of the reasons for the introduction of the legislation for unlawful assault causing death.<sup>155</sup> Therefore, whilst not within the intention of the legislation, intimate partner violence offences may have become more liable to punishment, but the use of the unlawful assault causing death may result in lower sentences. A balance between any conviction and an appropriate charge needs to be considered. Four of the 12 cases in this paper were clearly cases of intimate partner violence, with a further four involving other family members.

It would appear that the language used in the WA legislation has enabled the legislation to have wide ranging effects with unintended consequences. The *Parliamentary Debates* of 6 May 2008, regarding s 281, clearly indicated an intention to address the one punch deaths.<sup>156</sup> The very open wording of s 281 has not been addressed in the public domain where the legislation is still referred to as 'one punch', 'king hit', or 'coward's punch' and it is likely that unless particularly affected by the legislation the public will not know the true extent or effects of the legislation. Interestingly both the NSW and Victorian legislation has been framed in a more direct or targeted way, with clear descriptions of the actions that are chargeable.

## IX CONCLUSION

The unlawful assault causing death legislation in WA does not appear to have addressed the social issue that it was intended to address and what has been cited in the media as its intention: that is, that young men using violence against each other in entertainment precincts would be held accountable for their actions and the expectation that there would be a reduction in violent crime amongst young men in entertainment centres. Although the figures for assault in Perth city have reduced considerably between 2008 and 2014 there has been a range of measures introduced that may have had an effect such as increased policing in the area and licencing restrictions. The literature on deterrence suggests that it is unlikely that the reduction is due to

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<sup>154</sup> Ball, above n 24.

<sup>155</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2008.

<sup>156</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 6 May 2008.

the legislation as many assaults occur when the offender is intoxicated and less able to determine potential consequences of their actions.<sup>157</sup> The legislation is, however, providing greater opportunities for the punishment of offenders who may otherwise be found not guilty of more serious charges such as manslaughter or murder where intention to kill and the foreseeability of the results of the actions taken by the offender need to be proven to substantiate a guilty verdict.

The characteristics of the victims are also quite diverse. Five of the victims were female and the ages of victims ranged from 2 years to 83 years of age. Four of the victims were substance affected at the time of their death. The demographic information on the victims also does not fit with the public statements of young males perpetrating violence on each other and the perception that in many instances the victim was also intoxicated. There are concerns also expressed by feminist groups that the offence of unlawful assault causing death allows offenders (especially those involved in intimate partner violence) to plead guilty to the lesser charge and thereby receive a lesser sentence.

It is interesting that many of the Judges in handing down the sentence refer to the lack of intention or foreseeability. As the legislation clearly excludes these aspects, one would not expect these comments to be made in terms of sentencing and remorse. The reason for these issues being raised is not clear and it may be that the Judges are reinforcing the exclusion of intention or foreseeability from their deliberations or it may be that they have intuitively still not come to terms with these major alterations to WA criminal law. There have been calls for the WA legislation<sup>158</sup> to be reviewed and, in terms of its 'success' and unintended consequences, the findings in this paper suggest that a review is appropriate.

### *Postscript*

Just after this paper was reviewed for publication the authors located a JSR for a case in which the offender was a 22 year-old Aboriginal woman who stabbed her de facto partner whilst intoxicated with both alcohol and cannabis.<sup>159</sup> Both offender and victim had been drinking

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<sup>157</sup> Claude Steele and Lillian Southwick, 'Alcohol and Social Behaviour 1: The Psychology of Drunken Excess' (1985) 48(1) *Journal of Personality and Social Psychology* 18; Shantha Rajaratnam, Jennifer Redman and Michael Lenne, 'Intoxication and criminal behaviour' (2000) 7(1) *Psychiatry, Psychology and Law*, 59.

<sup>158</sup> Quilter, above n 5, 36; Cullen, above n 24, 67 – 68; Aleisha Orr, 'Could There Be a One-Punch Law Rethink?', *WA Today* (online), 31 January 2014 <<http://www.watoday.com.au/wa-news/could-there-be-a-one-punch-law-rethink-in-wa-20140131-31rta.html>>.

<sup>159</sup> *Western Australia v Woodley* [2015] WASC 114.

heavily and had argued. The man returned to the house to pack his belongings to leave the home and during a struggle he was stabbed in the chest with a kitchen knife.<sup>160</sup> The offender was originally charged with manslaughter and during the course of her trial changed her plea to guilty for unlawful assault causing death. This case highlights a range of issues presented in the paper about the location of offences, and the extension of the legislation to situations of intimate partner violence. The offender had been subjected to previously documented intimate partner violence and this was mentioned as a mitigating factor.<sup>161</sup> In this case the offender was sentenced to four years imprisonment with an opportunity for parole after 2 years.<sup>162</sup> The sentencing remarks indicate that the offender did not intend to kill the victim but that the death was foreseeable.<sup>163</sup>

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<sup>160</sup> Ibid [6]-[14].

<sup>161</sup> Ibid [27]-[28].

<sup>162</sup> Ibid [39].

<sup>163</sup> Ibid [36].

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## Occasional Essay

# THE CARDINAL, THE WRITER AND THE PHILOSOPHER: REFLECTIONS ON TEACHING AT UWS

ADJUNCT PROFESSOR THE HONOURABLE BRIAN SULLY AM QC<sup>\*</sup>

### I INTRODUCTION

It is old wisdom that confession is good for the soul. It might have useful work to do by way of an introduction to this essay. There are four considerations that have prompted the writing of this essay. They are:

1. A profound conviction of the essential worth of what I might call the UWS Project, (UWS being throughout an abbreviation of The University of Western Sydney);
2. An equally strong conviction, based upon some 50 years of professional practice as a Solicitor, a Barrister and a Judge, that the Common Law is one of the masterworks of Western civilisation and that its preservation is essential to the maintenance of what any appropriately informed Australian would understand by any reference to a civilised society grounded firmly in the Rule of Law;
3. The accumulated experiences deriving from eight years of teaching in the School of Law at the Campbelltown campus of UWS; and
4. The perception that in the year in which UWS celebrates the 25th anniversary of its foundation, there ought to be, among the tumult of rejoicing and satisfaction at things achieved, space for at least one voice willing to suggest that there are things that are not, perhaps, what they ought to be.

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<sup>\*</sup> Adjunct Professor, UWS School of Law (2007-Present); Judge, Supreme Court of NSW (1989-2007); Member, Legal Qualifications Committee (1999-2000); Deputy Presiding Member, Legal Practitioners Admission Board (1994-2007). The opinions expressed in this Occasional Essay are offered as nothing more than the author's own.

## II THE UWS PROJECT

UWS was formally established by the *University of Western Sydney Act 1988* (NSW) ('1988 Act'). The Act received the Royal Assent on 15th December 1988 and came into formal operation on 1st January 1989. Section 7(1) of the 1988 Act defines as follows the functions of the new University:

- (a) the provision of education facilities at university standard for persons attending it, having particular regard to the needs and aspirations of residents of the western districts of Sydney; and
- (b) the dissemination and increase of knowledge, the undertaking and promotion of research and scholarship and contribution to the intellectual life of western Sydney; and
- (c) the development of consultancy and entrepreneurial activities, including research and development initiatives, which will contribute to the development of western Sydney; and
- (d) the conferring of diplomas and the degrees of Bachelor, Master and Doctor and the issuing of such certificates as the by-laws may prescribe.

Interestingly, the term 'western districts of Sydney' was not defined in the 1988 Act.

In 1997 the 1988 Act was repealed and replaced by the *University of Western Sydney Act 1997* (NSW) ('1997 Act'). Section 8 of the 1997 Act redefined the object and functions of the refashioned University, but unlike the 1988 Act, it included a specific statement respecting the objectives of the refashioned body:

- 1) The object of the University is the promotion, within the limits of the University's resources, of scholarship, research, free inquiry, the interaction of research and teaching, and academic excellence.
- 2) The University has the following principal functions for the promotion of its object:
  - (a) the provision of facilities for education and research of university standard, having particular regard to the needs and aspirations of residents of Greater Western Sydney,
  - (b) the encouragement of the dissemination, advancement, development and application of knowledge informed by free inquiry,
  - (c) the provision of courses of study or instruction across a range of fields, and the carrying out of research, to meet the needs of the community, beginning in Greater Western Sydney,
  - (d) the participation in public discourse,

- (e) the conferring of degrees, including those of Bachelor, Master and Doctor, and the awarding of diplomas, certificates and other awards,
  - (f) the provision of teaching and learning that engage with advanced knowledge and inquiry,
  - (g) the development of governance, procedural rules, admission policies, financial arrangements and quality assurance processes that are underpinned by the values and goals referred to in the functions set out in this subsection, and that are sufficient to ensure the integrity of the University's academic programs.
- 3) The University has other functions as follows:
- (a) the University may exercise commercial functions comprising the commercial exploitation or development, for the University's benefit, of any facility, resource or property of the University or in which the University has a right or interest (including, for example, study, research, knowledge and intellectual property and the practical application of study, research, knowledge and intellectual property), whether alone or with others, with particular regard to the need to contribute to the development of Greater Western Sydney,
  - (b) the University may develop and provide cultural, sporting, professional, technical and vocational services to the community, *with particular regard to the need to contribute to the social, economic and intellectual life of Greater Western Sydney* [emphasis added],
  - (c) the University has such general and ancillary functions as may be necessary or convenient for enabling or assisting the University to promote the object and interests of the University, or as may complement or be incidental to the promotion of the object and interests of the University,
  - (d) the University has such other functions as are conferred or imposed on it by or under this or any other Act.
- 4) The functions of the University may be exercised within or outside the State, including outside Australia.

It is interesting that the expression 'Greater Western Sydney' is nowhere defined in the 1997 Act and it remains undefined in any of the subsequent amendments that have been passed from time to time to the original Act. The Minister having legislative sponsorship of the 1988 Act said, during the course of his Second Reading Speech:

I emphasize also that the university about to be created will be not only for western Sydney but also for the State and the Nation. Universities are institutions devoted to advancing the frontiers of knowledge. As well as teaching institutions, they are places of research and

scholarship. A first-class university is not only of benefit to the locality in which it exists, it is an asset for all mankind.<sup>1</sup>

How does that ambitious agenda stand 25 years later? In attempting an answer, I turn for help to each of the three persons to whom reference is made in this Essay's title.

### III IDEALS – THE CARDINAL

The Cardinal is John Henry, Cardinal Newman (1801-1890). Cardinal Newman was, in his time, an outstanding and nationally recognised Oxford academic and cleric, first in the Church of England and later in the Catholic Church. For four years from 1854, and at the request of the Catholic Bishops of Ireland, he was the first Rector of the newly established Catholic University of Ireland, now known as University College, Dublin. In connection with that work in the field of tertiary education, he published in 1873 a book which has become an iconic work on the topic of University education. The title of the book is *The Idea of a University*.<sup>2</sup>

The core of the book is a series of lectures, which Cardinal Newman refers to as Discourses. In them, he canvasses in great detail his concepts of what University education ought to be about. His language is, of course, the language of his time and, of course, when citing passages from such a work it is necessary to attend to the spirit of what is being said rather than to sneer derisively at the idiom in which it has been said. Approached with that simple and common sense adjustment, certain of the ideals which are spelt out in *The Idea of a University* are, I contend, fully as relevant and important now as they were then.

One of the Discourses, Discourse V, is entitled 'Knowledge Its Own End'. It is here that Cardinal Newman distils his basic concept of the fundamentals of authentic University education. He says, speaking of a student enrolled in such a University as is envisaged:

He profits from an intellectual tradition, which is independent of particular teachers, which guides him in his choice of subjects, and duly interprets for him those which he chooses. He apprehends the great outlines of knowledge, the principles on which it rests, the scale of its

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<sup>1</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 17 November 1988, 3636 (Terry Metherell).

<sup>2</sup> John Henry Newman, *The Idea of a University* (University of Notre Dame Press, 1982).

parts, its lights and its shades, its great points and its little, as he otherwise cannot apprehend them. Hence it is that his education is called 'Liberal'.

A habit of mind is formed which lasts through life, of which the attributes are, freedom, equitableness, calmness, moderation and wisdom; or what in a previous Discourse I have ventured to call a philosophical habit. This then I would assign as the special fruit of an education furnished by a University, as contrasted with other places of teaching or modes of teaching. This is the main purpose of a University in its treatment of its students.<sup>3</sup>

It is, of course, simplicity itself to deal with those propositions by deriding them as 'old fashioned', 'out of touch', and, of course, that favourite thunderbolt of the modern egalitarian pretender, 'elitist'. I observe that Parliament, when setting out what it thought the University ought to be doing, included specifically a function and an objective recognising in terms the proper place of intellectual improvement in the statutory remit of the newly established UWS. And what, when all is said and done, is that if not a differently expressed acknowledgment of the perceived importance of knowledge as its own end?

Cardinal Newman shows in the Discourses which follow Discourse V that he was wholly aware that a principal criticism of what he had said about knowledge as its own end would be that the concept is all very well in an ideal world, but what, in a world which is anything but ideal, is the use of it all? He meets this projected criticism by devoting a number of Discourses to the practical advantages in various vocational settings of the 'Liberal' education as he had previously expounded that notion.

Particularly relevant in that connection is Discourse VII, which is entitled: 'Knowledge Viewed In Relation To Professional Skill'. Contained within this particular Discourse is a summary which is so comprehensive in its coverage, so eloquent in its expression and so compelling in its perception, that any attempted abbreviation, still less any attempted gloss, is not only presumptuous, but also misrepresentative. The complete passage is:

If a practical end must be assigned to a University course, I say it is that of training good members of society. Its art is the art of social life, and its end is fitness for the world. It neither confines its views to particular professions on the one hand, nor creates heroes or inspires genius on

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<sup>3</sup> Ibid 76, 77.



the other. Works indeed of genius fall under no art; heroic minds come under no rule; a University is not a birthplace of poets or of immortal authors, of founders of schools, leaders of colonies or conquerors of nations. It does not promise a generation of Aristotles or Newtons, of Napoleons or Washingtons, of Raphaels or Shakespeares, though such miracles of nature it has before now contained within its precincts. Nor is it content on the other hand with forming the critic or the experimentalist, the economist or the engineer, though such too it includes within its scope. But a University training is a great ordinary means to a great but ordinary end; it aims at raising the intellectual tone of society, at cultivating the public mind, at purifying the national taste, at supplying true principles to public enthusiasm and fixed aims to popular aspiration, at giving enlargement and sobriety to the ideas of the age, at facilitating the exercise of political power, and refining the intercourse of private life. It is an education which gives a man a clear, conscious view of his own opinions and judgments, a truth in developing them, an eloquence in expressing them, and a force in urging them. It teaches him to see things as they are, to go right to the point, to disentangle a skein of thought, to detect what is sophistical, and to discard what is irrelevant. It prepares him to fill any post with credit, and to master any subject with facility. It shows him how to accommodate himself to others, how to throw himself into their state of mind, how to bring before them his own, how to influence them, how to come to an understanding with them, how to bear with them. He is at home in any society, he has common ground with every class; he knows when to speak and when to be silent; he is able to converse, he is able to listen; he can ask a question pertinently, and gain a lesson seasonably, when he has nothing to impart himself; he is ever ready yet never in the way; he is a pleasant companion, and a comrade you can depend upon; he knows when to be serious and when to trifle, and he has a sure tact which enables him to trifle with gracefulness and to be serious with effect. He has the repose of a mind which lives in itself, while it lives in the world, and which has resources for its happiness at home when it cannot go abroad. He has a gift which serves him in public, and supports him in retirement, without which good fortune is but vulgar, and with which failure and disappointment have a charm. The art which tends to make a man all this, is in the object which it pursues as useful as the art of wealth or the art of health, although it is less susceptible of method, and less tangible, less certain, less complete in its result.<sup>4</sup>

It can be allowed at once that this is not the language of modern management, that is to say, language which is not intended so much to convey comprehensible information as to create in words what muzak creates in sounds, that is to say, an agreeable but essentially pointless, general sensation.

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<sup>4</sup> Ibid 134, 135.

It can be allowed as readily that ideals of the stated kind are, in contemporary Australian society generally and in Australian Universities particularly, as likely to be roundly derided as to be correctly understood and, therefore, to be enthusiastically adopted. All of which having been said, why, precisely, is the following recent reformulation of UWS's objectives any better:

- Goal 1: A distinctively student-centred university
- Goal 2: A vibrant research-led university with regional, national and global impact
- Goal 3: A unique learning experience that is innovative, flexible and responsive
- Goal 4: An expanding international reach and reputation
- Goal 5: A leading advocate and champion for the Greater Western Sydney region and people
- Goal 6: A dynamic and innovative culture that secures success.<sup>5</sup>

The point of the comparison is not that there is something essentially wrong with the stated goals, as muzak-like generalities. But where is the inspiration? Where is the challenge to a UWS student, personally and individually, to aim for the highest standards of personal development as the ultimate fruit of a UWS education as distinct from a University X or University Y education?

From time to time I find myself putting to my classes the simple, (I should have thought the self-evidently correct), proposition that simply because something is unfashionable, it does not by any means follow that it is unsound. So with ideals of the kind expounded by Cardinal Newman about an authentic University education. Perhaps it is time to go behind the veil of the management, money and mumbo-jumbo paradigm and to refocus in simple and encouraging language upon putting before our students, but especially prospective students, that studying at UWS is centred upon having each one of them, looked at in a real way as an individual, aim consciously for precisely those

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<sup>5</sup> These stated goals appear in a draft forward-planning document approved in September 2014 by the UWS Board of Trustees: University of Western Sydney, *Securing Success: 2015-2020* (Discussion Paper, University of Western Sydney, September 2014) 6, <[http://www.uws.edu.au/\\_\\_data/assets/pdf\\_file/0008/753146/Securing\\_Success\\_Discussion\\_Paper\\_FINAL\\_.pdf](http://www.uws.edu.au/__data/assets/pdf_file/0008/753146/Securing_Success_Discussion_Paper_FINAL_.pdf)>.

Each goal is developed extensively in the document. In connection with the 'Strategic Goals and Objectives' for UWS in the period of 2015-2020 which are said to underpin these goals, it is stated on page 5 of the draft *Securing Success* document that the students are both 'customers' and 'clients'. These misconceived adjectives are thankfully absent from the final version: University of Western Sydney, *Securing Success: 2015-2020 Strategic Plan* (University of Western Sydney, 2015), <[http://www.uws.edu.au/\\_\\_data/assets/pdf\\_file/0004/844672/OVP5222\\_Securing\\_Success\\_Strategic\\_Plan\\_v10.pdf](http://www.uws.edu.au/__data/assets/pdf_file/0004/844672/OVP5222_Securing_Success_Strategic_Plan_v10.pdf)>.

attributes of which Cardinal Newman spoke and wrote in his Discourse VII.

#### IV DISTRACTIONS – THE WRITER

The writer is Lewis Carroll (1832-1898). Carroll is probably best known for his novel *Alice in Wonderland*. In 1871 he published a sequel, *Through the Looking Glass*. It contains a poem, 'The Walrus and the Carpenter', one verse of which is still frequently quoted in part. It reads:

'The time has come,' the Walrus said,  
'To talk of many things:  
Of shoes--and ships--and sealing-wax -  
Of cabbages--and kings -  
And why the sea is boiling hot -  
And whether pigs have wings.'

The poem, read as a whole, is not merely a fine example of nonsense poetry. It is a cautionary tale. The Walrus and the Carpenter are predators. They have decided to eat some oysters, so they approach an oyster bed and entice a number of splendid young oysters to leave the safety of the oyster bed, disdaining a warning to the contrary from an old and experienced oyster and, to borrow from modern management, to embark upon an exciting journey of discovery. When the Walrus makes the statement quoted above, the little oysters respond enthusiastically and, thus distracted, are promptly eaten by the Walrus and the Carpenter.

It strikes me that the moral of that story is highly relevant to contemporary education at UWS. The distractions, in the UWS context, are of course different. No sensible commentator could, or would attempt to, make the case that a huge, multi-campus University such as UWS can be operated as though it were a tuck shop at a small suburban school. Plainly, there has to be some formal administrative structure and a basic framework of rules in order to hold the institution together and to have it function efficiently in pursuit of its essential purposes.

It is, however, surely relevant to learn from the lessons that are taught daily by government and public administration at all three of the Federal, State and Local Government levels. One lesson is that while it is frivolous to suggest that there should be no such structured framework, it is demonstrably not the case that more and more means

better and better. Another is that while it is equally frivolous to suggest that there should be no formal legislation, whether primary or subordinate, it is demonstrably not the case that a blizzard of Acts of Parliament accompanied by a further blizzard of Rules and Regulations necessarily entails steady, principled improvement in the affairs of the Nation. Upon what basis could it be thought reasonably that the same is not true of such an institution as UWS?

Two or three years ago I had occasion to look carefully at one in particular of the formally promulgated Policies of UWS. As a matter of interest, I looked up on the relevant website the number of then active Policies. There were some 200, plus a further five said to be not currently active. I find it impossible to accept that such a level of bureaucracy is truly necessary. Bureaucracy is the same the world over. One can describe it usefully by a paraphrase of Lord Acton's celebrated aphorism about the corrupting effect of power: all bureaucracy tends to straightjacket, all expansion of bureaucracy tends to tighten the straightjacket, and virtually absolute bureaucracy tends to straightjacket absolutely, which is another way of saying that it simply strangles useful movement.

The current Federal Government has introduced a device called Repeal Day. The objective is to have regularly a deliberate and resolute look at current bureaucratic structures and red tape to the end of rooting out those that are either not doing useful work, or are positively inhibiting the carrying out of some perceived useful work. Two questions obviously arise. Is the idea sound in principle? If so, has its implementation thus far been sound in practice? The second question is irrelevant to this essay, but the first question seems to me to be very relevant.

Why should there not be put in place some simple, but resolute, procedure for revising, say once every year, every formal Policy of UWS in order to audit thoroughly the effects that each such Policy is having upon the attainment by UWS of the ideals earlier herein discussed? That process would entail necessarily, were it carried out independently and frankly, the assessment, not of elegant and ideologically fashionable abstractions, but of practical consequences: consequences for the recruitment of top quality teaching staff and their retention; consequences for the morale, personal and professional of current front-line teaching staff; consequences for the attainment by any normally intelligent UWS student of those personal characteristics and capacities articulated so eloquently and so convincingly by Cardinal Newman, being characteristics and capacities that encourage

the correct formation of personal and professional standards that transcend the mere acquisition of a formal degree or diploma.

I am not unmindful of the ease with which what I have been saying can be attacked upon the basis that it is wholly unrealistic in that it fails to take account of questions, imperative questions, of funding. Any commentator who was not fully alive to those questions could be thought of only as having had a very sheltered life. So, let us think about funding. Does not the current state of affairs boil down to this:

- an institution such as UWS cannot operate at all, let alone successfully, without having access to a colossal operating income;
- a significant part of that income has to come from student fees;
- that entails constant and sharp increases in the number of prospective students, and constantly improving rates of retention of current students;
- all of that entails, in turn, that nothing must be done that is likely to discourage students, prospective or current;
- to that end, every possible step must be taken in order to keep prospective and current students happy, no matter how shallow their happiness and no matter how peremptorily they demand to be kept happy;
- an equally significant component is formal Government subsidy;
- Government, any Government, cannot simply fund University education on a blank-cheque basis;
- Government, of all political persuasions, has tried to keep a lid on escalating costs by several devices one of which is to link the amount of funding to the number of students;
- this, too, entails the same imperatives as those previously noted in connection with the recruitment and then the retention of ever increasing numbers of students?

If that analysis is even broadly correct, then has the time not come for exchanging the current respective positions of the relevant cart and the relevant horse?

Judging, as I must always admit to doing, through my experience of my own classes, I do not accept as a simple and self-evident fact that the students at UWS who are there to get a University education in the best sense, rather than to have a good time while acquiring with the minimum effort the minimum marks necessary to graduate at the minimum level, would not seize with enthusiasm an opportunity to use their UWS years as a vehicle for developing themselves into both efficient and effective professionals in their chosen fields, and

authentically cultured and well-rounded individuals in the Newman sense.

Funding is an important part of the UWS project, no doubt about it. It is not, however, the most important part. That role is reserved for the standards, personal and professional alike, of the graduating student. If those standards are both articulated and insisted upon simply, clearly, and with the irreplaceable impetus of the good example of the teaching and research staffs, then the funding will come, whether from suitably appreciative Government, from suitably impressed private philanthropy and commercial investment, or from students whose understanding of the opportunity made available to them is more admirable and better centred than a perception that the opportunity is essentially that of being rich and famous. If those standards are dismissed outright, or disdained in practice albeit proclaimed in principle, or squeezed lifeless by ever encroaching bureaucracy and its suffocating distractions, then the desired funding might well be found nevertheless, but it will not be funding a University, and certainly not a University of the very special and important kind that Parliament thought it was establishing when it legislated for UWS.

#### V REMINDERS – THE PHILOSOPHER

The philosopher is Pierre Ryckmans (1935-2014), who frequently wrote under the pseudonym Simon Leys. Ryckmans was born in Belgium, but migrated to Australia. He was a scholar of international standing and distinction. He was Professor of Chinese Studies at the University of Sydney from 1987 to 1993 having previously taught Chinese Literature at the Australian National University. His standing as a scholar of Chinese culture and affairs was such that *The Economist*, in its issue of 23rd August 2014, devoted its one weekly Obituary page to him. Speaking of Ryckmans's assessments of the Communist Chinese regime throughout the Mao period, the author of the obituary said of him '...he was stubborn and principled, and besides, he was right.'<sup>6</sup> Any regular reader of *The Economist* will know that it is very sparing with that level of praise.

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<sup>6</sup> Obituary, 'Pierre Ryckmans (Simon Leys), an Old China Hand, Died on August 11<sup>th</sup>, Aged 78', *The Economist* (London), 23 August 2014, <<http://www.economist.com/news/obituary/21613159-pierre-ryckmans-simon-leys-old-china-hand-died-august-11th-aged-78-pierre-ryckmans>>.

In 2011 Ryckmans, using his pseudonym, published a book entitled *The Hall of Uselessness*.<sup>7</sup> The book is a collection of essays, speeches and occasional writings spanning many years. It is an altogether exceptional book. Everything in it is instinct with high intellect refined by learning and culture both broad and deep. Its scope is extraordinary. One of the items reproduced is the text of a speech delivered by Ryckmans on 23 March 2006 to the Campion Foundation Inaugural Dinner, Campion College being a liberal arts college in western Sydney. Ryckmans takes as his title *The Idea of a University*, in explicit acknowledgement of the previously discussed work of that name and written by Cardinal Newman. Ryckmans turns, in an early passage of his speech, to the correct definition of a University. He says:

Intellectual impostures always require convoluted jargon, whereas fundamental values can normally be in clear and simple language. Thus, the commonly accepted definition of the university is fairly straightforward: a university is a place where scholars seek truth, pursue and transmit knowledge for knowledge's sake – irrespective of the consequences, implications and utility of the endeavour.<sup>8</sup>

Developing this theme, Ryckmans suggests that there are four things required by any University correctly so denominated. The first of them he describes as a community of scholars. He explains as follows what he has in mind by that description:

Sir Zelman Cowen told this anecdote: some years ago in England, a bright and smart politician gave a speech to the dons at Oxford. He addressed them as 'employees of the university'. One don immediately stood up and corrected him: 'We are not employees of the university, we are the university.'

And one could not have put it better: the only employees of the university are the professional managers and administrators – and they do not direct or control the scholars, they are at the service of the scholars.<sup>9</sup>

He continues:

The second essential thing, a good library for the humanities and well-equipped laboratories for the scientists. This is self-evident and requires no further comment. Third, the students. The students constitute, of course, an important part of the university. It is good and fruitful to educate students; but students should not be recruited at any

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<sup>7</sup> Simon Leys, *The Hall of Uselessness: Collected Essays* (Black Inc, 2011).

<sup>8</sup> Ibid 398.

<sup>9</sup> Ibid 398.

cost, by all means, or without discrimination. (Note: in this country, foreign students who pay fees bring every year nearly \$2 billion to our universities. In the university where I last taught, in a written communication addressed to all staff, the vice-chancellor once instructed us to consider our students not as students but as customers . On that day, I knew that it was time for me to go.)<sup>10</sup>

The fourth essential is money, but not as the principal focus of the University's efforts. Speaking of what he sees as serious shortcomings in contemporary University education, Ryckmans says:

[The] elitist character of the ivory tower (which results from its very nature) is denounced in the name of equality and democracy. The demand for equality is noble and must be fully supported, but only within its own sphere, which is that of social justice. It has no place anywhere else. Democracy is the only acceptable political system; yet it pertains to politics exclusively, and has no application in any other domain. When applied anywhere else, it is death – for truth is not democratic, intelligence and talent are not democratic, nor is beauty, nor love – nor God's grace. A truly democratic education is an education that equips people intellectually to defend and promote democracy within the political world; but in its own field, education must be ruthlessly aristocratic and high-brow, shamelessly geared towards excellence.<sup>11</sup>

...

Vocational schools and technical colleges are very useful – people all understand that. As they cannot see the usefulness of the useless universities, they have decided to turn the universities into bad imitations of technical colleges. Thus the fundamental distinction between liberal education and vocational training has become blurred, and the very survival of the university is put in question. The university is now under increasing pressure to justify its existence in utilitarian and quantitative terms. Such pressure is deeply corrupting.<sup>12</sup>

...

When a university yields to the utilitarian temptation, it betrays its vocation and sells its soul. Five centuries ago, the great Renaissance scholar Erasmus defined with one phrase the essence of the humanist endeavour: *Homo fit, non nascitur* – One is not born a man, one becomes it. A university is not a factory producing graduates, as a sausage factory produces sausages. It is a place where a chance is given to men to become what they truly are.<sup>13</sup>

I have taken time to quote from this remarkable modern-day scholar, teacher and commentator for what is, I should imagine, an obvious

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<sup>10</sup> Ibid 398, 399.

<sup>11</sup> Ibid 399.

<sup>12</sup> Ibid 400.

<sup>13</sup> Ibid.



reason: reminders from such a one cannot simply be dismissed, as my own commentaries might well be dismissed, as the rather skewed perspectives of someone not at all remarkable on any of those counts. When such a one as Pierre Ryckmans reminds us that it is time to cut through the stifling distractions of modern University-level academic life and get a renewed grip upon the basics, then any reasonable person who is currently enmeshed in that life and in those distractions cannot simply shrug off what has been said with a languid wave of the hand and a few dismissive and patronising remarks about the commentator's not knowing what he is talking about.

## VI ADDENDUM AND CONCLUSION

I imagine that it will be apparent from the body of this essay that it was written originally last year and with a particular focus upon the anniversary then being celebrated by UWS.

I wrote originally a Conclusion in which I attempted to distil into a practical example the principles discussed in the essay. The example which I took entailed comparing and contrasting the contents of the current Learning Guide for a particular core Unit in the Law Course, and what I was intending to propound as a much better focused and structured Learning Guide for that Unit. For reasons the detail of which is not here relevant, the time lapse between the original writing of this essay and the time of its editorial revision before clearance for publication has been such that in many respects, but most importantly in respect of the intended Conclusion, events have overtaken what had been thus written and revised.

As it happens, however, one of those events has brought into perfect focus the concerns that the principal essay attempts to raise. In recent times a decision has been taken to rename UWS. In future, our institution is to be styled Western Sydney University. This is a decision that has been taken at the highest level of University administration. It will require a major redesign of such things as the University logo, the University stationery, and any other University material that requires a precise University identity. The change has been promoted not as a renaming, but as a 'rebranding', a description that I always associate with consumer goods like, for example, laundry detergent. It is, by any reasonable reckoning, a major change in the life and work of the University.

It would be reasonable to ask the perceived justification for the change. The official answer is that the 'rebranding' will emphasise in a way that the former 'brand' did not, the intimacy of the link between the University and what might be described as its core constituency, or in management-speak its core catchment area. Let it be assumed for present purposes that such a perception is something more than yet another triumph of form over substance. There remains, surely, the further question: what does this disruptive change say about the priorities of those set in lawful authority over the University?

It seems to me to be a fair comment that the change symbolises in a particularly stark and disturbing way those tendencies that the body of the essay questions: the tendency to confuse change with progress; the tendency to prefer the snappy gesture to the patient laying down of the highest and most rigorous academic standards as the fundamental measure of the worth of the University; and, perhaps worst of all, the seemingly ineradicable tendency to regard teaching as an adjunct of management rather to maintain the correct relationship of management as an adjunct of teaching.

It is precisely this perverse mismatch that risks institutionalising the deficiencies to which the principal essay is directed. The only positive thing that I can see in the 'rebranding' is that it might cause, at long last, some serious questions to be asked in the appropriate quarters about what is being done with, and more importantly what is being done to, the vision splendid of the UWS project as Parliament originally conceived it.

May the former UWS flourish.

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# UNTANGLING ADVERSE ACTION - CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION V BHP COAL PTY LTD

AMANDA CAVANOUGH\*

## I INTRODUCTION

In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd*<sup>1</sup> ('BHP Coal'), the High Court (by majority) found that the respondent employer ('BHP Coal') did not act unlawfully by dismissing an employee for his conduct during a protest organised by the appellant CFMEU ('Union'). In determining the case, the High Court referred heavily to its decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* ('Barclay').<sup>2</sup> In *Barclay*, the Court clarified the principles that Australian courts must apply in relation to claims of prohibited adverse action under the *Fair Work Act 2009* (Cth) ('Fair Work Act'). Importantly, the Court emphasised that an employer does not need to show that its reasons for taking action were 'entirely dissociated' from the employee's union position or activity.<sup>3</sup> Rather, the question is whether that was a 'substantial and operative factor'<sup>4</sup> in the decision. In other words, an employee who engages in misconduct while coincidentally being engaged in industrial activity is not thereby immune from discipline, which any other employee would face.

In *Barclay*, the employee, Mr Barclay, sent an email in his capacity as a delegate of the Australian Education Union to union members at the Bendigo Regional Institute of Technical and Further Education (the 'Institute') containing serious allegations of fraud against unnamed individuals in relation to an upcoming audit upon which the Institute's ongoing accreditation and funding depended. The trial judge accepted the evidence of the Institute's CEO, Dr Harvey, who testified that her reasons for taking adverse action did not include the fact that Mr

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<sup>1</sup> (2014) 253 CLR 243.

<sup>2</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500.

<sup>3</sup> *Ibid* 523 [62] and 542 [127]; see also *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235 especially 241.

<sup>4</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 522 [57], 542 [127].

Barclay was a union delegate or had participated in union activity. Rather, he was disciplined for the manner in which he raised the allegations (by way of a broadly distributed email) and his failure to report his concerns to management to enable them to be investigated.<sup>5</sup> The High Court unanimously upheld the approach taken by the trial judge at first instance, after his Honour's decision dismissing Mr Barclay's application was overturned on appeal to the Full Court.<sup>6</sup> By contrast, in *BHP Coal*, judicial opinion as to the appropriate outcome was split by a majority of three to two. This difference can largely be explained by the fact that in *BHP Coal*, the alleged misconduct was harder to distinguish from the protected industrial activity in question. The relevant facts are discussed below.

## II BACKGROUND

BHP Coal operated a mine in Queensland. The employee in question, Mr Doevendans, had been employed there for some 24 years. He was a longstanding member and officer of the Union. In his role as a union officer he was responsible for overseeing industrial disputes, recruiting new members, meeting with management and investigating complaints about occupational health and safety issues.

During 2011 and 2012, BHP Coal and the Union were negotiating for a new enterprise agreement to apply at the mine. Protected industrial action was taken in support of the union's demands. Relevantly, the Union organised a week-long work stoppage and a protest outside the entrance to the mine site. The protesters carried signs bearing various slogans which they would hold up whenever a car passed along the mine entrance road. One of the signs read, 'No principles SCABS No guts' with the word 'scabs' printed in large and bold red font. Mr Doevendans was alleged to have been holding and waving the 'scabs' sign on numerous occasions.

After an investigation into his conduct, he was given a letter setting out BHP Coal's allegations that his actions breached its workplace policies. Mr Doevendans was also asked to attend a meeting with the general manager of the mine, Mr Brick. At this meeting, Mr Doevendans accepted that he probably did hold up the sign but, according to Mr Brick, said that BHP Coal's rules and policies did not apply to him

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<sup>5</sup> See further, Justice Shane Marshall and Amanda Cavanough, 'Case note: Board of Bendigo Regional Institute of Technical and Further Education v Barclay' (2012) 16 *University of Western Sydney Law Review* 155.

<sup>6</sup> *Ibid.*

while he was 'on the picket line.'<sup>7</sup> After considering the allegations and his responses Mr Brick decided to dismiss Mr Doevendans.

### III THE CASE AT TRIAL

The case was tried in the Federal Court before Justice Jessup. The Union alleged that Mr Doevendans was dismissed for a reason prohibited under section 346 of the *Fair Work Act*: either because he was a member or officer of the Union; or because he participated in lawful activity organised by the Union; or because he represented or advanced the views, claims or interests of the Union.<sup>8</sup> An important feature of adverse action cases is the reverse onus of proof.<sup>9</sup> It is presumed that adverse action was taken for the prohibited reason alleged, unless the employer proves otherwise.<sup>10</sup> The central question in this context is: 'why was the adverse action taken?'<sup>11</sup> The focus of the court is on the state of mind of the decision-maker and his or her particular reasons for acting. Direct testimony from the relevant decision-maker as to his or her 'true' reasons will usually be essential to discharge the evidentiary burden, but direct evidence may be contradicted by other evidence or objective facts presented.<sup>12</sup>

Mr Brick gave evidence of his reasons for terminating Mr Doevendans' employment on behalf of BHP Coal. He said that he considered that the sign was offensive, humiliating, intimidating and harassing; that Mr Doevendans had deliberately held and waved the sign numerous times knowing it was inappropriate; that he had shown arrogance and a lack of contrition when confronted about his actions; and that Mr Brick thought his behaviour was antagonistic to the culture he was seeking to establish at the mine and a flagrant breach of workplace policies.<sup>13</sup> There was further evidence that the word 'scab' is a

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<sup>7</sup> *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [No 3]* (2012) 228 IR 195, [20].

<sup>8</sup> *Ibid* [33] - [35]. The meaning of engaging in 'industrial activity' is set out in s 347 of the *Fair Work Act*.

<sup>9</sup> Section 361 of the *Fair Work Act*. The reverse onus has been a feature of industrial legislation since 1904, see Anna Chapman, Kathleen Love and Beth Gaze, 'The Reverse Onus of Proof Then and Now: The Barclay Case and the History of the Fair Work Act's Union Victimisation and Freedom of Association' (2014) 37(2) *University of New South Wales Law Journal* 471.

<sup>10</sup> *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500, 517 [44] - [45] per French CJ and Crennan J; *General Motors-Holden's Pty Ltd v Bowling* (1976) 51 ALJR 235, 241 per Mason J.

<sup>11</sup> *Ibid* 517 [44].

<sup>12</sup> *Ibid* 517 [45].

<sup>13</sup> *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [No 3]* (2012) 228 IR 195, [28]-[31].

notorious insult in industries such as mining, denoting contempt for those who continue to work despite a collective decision to take action in support of an industrial objective.<sup>14</sup> In addition, some other employees had complained that they felt intimidated by the signs.

Justice Jessup accepted that Mr Brick's evidence as to the reasons for his decision represented his 'true' reasons in light of the objective facts.<sup>15</sup> However, his Honour found that, since a reason for the dismissal was that Mr Doevendans had held and waved the sign, it followed that one reason for his dismissal was his participation in the protest activity organised by the Union<sup>16</sup> and another was that he was representing or advancing the interests of the Union.<sup>17</sup> In reaching this conclusion, his Honour noted that section 346 is a beneficial protective provision of the *Fair Work Act* that should not be narrowly or pedantically construed.<sup>18</sup> The Court ordered Mr Doevendans be reinstated to his former position. BHP Coal appealed.

#### IV APPEAL TO THE FULL COURT OF THE FEDERAL COURT

The Full Court (by majority)<sup>19</sup> allowed the appeal, finding that the trial judge had erred in concluding that the dismissal was contrary to the *Fair Work Act*. The majority emphasised that it is an error to treat a person's union position, membership or activities as having to be entirely dissociated with the adverse action. Justice Dowsett said of the decision below:

His Honour's reasons are both careful and comprehensive but, with all respect, I find it impossible to reconcile his findings and conclusions with the High Court's decision in *Barclay*.... Clearly, holding and waving the sign comprised part of the reason for the adverse action as did, in *Barclay*, the sending of the relevant email. Although Mr Barclay's conduct was in discharge of his union duties, and may have involved his representing or advancing the views, claims or interests of the union, such characterisation did not mean that the adverse action was because of his engagement in union activity. Rather, it was the content of the email, the circumstances in which it was sent and the likely effects on the Institute's operations which caused the adverse action. In other words, an employee may act in a way which falls within

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<sup>14</sup> Ibid [92].

<sup>15</sup> Ibid [36], [41].

<sup>16</sup> Ibid [115].

<sup>17</sup> Ibid [123]-[124]. NB Jessup J held that Mr Doevendans was not dismissed because he was a member or officer of the union.

<sup>18</sup> Ibid [122].

<sup>19</sup> *BHP Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* (2013) 219 FCR 245.

*s 346 and/or s 347 but may do so in a way, or in circumstances which cause the employer to act adversely, not because of the employee's engagement in industrial activity, but because of other concerns...*

In my view, the primary Judge's finding that the employee's engagement in industrial action or activity played no part in the employer's decision-making process disposed of the matter.<sup>20</sup>

Similarly, Justice Flick observed that Mr Brick's reasons, accepted by the primary judge as true, went beyond the mere fact that he held and waved the 'scabs' sign and the *Fair Work Act* does not give union members or officials license to act in a way which would not be tolerated in the case of any other employee. In his Honour's view, the trial judge erred by seizing one aspect of the employee's conduct and 'placing to one side the reasoning process of Mr Brick.'<sup>21</sup> The result, in his Honour's opinion, was that the primary judge did not make an ultimate finding of fact as to what was a 'substantial and operative' reason for the dismissal.<sup>22</sup>

Justice Kenny, in dissent, said that by holding and waving the sign Mr Doevendans had been representing or advancing the union's interests in bargaining negotiations with BHP Coal and there was no error in the trial judge's finding that the employee was dismissed for this reason. Her Honour found that it was open to find that BHP Coal had not discharged the onus of proof on this point, considering Mr Brick's reasons against other evidence presented at trial.<sup>23</sup> Her Honour added that it did not matter whether the union's view (that employees who continued to work during the industrial action were 'scabs') was reasonable or not because there is no requirement under the *Fair Work Act* for the union's views and interests to be reasonable, as long as they are lawful.<sup>24</sup> However, her Honour agreed with the majority that the primary judge had erred in concluding that Mr Doevendans was dismissed because he participated in the protest.<sup>25</sup>

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<sup>20</sup> Ibid 250-251 [12]-[13] (emphasis added).

<sup>21</sup> Ibid 276 [108].

<sup>22</sup> Ibid.

<sup>23</sup> Ibid 265 [64].

<sup>24</sup> Ibid 267 [69].

<sup>25</sup> Ibid 263-264 [57]-[59].

## V THE HIGH COURT'S DECISION

*A The Majority*

Chief Justice French and Kiefel J concluded that it was not possible to find that the employer had contravened the *Fair Work Act* since none of the reasons stated by Mr Brick as actuating the dismissal (and accepted by the trial judge as true) were prohibited under the *Fair Work Act*. Their Honours observed that in *Barclay*, French CJ and Crennan J said that:

it is incorrect to conclude that, because the employee's union position and activities were inextricably entwined with the adverse action, the employee was therefore immune and protected from the adverse action. Such an approach would destroy the balance between employers and employees which the Act seeks to attain and which is central to s 361 [of the *Fair Work Act*].<sup>26</sup>

In their Honours' view, the trial judge, by accepting Mr Brick's reasons but nonetheless finding a breach seemingly added 'a further requirement to [the onus of proof], namely that the employer dissociate its adverse action completely from any industrial activity.'<sup>27</sup> Their Honours observed that Mr Brick's reasons had to do with the content of Mr Doevendans' communications with his fellow employees rather than the fact of participating in the protest or representing union views. Their Honours considered that it was not the mere fact that he attended the protest and held and waved the sign, but the content of the sign and other concerns about Mr Doevendans' behaviour as an employee which caused Mr Brick to dismiss him.<sup>28</sup>

In a separate judgment, Justice Gageler concurred with French CJ and Kiefel J that the appeal should be dismissed. His Honour noted the CFMEU's submission that the majority view potentially undermined the protective provisions of the *Fair Work Act* by allowing an employer to apply its own description to otherwise protected industrial action. However, his Honour was not persuaded by that argument and said, in effect, that an employer would not be able to escape liability so easily. The employer would need to show that the employee's industrial activity, membership or status was not an operative reason for the adverse action.<sup>29</sup> That condition was satisfied in this case because the trial judge did not accept that an inference was available

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<sup>26</sup> (2014) 253 CLR 243, 252 [20].

<sup>27</sup> Ibid 253 [22].

<sup>28</sup> Ibid 249 [10].

<sup>29</sup> Ibid 269 [91] - [92].



on the facts to contradict the reasons given by Mr Brick (which were accepted as his true motivations).<sup>30</sup>

### B *The Minority*

In his dissenting judgment, Hayne J said that the use of the word 'scabs' on the sign cannot be divorced from the circumstances in which it was used. In his Honour's view, it was not possible to distinguish between the employee's participation in the protest and the manner in which he protested. Therefore, it was not relevant for Mr Brick to consider whether the expression of that protest might be offensive to others; it was enough that it was lawful.<sup>31</sup> In dismissing Mr Doevendans for protesting in an offensive matter, his Honour found that Mr Brick acted for a prohibited reason.

Justice Crennan agreed with the reasons of Hayne J. Interestingly, her Honour was a member of the High Court which heard *Barclay* and said that *Barclay* did not impede a court from drawing inferences from all of the circumstances to contradict honest reasons given by a decision-maker.<sup>32</sup> In her Honour's view, notwithstanding that Mr Brick's evidence was accepted as true by the primary judge, 'the circumstances and conduct for which Mr Doevendans was dismissed were inconsistent with, and rendered unreliable, Mr Brick's assertion that Mr Doevendans' engagement with industrial action or activity had nothing to do with his decision.'<sup>33</sup>

## VI CONCLUSION

As explained above, the members of the High Court (and the Federal Court below) took different approaches to determining this case while all emphasising that their task involved a factual enquiry into the state of mind of the decision-maker viewed in light of the surrounding facts and circumstances. Clearly, the application of settled principles is less likely to produce uniform decisions where adverse action is taken against an employee for misconduct which is closely entwined with the employee's participation in industrial activity. Some suggest that the 'strict' application of *Barclay* which prevailed in the High Court may undermine the protective provisions of the *Fair Work Act*.<sup>34</sup> However,

<sup>30</sup> Ibid 268 [90]; see further (2012) 28 IR 195, [38]- [41].

<sup>31</sup> Ibid 258 [47].

<sup>32</sup> Ibid 263 [68].

<sup>33</sup> Ibid 263 [67].

<sup>34</sup> 'High Court 'scab' ruling not the end: Stewart', *Workplace Express*, 16 October 2014. This echoes Justice Jessup's concern that section 346 of the *Fair Work Act* is a beneficial

each case turns on its own facts. Employers cannot escape liability under the *Fair Work Act* simply by labelling protected industrial activity as something else, such as disloyalty. Employees and unions will continue to challenge employer decisions in this area and it is for employers to demonstrate, in light of all of the evidence, that they did not act for the prohibited reason alleged.<sup>35</sup>

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protective provision and should be beneficially construed. See further *CFMEU v Endeavour Coal Pty Ltd* [2015] FCAFC 76 at [185] per Bromberg J.

<sup>35</sup> See for example, *Sayed v CFMEU* [2015] FCA 27 per Mortimer J especially at [189] and following.

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## BOOK REVIEW

*Murray Gleeson: The Smiler*

Michael Pelly, The Federation Press, Sydney 2014  
280 pages, ISBN 978-1-86287-960-7

GRANT BAILEY\*

All Australian lawyers are familiar with the work of Murray Gleeson, Chief Justice of the High Court until 2008 and previously, Chief Justice of the Supreme Court of New South Wales. Many lawyers are aware of the public persona that earned Gleeson the ironic nickname 'The Smiler'. A few have had the experience of appearing before him. But very few have been privy to citizen Gleeson, as opposed to Chief Justice Gleeson. What drives Murray Gleeson? What sort of person is he?

*Murray Gleeson: The Smiler* provides us with a few glimpses, which is perhaps as many as we are likely to get. Michael Pelly gives a good account of Gleeson's childhood and schooling; his early years as a practitioner; his period as a leading barrister and finally, his judicial career. But we never really get to know Gleeson the man. It is due to Gleeson's reticence, and not any failing of his biographer, that we still know little about the man and next to nothing about his attitudes on non-law subjects. What is important to him on a personal level? What are his views on such contemporary issues as the environment and terrorist threats? What does he consider vital for the future prosperity of Australia?

Michael Pelly's biography was undertaken with the approval of his subject, which is fortunate since without it we may not have had this book at all. Although Gleeson did give extensive interviews, his greatest assistance was in allowing access to his family who provide most of the interesting insights. They make it clear that at home, Gleeson was not the most enthusiastic participant in family get-togethers, often leaving a gathering early to go back to his study. He was also something of a hypochondriac and justified his frequent absences on the basis that he could not afford to get sick. He was also a touch squeamish, with his wife Robyn recalling the birth of their first child: 'Murray took me to the hospital, left, and then appeared some hours later in a back-to-front hospital gown. He turned a nasty shade

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of green and disappeared again until after the birth'. Perhaps less understandable was the new father's refusal to change nappies ('Never change a nappy, because once you change one nappy you are known as a nappy changer, available on request') or his earlier insistence that 'Barrister's wives don't work'. Nevertheless, for reasons of pragmatism or otherwise, Gleeson's views on some matters (such as the place of women) have evidently changed over the years. That is just as well, for his eldest daughter Jacqueline is not only a mother but also a judge of the Federal Court of Australia.

The book provides an interesting overview of Gleeson's work, first as a legal practitioner (he became a QC at the spectacularly early age of 36) and later as a judge. As a young barrister he quickly developed a busy practice, the more impressive considering the 'galaxy of talent' which surrounded him at the Sydney bar, including Laurence Street (his tutor), William Deane (who guaranteed a loan of £1000 to the fledgling barrister) and Anthony Mason. Not many people would be aware of Gleeson's role in the dismissal of the Whitlam government (he was one of three barristers briefed to advise the Liberal Party on the powers of the Governor-General).

Politically, Gleeson has never worn his beliefs on his sleeve, although his views on taxation reform (particularly those expressed in what has become known as his 'human rights for tax evaders' speech to the International Commission of Jurists in 1988) indicate some sympathy with conservative ideology. Taxation cases, as well as commercial causes, suited Gleeson's preference for cold analysis of impersonal topics. An example of the latter was *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon* (The New York Star) which Gleeson took to the Privy Council and won. Gleeson said of the case:

It was the sort of case that would interest practically nobody but me. There was not even an ounce of human interest, which made it good. It was about two insurance companies fighting it out over money and not very much money at that. It was stripped of any complications that might come from weepy people.

That Gleeson was not sympathetic to people had been recognised early by his father, the owner of a service station, who noticed that the future Chief Justice was not pleasant to his customers (the young Gleeson filled cars during his school holidays).

Pelly's coverage of Gleeson's judicial work strikes a balance between a focus on the issues of the major cases and an analysis of the judgments. A more extensive collection of Gleeson's writings would have better

illustrated the force of his expressive skills but would also have alienated the lay reader. Overall, the balance is appropriate. The reader gets an understanding of the range and complexity of cases in the highest courts that may be deepened with further reading.

Pelly indicates that Gleeson's High Court judgments 'reflect a judicial philosophy grounded in a belief that the court should be reluctant to invalidate legislation or develop the law'. Some lawyers might express the same concept in less neutral terms. Pelly is perhaps less cagey in describing Gleeson's intent, upon being appointed to the High Court, on 'restoring the reputation of strict and complete legalism' advocated by Sir Owen Dixon. Gleeson himself was prepared to laugh about his legal conservatism; in answer to a law student's question how the Gleeson High Court should be characterised, he responded 'The bleeding heart court'.

*Murray Gleeson: The Smiler* is, to be sure, a most enjoyable biography, well-researched and engagingly written. To wish that Gleeson had opened up more to his biographer is to praise what Michael Pelly has managed to coax from his enigmatic subject and from those who know him.

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